Bench: S Sinha, D Verma

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1283 OF 2009 (Arising out of SLP (CRL.) No. 2703 of 2008)

KISHAN LAL ... APPELLANT

Versus

DHARMENDRA BAFNA & ANR. ... RESPONDENTS

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Jurisdiction of a Magistrate to direct reinvestigation of a case from

time to time as laid down under sub-section (8) of Section 173 of the Code

of Criminal Procedure, 1973 (for short, "the Code") is the question involved

in this appeal. It arises out of a judgment and order dated 13th March, 2008

passed by a learned single judge of the High Court of Judicature at Madras

in Crl. R.C. No. 245 of 2008 allowing the criminal revision application filed 2

by the respondent No.1 from an order dated 13th February, 2008 passed by

the learned III Metropolitan Magistrate, George Town, Chennai.

3. Indisputably, on or about 30th December 2005, a complaint was

lodged by the appellant against Accused Nos. 1 to 9, namely, Lakshmichand

Bafna (Accused No.1), Dharmendra Bafna (Accused No.2), Mahendar

Bafna (Accused No.3), Rakesh Bafna (Accused No.4), G.R. Surana

(Accused No.5), Shantilal Surana (Accused No.6), Vijayaraj Surana

(Accused No.7), Dinesh Chand Surana (Accused No.8) and Maran (Accused

No.9) before the Commissioner of Police, Chennai City, Chennai inter alia

alleging that they connived together from the beginning and cheated him a

sum of Rs.4.65 crores by denying to return the money which was given to

them for purchase of gold. It was alleged that the amount was entrusted on

various dates from 06th October 2005 to 17th November 2005. Although they

have admitted the liability to the extent of 4.95 crores, but did not return

either any gold or money to the complainant.

4. On or about 12th January 2006, an application for grant of anticipatory

bail before the High Court of Madras was filed by all the accused stating

that the Accused Nos. 5 to 8 are brothers and are the directors of their family

business known as M/s Surana Corporation Limited. It was admitted that 3

the Accused No.2 is the sub-agent of Surana Corporation Limited who

introduces investors.

5. A First Information Report ("FIR") was lodged by the appellant

against all the accused on or about 22nd January, 2006 in the Central Crime

Branch Station.

Allegedly, on or about 27th January 2006, in the aforementioned bail

application, the said accused filed statement of accounts of the appellant/de

facto complainant mentioned in the Multi Commodity Exchange of India

Limited ("MCX") which is a Government approved On-Line Trading

Exchange of Bullion, Energy, Metal and Oil, admitting that they had

undertaken bullion trade with MCX by using the appellant's money.

Apart from the said FIR, the parties have filed some Civil Suits also.

Indisputably, however, Banwarlal Sharma (Accused No.10) was

subsequently added. It is furthermore not in dispute that the investigation

was transferred to CBCID, Chennai by the Director General of Police, Tamil

Nadu.

On or about 8th October, 2007, a charge-sheet was filed before the

learned III Metropolitan Magistrate, George Town, Chennai only against 4

Accused Nos. 1 and 2 under Sections 406, 420 and 120B of the Indian Penal

Code ("IPC"). The learned Magistrate took cognizance against the said

accused.

On or about 29th October 2007, on the premise that the learned

Magistrate had not taken cognizance against the other accused, the appellant

filed an application under Section 482 of the Code before the High Court for

setting aside the said order. The said application was disposed of by the

learned single judge of the High Court in the following terms:

"8. Therefore in the considered view of this order, the above criminal original petition can be disposed of with the following directions:- The petitioner is at liberty to file an appropriate petition before the III Metropolitan Magistrate,George Town, Chennai, incorporating his grievances and the alleged lapses on the part of the investigating agency and seek further investigation in the case. On such petition being filed, the learned Magistrate, shall consider the same in accordance with law and if the learned Magistrate is satisfied that a case has been made out by the petitioner for ordering further investigation under Section 173(8) of the Criminal Procedure Code, the learned Magistrate is entitled to invoke the powers under Sections 173(8) of the Criminal Procedure Code and direct the respondent to further investigate into the matter." 5

