

(2016) 08 KAR CK 0082

In the Karnataka High Court

Case No : Writ Petition No. 21782 of 2014 (GM-RES) connected with Writ Petition Nos. 38450-38451 of 2014 (GM-RES), Writ Petition No. 38498 of 2014 (GM-RES), Criminal Petition No. 7166 of 2015

Sri C. Mruthvunjayaswamy

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 22-08-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, Section 156, Section 157, Section 165, Section 482

Citation : (2017) 1 AirKarR 83 : (2017) 2 KantLJ 493 : (2016) 4 KCCR 3593

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Shri. G. Devaraj, Advocate, for the Respondent No. 4; Shri Venkatesh P. Dalwai, Advocate, for the Respondent Nos. 1 and 3; Shri V. Lakshminarayana, Senior Advocate for Smt. Shilpa Rani, Advocate, for the Petitioner

Final Decision : Allowed

Judgement

Anand Byrareddy, J. - These petitions are heard and disposed of together as the issue arising for consideration is identical. The facts of each case is as follows.

WP 38498/2014

The petitioner is said to be an engineer and was working as the Project Engineer in Shapoorji Pallonji. He was said to be a resident of Bangalore. His father was said to have retired from service as an Assistant Registrar of Co-operative Societies. Apart from the retirement benefits received by his father, there were said to be other declared assets, which had come to the petitioner's hands. It transpires that the petitioner had sold two properties, one belonging to himself and another which belonged to his mother and had received an advance amount totalling to Rs. 49 lakh which was intended to be reinvested to avoid capital gains tax.

It transpires that on 22.7.2011 , the police had executed a search warrant in respect of house No. 3799 13th Cross, BSK II Stage, Bangalore and in respect of the petitioner's re residence at 3854/A, 26th Main, 32nd Cross, BSK-II Stage, Bangalore, even though there was no search warrant specifying the petitioner's residence It is alleged that various documents such as bank pass books and cash was said to have been seized and various bank accounts have been frozen.

In the absence of a complaint against the petitioner, the search warrant having been issued was not preceded by a judicial order. There was no search warrant issued against the petitioner specifically or in respect of his house property. But the warrant has been executed in respect of two of the petitioner's place of residence and various documents and cash has been seized without authority of law The petitioner herein is the mother of the petitioner in WP 38498/2014 and is aggrieved by the same action taken in the above said petition as documents and cash belonging to the petitioner have been seized in the same incident of alleged execution of a search warrant. There was no search warrant issued in her name or in respect of the residence where such seizure is said to have been made. There was no complaint as against her.

WP 21782/2014

The petitioner was said to be working as a Chief Engineer in the Public Works Department. He had risen to that position from the post of an Assistant Executive Engineer in the year 1992. He had an unblemished service record.

On 22.7.2011, however, the Lokayuktha Police are said to have raided the house of the petitioner and produced him before a magistrate on 25.7.2011 and he was said to have been released on bail on 27.7.2011. The petitioner is said to have regularly filed his Annual assets and liabilities Statement to his employer.

His wife was said to be a Dentist and was also running a diagnostic centre.

Co-incidentally, the petitioner in WP 38451/2014 was the mother-in-law of the petitioner. However, her residence had been raided, when the search warrant issued was in respect of the petitioner's residence.

It is stated that the petitioner was produced before the designated Court on 25.7.2011, when for the first time an investigation report said to have been submitted by the Inspector of Lokayuktha police was opened for the first time. However, a search and seizure had been conducted even before the report was perused by the Court This is the primary ground of challenge.

WP 38450/2014

The petitioner herein is the wife of the petitioner in WP 21782/2014. Pursuant to the search warrant, the police having seized Rs. 5 lakh in cash belonging to the petitioner and having frozen 8 bank accounts of the petitioner, even though she has not been named in the search warrant, seeks to question the entire proceedings.

The petitioner is said to be an Assistant Engineer in the Pattana Panchayath, Jagalur, Davangere District. The petitioner's wife is said to be working as the Block Health Education Officer, Health Department, Ujjini.

It transpires that the Lokayuktha police had conducted an investigation and gathered materials against the petitioner before filing a secret report, on the basis of which an First Information Report (FIR) is said to have been registered as on 29.10.2013, based on the report dated 28.10.2013. It is this action of investigation and gathering of evidence, even before an FIR could be registered against the petitioner, which is sought to be questioned in these proceedings.

