

(2015) 05 SHI CK 0028
In the High Court Of Himachal Pradesh
Case No : Criminal MMO No. 72 of 2015

Maresh Puri

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 29-05-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 156(3), 157, 167(2)

Citation : (2015) 05 SHI CK 0028

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : J.S. Bhogal, Senior Advocate and Satyen Vaidya, for the Appellant; Virender Kumar Verma, Meenakshi Sharma and Rupinder Singh, Additional Advocate Generals and Parul Negi, Deputy Advocate General, Advocates for the Respondent

Final Decision : Allowed

Judgement

Tarlok Singh Chauhan, J.—By medium of this petition under Section 482 of the Code of Criminal Procedure, the petitioner has sought quashing of the order dated 18.3.2015 passed by learned Special Judge (Forest), whereby he allowed the prayer of the prosecution and permitted the filing of the supplementary challan and allowed the prosecution to produce evidence.

2. The bone of contention is regarding the documents Annexures-1, B-1, C-1, D, E and F, total 32 leaves, which according to the petitioner is not the part of the part of the original report Ex. PW-10/B as now filed along with the supplementary challan.

3. It is not in dispute that in case these annexures form part of the enquiry report Ex. PW-10/B, then no infirmity or illegality can be found with the order passed by the learned Court below, but in case it is otherwise, then the learned Court below had no jurisdiction to these documents on record as this would amount to re-investigation of the case without an application and due permission

of the Court to this effect.

4. It is the specific case of the petitioner that the documents now sought to be produced on record by the prosecution were in fact manufactured after cross-examination of PW-10 and were not a part of the original report Ex. PW-10/B.

5. In response, the prosecution in its affidavit had contended as follows:--

"9.... The statements of Shri Anil Gupta, Executive Engineer, PWD, HPRIDC SE was recorded on 21.07.2008 where in the detail of the documents i.e. Annexure 1, B-1, C-1, D and F total-32 leaves find mentioned in the statement of 2008, therefore, the allegation that the documents were manufactured after 25.09.2012 and 17.07.2013 are total misplaced and a result of concoction...."

6. After perusal of the record, which had been produced by the respondent, this Court did not find the contents of the affidavit to be true as the same were not borne out of the records. Consequently, a show cause notice for initiating contempt proceedings against the deponent of the affidavit was issued. The deponent thereafter filed a reply, still trying to justify the stand as taken in para 9 of the reply, quoted above, however, after realizing his mistake, he sought liberty to withdraw the reply and file a fresh reply.

7. Today the deponent tendered his sincere and unconditional apology, which was accepted by this Court. However, no further reply whatsoever was filed on behalf of the respondent. Therefore, the uncontroverted and unchallenged position remains that nowhere in the statement of Anil Gupta recorded on 21.7.2008 was there a mention of Annexures 1, B-1, C-1, D, E and F and further there was no mention of the details of these documents were contained in 32 leaves, as alleged. What, therefore, emerges is that the case admittedly is of re-investigation and not a case of further investigation and therefore, the same could not be carried out without the prior permission of the Court.

8. This aspect of the matter has been dealt with in detail by this Court in Cr.MMO No. 271 and 272 of 2014, titled Pritam Singh Chaudhary and Another v. State of Himachal Pradesh and others, wherein this Court has held as follows:--

"10. The parties are not at variance and have rather jointly relied upon the judgment of Hon"ble Supreme Court in Vinay Tyagi Vs. Irshad Ali @ Deepak and Others, (2013) 2 ABR 36 : (2013) 1 AD 157 : (2013) CriLJ 754 : (2013) 1 JT 97 : (2013) 2 RCR(Criminal) 197 : (2012) 12 SCALE 343 : (2013) 5 SCC 762 , to canvass that this case will have to be decided on the basis of principles laid down therein. The Hon"ble Supreme Court after analyzing the provisions of the Code and various judgments on the subject had observed:--