Pursuant to or in furtherance of the said observations, appellant filed

an application for further investigation before the learned Magistrate and by

an order dated 13th February 2008, a direction for further investigation was

issued, observing:

"While considering the averments made in this petition, this Court holds that several kinds of issues were not undisclosed and beyond from knots of doubts. If those doubts were not cleared through suitable investigation, no opportunity could be given to get it revealed the true picture. While considering the nature of the case, it is important to find out how the amount given by the petitioner utilized, when it was utilized and on which state the amount has been kept. But, as alleged on behalf of the petitioner, it is the duty of this Court to find out the truth by holding suitable investigation of the matters which were unearthed. In the event of this court refusing to find out the true picture by ordering a reinvestigation, either party is likely to get hardships and losses. If the reinvestigation is ordered, a situation for handing out an opportunity for both the parties to bring out the hidden truths in this case and the facts in this case and this Court holds that it would pave a way for conducting a trial in the proper direction. As this court holds that certain cause of actions available in this case, and in view of the necessity to find out several facts in this case and in accordance of the orders of the High Court of Madras in CRL.O.P. 33354 of 2007, it is to meet the ends of justice, the case could be ordered for reinvestigation and thereby the petition presented by the Petitioner/complainant u/s 173(8) is allowed."

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Accused No.2 filed revisional application thereagainst before the High

Court. By reason of the impugned judgment, as noticed hereinbefore, the

said revision application has been allowed.

6. Mr.K.T.S. Tulsi, learned Senior Counsel appearing on behalf of the

appellant would contend:

(i) The High Court committed a serious error in opining that no direction for further investigation or reinvestigation can be directed after cognizance of an offence is taken.

(ii) The application for a direction for further investigation having

been filed only in terms of the order of the High Court dated 17th December 2007, another learned judge of the same High Court could not have taken a contrary view.

(iii) Direction for further investigation having been made by the learned Magistrate upon taking into consideration all aspects of the matter, the High Court committed a serious error in interfering therewith.

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(iv) The High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration that Accused No.6 being father of Accused No.2 and Accused Nos. 5, 7 and 8 being his brothers; were running and operating Surana Corporation Limited and having admittedly invested the said amount in MCX, they must be held to have conspired together for misappropriation of the

aforementioned amount of Rs.4.65 crores entrusted by the appellant to the accused No.2, and consequent refusal on their part to return the amount on the ground that they have suffered a huge loss.

7. Mr. U.U. Lalit, the learned Senior Counsel appearing on behalf of the accused other than accused Nos. 2 and 6, on the other hand, urged:

(i) Despite the fact that the learned Magistrate had the requisite jurisdiction to direct further investigation, such order could not have been passed in the instant case as all aspects of the matter had been taken into consideration by the Investigating Officers. 8

(ii) Further investigation, the learned counsel would urge, could be directed only in the event where investigation was not carried in respect of certain aspects of the matter or where during trial it came to the notice to the court that some facts which were relevant for arriving at the truth had not been gone into.

8. Mr. M.N. Rao, learned Senior Counsel appearing on behalf of the State would take us through the detailed counter affidavit filed on behalf of

the State to contend that the investigation had been carried out in a fair and

diligent manner touching all aspects of the matter.

9. It is now a well settled principle of law that when a final form is filed

by any Investigating Officer in exercise of his power under sub-section (2)

of Section 173 of the Code, the first informant has to be given notice. He

may file a protest petition which in a given case may be treated to be a

complaint petition, on the basis whereof after fulfilling the other statutory

requirements cognizance may be taken. The learned Magistrate can also

take cognizance on the basis of the materials placed on record by the

investigating agency. It is also permissible for a learned Magistrate to direct

further investigation.

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The Investigating Officer when an FIR is lodged in respect of a

cognizable offence, upon completion of the investigation would file a police

report. The power of investigation is a statutory one and ordinarily and save

and except some exceptional situations, no interference therewith by any

court is permissible.