2. The learned Senior Advocate Shri V Lakshminarayan, appearing for the Counsel for the petitioners would contend that a preliminary investigation report submitted by the inspector holding that the accused was possessed of disproportionate assets, without filing a FIR, would vitiate the investigation. The consequent filing of a charge report would also be invalid. It is contended that under the Code of Criminal Procedure, 1973 (Hereinafter referred to as the "CrPC" for brevity), there is no provision provided for the holding of a preliminary enquiry. It is permitted only after receipt of a FIR.

It is contended that the competent authority to investigate an offence punishable under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 (Hereinafter referred to as the "PC Act", for brevity) is the Superintendent of Police or upon authorization, an officer not lower in rank than a Deputy Superintendent of Police. It is only the designated officers who could have investigated and not any other.

It is also contended that the informant or the complainant himself cannot participate in the investigation. A person who registers a case cannot also conduct investigation or carry out search and seizure.

Reliance is placed on a large number of authorities in support of the above propositions, while seeking that the proceedings initiated against each of the petitioners be quashed, as the same are clearly vitiated.

The Lokayuktha Police have filed Statement of objections in WP 21782/2014. It is contended that the registration of proceedings is in Crime No.28/2011 by the Lokayuktha police. It is stated that in the said case, a source report was said to have been submitted to the Superintendent of Police (SP) of the respondent on 21.7.2011 by the inspector of police, which is a report in the nature of information on a preliminary enquiry of the commission of a cognisable offence under the provisions of the PC Act. The SP, after due scrutiny and verification, is said to have directed the Deputy Superintendent of Police, Lokayuktha, to register the case and to investigate under Section 13(1)(e) read with 13(2) of the PC Act, in compliance with the second proviso to Section 17 of the PC Act on 21.7.2011. Thereafter, the SP had passed a reasoned order dated 10.11.2012,

authorizing the Police inspector to further investigate into the offences committed by the petitioner. Thereafter, a FIR was registered in the above case and sent to the jurisdictional Court in a sealed cover on 21.7.2011.

It is claimed that the respondents completed the investigation and found that the petitioner had amassed wealth disproportionate to his known sources of income and had submitted a final report for issuance of sanction on 14.5.2013. It is claimed that during the course of investigation, the petitioner had furnished an explanation as regards the wealth unearthed, which was found to be false and hence the report had been submitted for sanction to prosecute.

It is sought to be pointed out that the petitioner had deliberately suppressed the fact that he was fully aware of the completion of investigation and had filed a petition in Criminal Petition 6975/2013, which was disposed of in the belief that investigation was still not concluded. Taking advantage of the directions issued to consider documents, which maybe furnished by the petitioner, sought to furnish a further explanation to make amends to his earlier explanation which was proven to be false. This earlier conduct of the petitioner is conveniently glossed over in the present petition.

It is contended that the source report which is prepared cannot be considered as the FIR in itself. It is information regarding the commission of a cognisable offence by the petitioner, which has then resulted in the FIR being registered. Such a preliminary enquiry is an exception in respect of Prevention of Corruption cases.

It would be for the petitioner to establish at the trial as regards any prejudice that has resulted in the procedure that is followed by the respondents.

3. The Counsel for the respondent hence seeks dismissal of the petitions.

4. Keeping in view the broad facts of each of the petitions, the common questions of law that arise for consideration are:

(a) Whether there could be a preliminary enquiry conducted by the police as to whether a cognisable offence had been committed, even in the absence of a complaint, or even prior to the registration of an FIR ?

(b) Whether the complainant could also act as the investigating officer.

(c) Whether an illegal search and seizure would be fatal to the case of the prosecution .?

5. In so far as the first point for consideration, is concerned, a Constitution Bench of the Supreme Court in *Lalita Kumari v. Govt, of UP*, (2014)2 SCC 1: (2012 (5) KCCR SN 472 (SC)), has held that in the context of offences relating to corruption, it had in *P. Sirajuddin v. State of Madras*, (1970) 1 SCC 595, expressed the need for a preliminary enquiry before proceeding against public servants. And similarly in *CBI v. Tapan Kumar Singh* (2003) 6 SCC 175, it had validated a preliminary enquiry prior to registering an FIR only on the ground

that at the time the first information was received, the same did not disclose a cognisable offence.

The Court has reviewed the entire case law on the point and has summarized the law thus:

"120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognisable offence and no preliminary inquiry is permissible in such a situation.