"15. A very wide power is vested in the investigating agency to conduct further investigation after it has filed the report in terms of Section 173(2). The legislature has specifically used the expression "nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Section 173(2) has been forwarded to the Magistrate", which

unambiguously indicates the legislative intent that even after filing of a report before the court of competent jurisdiction, the Investigating Officer can still conduct further investigation and where, upon such investigation, the officer in charge of a police station gets further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the prescribed form. In other words, the investigating agency is competent to file a supplementary report to its primary report in terms of Section 173(8). The supplementary report has to be treated by the Court in continuation of the primary report and the same provisions of law, i.e., sub-section (2) to sub-section (6) of Section 173 shall apply when the Court deals with such report.

22. "Further investigation" is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a "further investigation". Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as "supplementary report". "Supplementary report" would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a "reinvestigation", "fresh" or "de novo" investigation.

28. The next question that comes up for consideration of this Court is whether the empowered Magistrate has the jurisdiction to direct "further investigation" or "fresh investigation". As far as the latter is concerned, the law declared by this Court consistently is that the learned Magistrate has no jurisdiction to direct "fresh" or "de novo" investigation. However, once the report is filed, the Magistrate has jurisdiction to accept the report or reject the same right at the threshold. Even after accepting the report, it has the jurisdiction to discharge the accused or frame the charge and put him to trial. But there are no provisions in the Code which empower the Magistrate to disturb the status of an accused pending investigation or when report is, filed to wipe out the report and its effects in law. Reference in this regard can be made to *K. Chandrasekhar Vs. The State of Kerala and Others*, (1998) 4 AD 657 : AIR 1998 SC 2001 : (1998) CriLJ 2897 : (1998) 2 Crimes 300 : (1998) 3 JT 612 : (1998) 3 SCALE 294 : (1998) 5 SCC 223 : (1998) 3 SCR 72 : (1998) 1 UJ 778 : (1998) AIRSCW 1852 : (1998) 4 Supreme 374 ; *Ramachandran Vs. R. Udhayakumar and Others*, AIR 2008 SC 3102 : (2008) 3 CLT 1 : (2008) CriLJ 4309 : (2008) 6 JT 582 : (2008) 7 SCALE

609 : (2008) 5 SCC 413 : (2008) AIRSCW 5469 : (2008) 4 Supreme 305 , Nirmal Singh Kahlon Vs. State of Punjab and Others, AIR 2009 SC 984 : (2009) CriLJ 958 : (2008) 12 JT 331 : (2008) 14 SCALE 639 : (2009) 1 SCC 441 : (2009) 2 SLJ 371 : (2009) AIRSCW 60 ; Mithabhai Pashabhai Patel and Others Vs. State of Gujarat, (2009) 7 JT 666 : (2009) 7 SCALE 559 : (2009) 6 SCC 332 : (2009) 7 SCR 1126 : (2009) 6 UJ 2891 ; and Babubhai Vs. State of Gujarat and Others, (2010) 9 JT 177 : (2010) 12 SCC 254 : (2010) 10 SCR 651 : (2010) 8 UJ 3896 .

29. Now, we come to the former question, i.e., whether the Magistrate has jurisdiction under Section 173(8) to direct further investigation.

30. The power of the Court to pass an order for further investigation has been a matter of judicial concern for some time now. The courts have taken somewhat divergent but not diametrically opposite views in this regard. Such views can be reconciled and harmoniously applied without violation of the rule of precedence. In the case of State of Punjab Vs. Central Bureau of Investigation and Others, AIR 2011 SC 2962 : (2011) 4 JCC 2684 : (2011) 10 JT 185 : (2011) 4 RCR(Criminal) 152 : (2011) 9 SCALE 620 : (2011) 3 SCC(Cri) 666 : (2011) 11 SCR 281 : (2011) AIRSCW 5248 , the Court noticed the distinction that exists between "reinvestigation" and "further investigation". The Court also noticed the settled principle that the courts subordinate to the High Court do not have the statutory inherent powers as the High Court does under Section 482 of the Code and therefore, must exercise their jurisdiction within the four corners of the Code.