In Naresh Kavarchand Khatri vs. State of Gujarat & Anr. [(2008) 8

SCC 300], this Court held:

"6. The power of the court to interfere with an investigation is limited. The police authorities, in terms of Section 156 of the Code of Criminal Procedure, exercise a statutory power. The Code of Criminal procedure has conferred power on the statutory authorities to direct transfer of an investigation from one Police Station to another in the event it is found that they do not have any jurisdiction in the matter. The Court should not interfere in the matter at an initial stage in regard thereto. If it is found that the investigation has been conducted by an Investigating Officer who did not have any territorial jurisdiction in the matter, the same should be transferred by him to the police station having the requisite jurisdiction.

In Dharmeshbhai Vasudevbhai & Ors. vs. State of Gujarat & Ors.

[2009 (7) SCALE 214], this Court held: 10

"9. Interference in the exercise of the statutory power of investigation by the Police by the Magistrate far less direction for withdrawal of any investigation which is sought to be carried out is not envisaged under the Code of Criminal Procedure. The Magistrate's power in this regard is limited. Even otherwise, he does not have any inherent power. Ordinarily, he has no power to recall his order.

This aspect of the matter has been

considered by this Court in S.N. Sharma v. Bipen Kumar Tiwari & Ors. [(1970) 1 SCC 653], wherein the law has been stated as under : "6. Without the use of the

expression "if he thinks fit", the second alternative could have

been held to be independent of

the first; but the use of this

expression, in our opinion,

makes it plain that the power

conferred by the second clause

of this section is only an

alternative to the power given

by the first clause and can,

therefore, be exercised only in

those cases in which the first

clause is applicable.

7. It may also be further noticed

that, even in sub-section (3) of

Section 156, the only power

given to the Magistrate, who

can take cognizance of an

offence under Section 190, is to order an investigation; there is no mention of any power to stop an investigation by the police. The scheme of these

sections, thus, clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct an investigation, or, in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case. The power of the

police to investigate has been

made independent of any

control by the Magistrate."

Interpreting the aforementioned provisions vis-a-vis the lack of inherent power in the Magistrate in terms of Section 561-A of the Old Criminal procedure Code (equivalent to Section 482 of the new Code of Criminal procedure), it was held :

"10. This interpretation, to

some extent, supports the view

that the scheme of the Criminal

Procedure Code is that the

power of the police to

investigate a cognizable

offence is not to be interfered

with by the judiciary. Their

Lordships of the Privy Council

were, of course, concerned only

with the powers of the High

Court under Section 561-A

CrPC, while we have to

interpret Section 159 of the

Code which defines the powers of a Magistrate which he can exercise on receiving a report from the police of the cognizable offence under Section 157 of the Code. In our opinion, Section 159 was really intended to give a limited power to the Magistrate to ensure that the police investigate all cognizable offences and do not refuse to do so by abusing the right granted for certain limited cases of not proceeding with the investigation of the offence."

Yet again in Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors. [(1976) 3 SCC 252], this Court, upon comparison of the provision of the old Code and the new Code, held as under :

"7. Section 156(3) occurs in Chapter XII, under the caption :

"Information to the Police and
their powers to investigate";
while Section 202 is in Chapter
XV which bears the heading:
"Of complaints to Magistrates". The power to order police
investigation under Section
156(3) is different from the
power to direct investigation
conferred by Section 202(1).
The two operate in distinct
spheres at different stages. The
first is exercisable at the pre-
cognizance stage, the second at

the post-cognizance stage when
the Magistrate is in seisin of the
case. That is to say in the case
of a complaint regarding the
commission of a cognizable
offence, the power under

Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(l)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous

process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is

empowered under Section 202 to direct, within the limits circumscribed by that section an investigation "for the purpose of deciding whether or

not there is sufficient ground

for proceeding". Thus the

object of an investigation under

Section 202 is not to initiate a

fresh case on police report but

to assist the Magistrate in

completing proceedings already

instituted upon a complaint

before him."

We are, however, not oblivious of the fact that recently a Division

Bench of this Court in Sakiri Vasu vs. State of Uttar Pradesh & Ors. [(2008)

2 SCC 409] while dealing with the power of the court to direct the police

officer to record an FIR in exercise of power under Section 156(3) of the

Code observed that the Magistrate had also a duty to see that the

investigation is carried out in a fair manner (correctness whereof is open to

question).