120.2 If the information received does not disclose a cognisable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognisable offence is disclosed or not.

120.3 If the inquiry discloses the commission of a cognisable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4 The police officer cannot avoid his duty of registering offence if cognisable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognisable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognisable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

- a) Matrimonial disputes/ family disputes
- b) Commercial offences
- c) Medical negligence cases
- d) Corruption cases
- e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7 While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8 Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognisable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above. "

6. In the instant case on hand, before proceeding to conduct a preliminary enquiry and prior to the submission of a source report to the Superintendent of Police, there is no indication that there were any entries made in the Station Diary - as to the information, however vague, said to have been received or gathered, and of the decision to conduct a preliminary enquiry by the officer concerned, except an entry immediately prior to filing of the FIR, in each case. In the face of which, there has been a violation of the mandatory procedure to be strictly followed.

7. In so far as the second point for consideration, namely, that the complainant himself could not also have been permitted to carry out further investigation and file a final report, is concerned, as a general question, the point stands answered by the Supreme Court in the case of Vinod Kumar v. State of Punjab, AIR 2015 SC 1206. It is held as follows :

"23. There is no doubt that the status of PW8 is that of an interested witness. There is no cavil over the fact that he had sent the FIR and conducted the investigation, but the question posed is whether the investigation by him is vitiated. In this context we may, with profit, refer to the decision in Bhagwan Singh v. State of Rajasthan, (1976) 1 SCC 15 where one Ram Singh, who was a Head Constable, was the person to whom the offer of bribe was alleged to have been made by the appellant therein and he was the informant who had lodged the First Information Report for taking action against the appellant. He himself had undertaken the investigation. In that factual backdrop the Court ruled thus:

"Now, ordinarily this Court does not interfere with concurrent findings of fact reached by the trial Court and the High Court on an appreciation of the evidence. But this is one of those rare and exceptional cases where we find that several important circumstances have not been taken into account by the trial Court and the High Court and that has resulted in serious miscarriage of justice calling for interference from this Court. We may first refer to a rather disturbing feature of this case. It is indeed such an unusual feature that it is quite surprising that it should have escaped the notice of the trial Court and the High Court. Head Constable Ram Singh was the person to whom the offer of bribe was alleged to have been made by the appellant and he was the informant or complainant who lodged the first information report for taking action against the appellant. It is difficult to understand how in these circumstances Head Constable Ram Singh could undertake investigation of the case. How could the complainant himself be the investigator? In fact, Head Constable Ram Singh, being an officer below the rank of Deputy Superintendent of Police, was not authorised to investigate the

case but we do not attach any importance to that fact, as that may not affect the validity of the conviction. The infirmity which we are pointing out is not an infirmity arising from investigation by an officer not authorised to do so, but an infirmity arising from investigation by a Head Constable who was himself the person to whom the bribe was alleged to have been offered and who lodged the first information report as informant or complainant /This is an infirmity which is bound to reflect on the credibility of the prosecution case".

24. In *Megha Singh v. State of Haryana*, (1936) 11 SCC 799, the Court noticed the discrepancy in the depositions of PW-2 and PW-3 and absence of independent corroboration. Be it noted, the Court was dealing with an offence under Section 6(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1985. In that context the Court observed that the testimony of the said witnesses did not inspire confidence about the reliability of the prosecution's case. Proceeding further, the Court held;

".... We have also noted another disturbing feature in this case. PW 3, Siri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 CrPC. Such practise, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation".

25. In this regard, it is useful to refer to the pronouncement in *State v. V. Jayapaul*, (2004) 5 SCC 223 wherein the Court posed the question whether the High Court was justified in quashing the criminal proceedings On the ground that the police officer, who had lodged/recorded the FIR regarding the suspected commission of certain cognisable offence by the respondent should not have investigated the case. The case against the accused was that he was indulging in corrupt practices by extracting money from the drivers and owner of the motor-vehicles while conducting check of the vehicles and making use of certain bogus notice forms in the process. The charge sheet was filed under Sections 420 and 201 I.P.C. and Section 13(2) read with Section 13(l)(d) of the Act. The Court referred to the decision in the *State of U.P. v. Bhagwant Kishore Joshi*, AIR 1964 SC 221 wherein it has been ruled thus;

"Section 154 of the Code prescribes the mode of recording the information received orally or in writing by an officer in charge of a police station in respect of the commission of a cognisable offence. Section 156 thereof authorises such an officer to investigate any cognisable offence prescribed therein. Though ordinarily investigation is undertaken on information received by a police officer, the receipt of information is not a condition precedent for investigation. Section 157 prescribes the procedure in the matter of such an investigation which can be initiated either on information or otherwise. It is clear from the said provisions

that an officer in charge of a police station can start investigation either on information or otherwise."