31. Referring to the provisions of Section 173 of the Code, the Court observed that the police has the power to conduct further investigation in terms of Section 173(8) of the Code but also opined that even the Trial Court can direct further investigation in contradistinction to fresh investigation, even where the report has been filed. It will be useful to refer to the following paragraphs of the judgment wherein the Court while referring to the case of Mithabhai Pashabhai Patel v. State of Gujarat (2009) 1 SCC 332 held as under: (CBI case, SCC pp 191-92, para 23)

"23. "13. It is, however, beyond any cavil that "further investigation" and "reinvestigation" 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 reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. Pasayat, J. in Ramachandran Vs. R. Udhayakumar and Others, AIR 2008 SC 3102 : (2008) 3 CLT 1 : (2008) CriLJ 4309 : (2008) 6 JT 582 : (2008) 7 SCALE 609 : (2008) 5 SCC 413 : (2008) AIRSCW 5469 : (2008) 4 Supreme 305 opined as under: (SCC p. 415, para 7) "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 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."

A distinction, therefore, exists between a reinvestigation and further investigation.

* * *

15. The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The pre-cognizance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four corners of the Code." Mithabhai Pashabhai Patel and Others Vs. State of Gujarat, (2009) 7 JT 666 : (2009) 7 SCALE 559 : (2009) 6 SCC 332 : (2009) 7 SCR 1126 : (2009) 6 UJ 2891

32. In the case of Minu Kumari and Another Vs. The State of Bihar and Others, AIR 2006 SC 1937 : (2006) 101 CLT 821 : (2006) CriLJ 2468 : (2006) 4 JT 569 : (2006) 4 SCALE 329 : (2006) 4 SCC 359 , this Court explained the powers that are vested in a Magistrate upon filing of a report in terms of Section 173(2)(i) and the kind of order that the Court can pass. The Court held that when a report is filed before a Magistrate, he may either (i) accept the report and take cognizance of the offences and issue process; or (ii) may disagree with the report and drop the proceedings; or (iii) may direct further investigation under Section 156(3) and require the police to make a further report.

33. This judgment, thus, clearly shows that the Court of Magistrate has a clear power to direct further investigation when a report is filed under Section 173(2) and may also exercise such powers with the aid of Section 156(3) of the Code. The lurking doubt, if any, that remained in giving wider interpretation to Section 173(8) was removed and controversy put to an end by the judgment of this Court in the case of Hemant Dhasmane Vs. Central Bureau of Investigation and Another, AIR 2001 SC 2721 : (2001) CriLJ 4190 : (2001) 4 Crimes 183 : (2001) 6 JT 473 : (2001) 5 SCALE 312 : (2001) 7 SCC 536 : (2001) AIRSCW 3064 : (2001) 6 Supreme 217 where the Court held that although the said order does not, in specific terms, mention the power of the court to order further investigation, the power of the police to conduct further investigation envisaged therein can be triggered into motion at the instance of the court. When any such order is passed by the court, which has the jurisdiction to do so, then such order should not even be interfered with in exercise of a higher court's revisional jurisdiction. Such orders would normally be of an advantage to achieve the ends of justice. It was clarified, without ambiguity, that the magistrate, in exercise of powers under Section 173(8) of the Code can direct the CBI to further investigate the case and collect further evidence keeping in view the objections raised by the appellant to the investigation and the new report to be submitted by the Investigating Officer, would be governed by Sub-section (2) to Sub-

section (6) of Section 173 of the Code. There is no occasion for the court to interpret Section 173(8) of the Code restrictively. After filing of the final report, the learned Magistrate can also take cognizance on the basis of the material placed on record by the investigating agency and it is permissible for him to direct further investigation. Conduct of proper and fair investigation is the hallmark of any criminal investigation.