10. An order of further investigation can be made at various stages

including the stage of the trial, that is, after taking cognizance of the offence.

Although some decisions have been referred to us, we need not dilate

thereupon as the matter has recently been considered by a Division Bench of 15

this Court in Mithabhai Pashabhai Patel & Ors. vs. State of Gujarat [2009

(7) SCALE 559] in the following terms:

"16. This Court while passing the order in exercise of its jurisdiction under Article 32 of Constitution of India did not direct re- investigation. This court exercised its jurisdiction which was within the realm of the Code. Indisputably the investigating agency in terms of sub-section (8) of Section 173 of the Code can pray before the Court and may be granted permission to investigate into the matter further. There are, however, certain situations, where such a formal request may not be insisted upon.

17. It is, however, beyond any cavil that `further investigation' and `re-investigation' stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely under Articles 226 and 32 of the Constitution of India could direct a `State' to get an offence investigated and/or further investigated by a different agency. Direction of a re-investigation, however, being forbidden in law, no superior court would ordinarily issue such a direction.

Pasayat, J. in Ramachandran v. R. Udhayakumar, [(2008) 5 SCC 413], opined as under :-

"7. At this juncture it would be

necessary to take note of

Section 173 of the Code. From

a plain reading of the above

section it is evident that even

after completion of

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investigation under sub-section

(2) of Section 173 of the Code,

the police has right to further

investigate under sub-section

(8), but not fresh investigation

or reinvestigation..."

11. We have referred to the aforementioned decision only because Mr.

Tulsi contends that in effect and substance the prayer of the appellant before

the learned Magistrate was for reinvestigation but the learned Magistrate had

directed further investigation by the Investigating Officer inadvertently.

The Investigating Officer may exercise his statutory power of further

investigation in several situations as, for example, when new facts come to

its notice; when certain aspects of the matter had not been considered by it

and it found that further investigation is necessary to be carried out from a

different angle(s) keeping in view the fact that new or further materials came

to its notice. Apart from the aforementioned grounds, the learned Magistrate

or the Superior Courts can direct further investigation, if the investigation is

found to be tainted and/or otherwise unfair or is otherwise necessary in the

ends of justice.

12. The question, however, is as to whether in a case of this nature a

direction for further investigation would be necessary. 17

Mr. Dhayalan, Inspector of Police, Crime Branch CID, Metro Wing,

Chennai in his counter affidavit inter alia brought to this Court's notice that

the matter was investigated by (1) Tr. S. Saravana Brabu, Inspector of

Police, Chennai CCB, (2) Tr. Salathraj, Assistant Commissioner of Police,

CCB Chennai (3) Tr. S. Veiladurai, Assistant Commissioner of Police, Job

Rocket and Video Piracy, Chennai City, (4) Tr. C. Edward, Inspector of

Police, CCB, Chennai and (5) Tr. K.G. Rajakumar, Assistant Commissioner

of Police, CCB, Egmore, Chennai apart from him.

We have noticed hereinbefore that the investigation was transferred to

CBCID by an order dated 29th March 2007 passed by the DGP, Tamil Nadu.

The matter, thus, has been investigated by two specialized agencies. The

deponent of the counter affidavit categorically stated that he had made a

thorough investigation and upon consideration of the materials gathered

during investigation identified that there was no connection between the

money of the de facto complainant and Accused Nos. 3 to 10 and hence the

final form was filed in their favour. It was pointed out that the complainant

had filed the aforementioned application under Section 173(8) of the Code

principally on the premise that no investigation had been carried out in

respect of three documents being (1) The additional grounds raised in the 18

anticipatory bail application, (2) The plaint filed by Accused No.2 in the

Civil Suit filed by him and (3) the letter written by Mahaveer Surana, the

authorized signatory of Surana Corporation Ltd., to the Chief Minister's cell.