26. After reproducing the said paragraph, the Court proceeded to state thus:

"Though there is no such statutory bar, the premise on which the High Court quashed the proceedings was that the investigation by the same officer who "lodged" the FIR would prejudice the accused inasmuch as the investigating officer cannot be expected to act fairly and objectively. We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased. In the present case, the police officer received certain discreet information, which, according to his assessment, warranted a probe and therefore made up his mind to investigate. The formality of preparing the FTR in which he records the factum of having received the information about the suspected commission of the offence and then taking up the investigation after registering the crime, does not, by any semblance of reasoning, vitiate the investigation on the ground of bias or the like factor. If the reason which weighed with the High Court could be a ground to quash the prosecution, the powers of investigation conferred on the police officers would be unduly hampered for no good reason. What is expected to be done by the police officers in the normal course of discharge of their official duties will then be vulnerable to attack."

Be it noted, the Court distinguished the decisions in Bhagwant Kishore Joshi (AIR 1964 SC 221) (supra) and Megha Singh (supra).

27. At this juncture, it would be fruitful to refer to *S. Jeevanatham v. State*, (through Inspector of Police, T.N.), (2004) 5 SCC 230. In the said case, the appellant was found guilty under Section 8(c) read with Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985. One of the contentions that was canvassed was that PW- 8, who lodged the FIR had himself conducted the investigation and hence, the entire investigation was vitiated. The Court referred to the decision in *Jayapaul* (AIR 2004 SC 2684) (supra) and opined thus:

"In the instant case, PW 8 conducted the search and recovered the contraband article and registered the case and the article seized from the appellants was narcotic drug and the Counsel for the appellants could not point out any circumstances by which the investigation caused prejudice or was biased against the appellants. PW 8 in his official capacity gave the information, registered the case and as part of his official duty later investigated the case and filed a

charge- sheet. He was not in any way personally interested in the case. We are unable to find any sort of bias in the process of investigation."

28. In the instant case, PW-8, who was a member of the raiding party had sent the report to the police station and thereafter carried the formal investigation. In fact, nothing has been put to him to elicit that he was anyway personally interested to get the appellant convicted. In our considered view, the decision in *S. Jeevanatham*, AIR 2004 SC 4608 (supra) would be squarely applicable to the present case and, accordingly, without any reservation we repel the submission so assiduously urged by Mr. Jain, learned senior Counsel for the appellant."

In so far as the third question as to the search and seizure effected being illegal, which would be fatal to the case of the prosecution is concerned, there are a catena of decisions of the Supreme Court negating such a proposition.

It was held that the question whether a search and seizure was done in accordance with law could not be considered at a preliminary stage of the proceedings, if ultimately the accused should face the trial, it would be one of the grounds to question the validity of the proceedings. (See. *CBI v. Tapan Kumar Singh*, (2003) 6 SCC 175).

In *State of Maharashtra v. Natwarlal D. Soni*, (1980)4 SCC 669, it was held that even if a search is illegal, that would not vitiate the seizure and the further investigation.

In *Ravindran v. Superintendent of Customs*, (2007) 6 SCC 410, it was held that the illegality of the search would not always be fatal to the prosecution, it would only have a bearing on the appreciation of evidence of the official witnesses and other materials depending on the facts of the case. Similar was the view in *Pratap Singh v. Director of Enforcement*, (1985) 3 SCC 72.

8. In the light of the above discussion, it may be said the proceedings before the Court below are vitiated. Consequently, the petitions are allowed and the proceedings in respect of each of the petitioners stands quashed. It is to be noticed that the petitioners in WP 38498/2014, WP 38451/2014 and WP 38450/2014 are all close family members of the petitioner in WP 21782/2014 and are implicated only on that account, and in view of the said petition being allowed, the case against each of the other petitioners who are not public servants would fail.

In so far as the petitioner in Criminal Petition 7166/2015 is concerned, he would have the benefit of the findings on points of law as to the proceedings being vitiated.