34. In support of these principles reference can be made to the judgments of this Court in the cases of Union Public Service Commission Vs. S. Papaiah and others, AIR 1997 SC 3876 : (1997) CriLJ 4636 : (1998) 3 Crimes 40 : (1997) 8 JT 24 : (1997) 6 SCALE 39 : (1997) 6 SCALE 35 : (1997) 7 SCC 614 : (1997) 4 SCR 56 Supp : (1997) AIRSCW 3801 : (1998) 5 Supreme 329 , State of Orissa Vs. Mahima @ Mahimananda Mishra and Others, (2002) 8 JT 308 : (2003) 5 SCALE 566 , Kishan Lal Vs. Dharmendra Bafna and Another, AIR 2009 SC 2932 : (2009) CLT 1553 : (2009) CriLJ 3721 : (2009) 9 JT 669 : (2009) 7 SCC 685 : (2009) 11 SCR 234 : (2009) AIRSCW 4677 : (2009) 6 Supreme 60 , State of Maharashtra Vs. Sharadchandra Vinayak Dongre and Others, AIR 1995 SC 231 : (1994) 6 JT 562 : (1994) 4 SCALE 438 : (1995) 1 SCC 42 : (1994) 4 SCR 378 Supp .

35. We may also notice here that in the case of S. Papaiah (supra), the Magistrate had rejected an application for reinvestigation filed by the applicant primarily on the ground that it had no power to review the order passed earlier. This Court held that it was not a case of review of an order, but was a case of further investigation as contemplated under Section 173 of the Code. It permitted further investigation and directed the report to be filed.

36. Interestingly and more particularly for answering the question of legal academia that we are dealing with, it may be noticed that this Court, while pronouncing its judgment in the case of Hemant Dhasmana v. CBI, (supra) has specifically referred to the judgment of S. Papaiah (supra) and Bhagwant Singh Vs. Commissioner of Police and Another, AIR 1985 SC 1285 : (1985) CriLJ 1521 : (1985) 1 Crimes 994 : (1985) 1 SCALE 1194 : (1985) 2 SCC 537 : (1985) 3 SCR 942 : (1985) 17 UJ 820 . While relying upon the three Judge Bench judgment of Bhagwant Singh (supra), which appears to be a foundational view for development of law in relation to Section 173 of the Code, the Court held that the Magistrate could pass an order for further investigation. The principal question in that case was whether the Magistrate could drop the proceedings after filing of a report under Section 173(2), without notice to the complainant, but in paragraph 4 of the judgment, the three Judge Bench dealt with the powers of the Magistrate as enshrined in Section 173 of the Code. Usefully, para 4 can be reproduced for ready reference: (Bhagwant Singh case, SCC pp 541-43)

"4. Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate under sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of

three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156. Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the first information report, the informant would certainly be prejudiced because the first information report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the first information report lodged by him is clearly recognised by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and Sub-section (2)(ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the first information report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the first information report has to be communicated to the informant and a copy of the

report has to be supplied to him under sub-section (2)(i) of Section 173 and if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate."

37. In some judgments of this Court, a view has been advanced, [amongst others in the case of *Reeta Nag Vs. State of West Bengal and Others*, (2010) CriLJ 2245 : (2009) 11 SCALE 395 : (2009) 9 SCC 129 : (2009) 14 SCR 276 : (2009) 8 UJ 3984 : (2010) AIRSCW 476 , *Ram Naresh Prasad Vs. State of Jharkhand and Others*, (2009) 4 JT 379 : (2009) 11 SCC 299 : (2009) 2 SCR 369 and *Randhir Singh Rana Vs. The State Being the Delhi Administration*, AIR 1997 SC 639 : (1997) CriLJ 779 : (1997) 1 Crimes 58 : (1996) 11 JT 638 : (1996) 9 SCALE 447 : (1997) 1 SCC 361 : (1996) 10 SCR 880 Supp : (1997) AIRSCW 356 : (1997) 1 Supreme 278 , that a Magistrate cannot suo moto direct further investigation under Section 173(8) of the Code or direct re-investigation into a case on account of the bar contained in Section 167(2) of the Code, and that a Magistrate could direct filing of a charge sheet where the police submits a report that no case had been made out for sending up an accused for trial. The gist of the view taken in these cases is that a Magistrate cannot direct reinvestigation and cannot suo moto direct further investigation.