It was furthermore pointed out:

"(b) The second accused came forward with improbable stories for him to escape from prosecution. The version of the accused in his anticipatory bail application is without any material to support the same and was not believed. Similarly, the version of A2 in the suit filed by him was also not believed as it was not borne out by any documentary evidence. Similarly, the letter written by Mahaveer Surana to the Chief Minister's Cell is also a document intended to save A-1 and A-2 from the crime and hence not to be believed. The version of the de facto complainant, the petitioner herein and also of A-2 to establish the connection between the money paid by the de facto complainant to A-2 with A-3 to A-10 is not borne out by any documentary evidence. Hence, the case against A-3 to A-10 were dropped. All the three documents are that of the accused. The documents cannot be proved through accused. No accused can be compelled to be a witness against himself. The documents could be hit by under Article 20(3) of the Constitution of India."

The investigating officer was of the opinion that the amount of

Rs.4.65 crores was given to Accused No.2 for both trading in gold and silver 19

on the basis of orally agreed terms. Accused No. 2 was introduced by

Accused No.1. Accused No.2 had given the said amount on 18th November

2005 to M/s Vinayaga Vyapar Limited on various dates on its own risks and

on the basis whereof M/s Vinayaga Vyapar Ltd. entered transactions with

M/s Surana Corporation Ltd. on 17th November 2005 and all payments had

been made through cheques only. Upon giving the details, the Investigating

Officer had come to the following conclusion:

"These transactions were for speculative trading only. It is stated in the FIR filed by the petitioner that the transaction between the petitioner and the A-2 Dharmendra Bafna are independent

transaction between themselves and no third party was involved. The petitioner did not make any agreement or contract with the A-2 Dharmendra Bafna for doing gold bullion forward trade business and failed to obtain the trade order, trade execution order and trade confirmation order from the A-2 Dharmendra Bafna and did not deal in cheque transactions. The petitioner has given Rs.4.65 crores by cash and entered upon a shady transaction with the A4 Dharmendra Bafna."

In regard to the statements made by the accused in their application

for anticipatory bail with regard to account with M/s MEGHA GG, it has

been contended that the same cannot be construed to be an admission on the

part of the Accused Nos. 3 to 10 especially when the petition had not been 20

signed by any of the accused and all the documentary evidence and material

gathered during the investigation were to the contrary. The said Shri

Dhayalan had also stated in great details as to why Accused Nos. 3 to 10

were dropped. He had also taken into consideration the dealings by and

between the parties inter se as also the litigations filed by them against each

other. It is neither necessary nor desirable to notice the statements made

therein by us as we are concerned with a question of law.

13. It is correct that the revisional court should not interfere with the

discretionary jurisdiction exercised by the learned Magistrate unless a

jurisdictional error or an error of law is noticed.

We have noticed hereinbefore the order passed by the learned

Magistrate. His order that "several kinds of issues were not disclosed and

beyond from knots of doubts" is vague in nature. It has not been pointed out

that in what respect the investigation has not been carried out. What are

hidden truths required to be unearthed had also not been pointed out. The

learned Magistrate did not consider the fact that the investigation had been

carried out by two different agencies and by responsible police officers. It

has not been found that the Investigating Officer was in any way biased

towards the complainant. Furthermore, if the contention of Mr. Tulsi is 21

correct, the question as to whether Accused Nos. 3 to 10 were involved in

the matter could be pointed out from the materials which had already been

brought on record. Furthermore, whether the admissions made in the

application for anticipatory bail were binding on them, the same being a

matter of inference can also be urged. The other and further remedies as

pointed out can be resorted to as also invocation of the provisions of Section

319 of the Code at the stage of trial is also permissible in law, if an

appropriate case is made out therefor. We furthermore clarify that any

observations made by the High Court or by us should not prejudice the

either party and the learned Magistrate should consider the matter on its own

merit and without in any way being influenced by the same, if any occasion

arises in this behalf in future.

14. For the reasons aforementioned, we do not find any merit in this

appeal. The appeal is dismissed accordingly.

.....J. [S.B. Sinha]

.....J. [Deepak Verma]

New Delhi;

July 21, 2009