38. However, having given our considered thought to the principles stated in these judgments, we are of the view that the Magistrate before whom a report under Section 173(2) of the Code is filed, is empowered in law to direct "further investigation" and require the police to submit a further or a supplementary report. A three Judge Bench of this Court in the case of *Bhagwant Singh* has, in no uncertain terms, stated that principle, as afore-noticed.

39. The contrary view taken by the Court in the cases of *Reeta Nag* (supra) and *Randhir Singh* (supra) do not consider the view of this Court expressed in *Bhagwant Singh* (supra). The decision of the Court in *Bhagwant Singh* (supra) in regard to the issue in hand cannot be termed as an obiter. The ambit and scope of the power of a magistrate in terms of Section 173 of the Code was squarely debated before that Court and the three Judge Bench concluded as afore-noticed. Similar views having been taken by different Benches of this Court while following *Bhagwant Singh*, are thus squarely in line with the doctrine of precedence. To some extent, the view expressed in *Reeta Nag*, *Ram Naresh* and *Randhir Singh*, besides being different on facts, would have to be examined in light of the principle of stare decisis."

After analyzing the provisions of the Code and various judgments, as aforeindicated, it culled out the following conclusions in regard to the powers of the Magistrate in terms of Section 173(2) read with Sections 173(8) and 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 Sub-para 40.2 above is in conformity with the principle of law stated in Bhagwant Singh case by a three-Judge Bench and thus in conformity with the doctrine of precedent.

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 propriety that the police has to seek permission of the court to continue "further investigation" and file supplementary charge-sheet. 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."

11. From the above, it is clear that when a final report has been filed under Section 173(2) of the Code of Criminal Procedure by the investigating officer, if the Court on applying its mind is satisfied that there is a lapse or defect in the investigation or if it is satisfied that further investigation have to be conducted, the Court on its own motion can trigger a further investigation under Section 173(8) of the Code of Criminal Code to be done by the investigating officer. The investigating officer himself after obtaining permission from the Court can exercise such jurisdiction under Section 173(8) of Cr.P.C., if he wants to conduct further investigation in case he reveals some fresh acts or materials after filing the final report under Section 173(2) of Cr.P.C. He can conduct such further investigation and file supplementary final report before the Court under Section 173(8) Cr.P.C."

9. It cannot be disputed that the investigating officer has the powers to carry out further investigation of his own, but in case he wants to carryout re-investigation, he can only do so after obtaining permission from the Court. The permission of the Court is a sine qua non for exercising the powers of re-investigation after final report has been submitted to the Court under Section

173(2) of the Code of Criminal Procedure.

10. Since it has been proved on record that Ex. PW-10/B did not contain the annexures 1, B-1, C-1, D, E and F, the annexures now sought to be produced along with the supplementary challan could have been allowed to be placed only after seeking permission of the Court to re-investigate the matter. Having failed to do so, the impugned order passed by the learned Special Judge, permitting the prosecution to place on record these documents cannot be sustained as these documents did not form part of the enquiry report Ex. PW-10/B and have been manufactured later on by conducting reinvestigation, that too without the leave of the Court. Therefore, these documents could not have been permitted to be brought on record by simply filing a supplementary challan.

Accordingly, the petition is allowed and the order dated 18.3.2015 passed by the learned Special Judge (Forest), Shimla in Corruption Case No. 8-S/7 of 2009, titled State of Himachal Pradesh v. Singal and others is quashed and set aside.