
(2010) 05 BOM CK 0061

In the Bombay High Court

Case No : Criminal Writ Petition No. 385 of 2010

Sunil Tondon

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 06-05-2010

Acts Referred:

Constitution of India, 1950 — Article 32

Criminal Procedure Code, 1973 (CrPC) — Section 173, 173(2), 173(8)

Citation : (2010) CriLJ 4263

Hon'ble Judges : D.B. Bhosale, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Vikas Singh, Yusuf Iqbal, Amrita Narayan and Anvee Mehta,
instructed by Yusuf and Associates, for the Appellant; A.S. Pai, Assistant Public
Prosecutor and A.H.H. Ponda, for the Respondent

Final Decision : Dismissed

Judgement

D.B. Bhosale, J.—Heard Mr. Singh, learned Senior Counsel for the petitioner, Mr. Ponda, learned Counsel for respondent No. 2 and Mrs. Pai, learned A.P.P. for the State.

2. In this Petition, the petitioner has made the following prayer:

(b) appropriate orders be passed by this Hon''ble Court inter alia restraining this Respondent from carrying out any further investigation in C.R. No. 66/05 pending before the Learned Additional Chief Metropolitan Magistrate''s 19th Court at Esplanade, Mumbai;

3. Counsel for the parties addressed the Court only on the aforesaid prayer made in the Petition.

4. Earlier the petitioner had filed Criminal Writ Petition No. 1658 of 2009 in this Court for quashing of the charge sheet on the ground that he did not commit any offence and even the investigation did not prove any offence having been committed by him. Since the charge sheet was filed and the petitioner''s

application for discharge was pending before the trial Court, so also the application filed by the prosecution keeping the learned Magistrate informed about their decision to carry out further investigation, this Court disposed of the writ petition vide order dated 27-7-2009, with directions to the Magistrate to dispose of both the applications after hearing all the parties within time frame. Thereafter in September, 2009 a criminal application being Criminal Application No. 327 of 2009 in Criminal Writ Petition No. 1658 of 2009 was filed by the petitioner seeking direction to decide the application filed by the prosecution in connection with the further investigation/reinvestigation. While deciding the application, this Court in order dated 19.1.2010 made following observations:

1. By way of this application, the applicant has prayed that learned Magistrate may be directed to decide the application in connection with the further investigation/reinvestigation. On going through the record, it seems that mere intimation has been given on behalf of the learned APP to the concerned Magistrate in connection with the further investigation and no application was pending before the concerned Magistrate. Perhaps through oversight, the learned APP at the relevant time, made such a statement that the application is pending. Be that as it may, in view of the fact that the police is further investigating the case, which according to the learned Counsel for the applicant, is nothing but reinvestigation, we permit the applicant to take out substantive proceedings by way of writ petition or any other proceedings, as may be deemed fit, for quashing the reinvestigation/further investigation if any. It would not be proper to examine this issue in an application in a writ petition which is already disposed of by this Court. We make it clear that we have not expressed any opinion as to whether it is further investigation or reinvestigation and the contentions of both the sides are kept open.

(emphasis supplied)

5. It is against this backdrop, the petitioner has filed the present writ petition. It appears that the learned Magistrate decided both the applications i.e. application filed by the petitioner for discharge and the application filed by the prosecution keeping the learned Magistrate informed about further investigation. Insofar as the application filed by the petitioner for discharge is concerned, the learned Magistrate has dismissed the same vide order dated 1st August, 2009. This order has not been challenged by the petitioner so far. The application filed by the prosecution was also disposed of by the learned Magistrate vide order dated 6.8.2009. We have perused the application filed by the prosecution dated 5.1.2009. By that application, the prosecution had simply kept the learned Magistrate informed about their decision to carry out further investigation as per Section 173(8) of Cr.P.C. and that there was no prayer made therein. In view thereof, the learned Magistrate while deciding the application vide order dated 6.8.2009 in paragraph-6 held thus:

6. This application is taken on the file of this Court on 2.1.2009. I have carefully perused the contents of this application. This application is without any prayer.

So the court need not pass any order on this application. Similarly, there is no question of accepting or rejecting this intimation. With this observation this application is disposed off.

6. Mr. Singh, learned Senior Counsel for the petitioner vehemently submitted that the prosecution under the garb of further investigation, is virtually reinvestigating the offence which is not permissible in law. He submitted that the law is well settled that once having approached the Magistrate either for giving intimation, as has been done by the prosecution in the present case, or for seeking permission to carry out further investigation, it is not open to the investigating agency to carry out further investigation unless formal permission is granted by the Magistrate. In this case, he submitted that once having approached the Court vide the application dated 5.1.2009, and that no formal permission was granted by the learned Magistrate, it is not open to the investigating agency to carry out further investigation. In short, he submitted that in the facts of this case leave of the Court for carrying out further investigation is must. He then submitted that the further investigation being carried out is in fact in the nature of fresh or reinvestigation, which is not sustainable in law. In support of his contentions, he placed reliance upon the judgment of the Supreme Court in T.T. Antony Vs. State of Kerala and Others, , Mithabhai Pashabhai Patel and Others Vs. State of Gujarat, , Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of Andhra Pradesh and Others, , and Ram Lal Narang Vs. State (Delhi Administration), .

7. On the other hand, learned APP, on instructions, submitted that the investigating agency is not carrying out fresh investigation or reinvestigating the crime, as alleged. She submitted that a charge sheet has already been filed, and now whatever investigation the investigating agency is carrying out is only further investigation as contemplated by Section 173(8) of Cr. P.C. Mr. Ponda, learned Counsel for respondent No. 2 invited our attention to the judgment of the Supreme Court in Rama Chaudhary v. State of Bihar (2009) 6 Supreme Court Cases 346 and submitted that the law does not mandate taking of prior permission from the Magistrate for carrying out further investigation and, therefore it cannot be stated that formal permission is necessary. He submitted that the judgments relied upon by the petitioner do not apply to the facts of the present case. He also placed reliance upon the judgment of the Supreme Court in State of Andhra Pradesh v. A.S. Peter (2008) 2 Supreme Court Cases 383 and Mithabhai Pashabhai Patel and Ors. v. State of Gujarat (2009) 6 Supreme Court Cases 332 in support of his contentions,

8. The Supreme Court in T.T. Antony's case (supra) in paragraph-19 has observed that "even after filing such a report u/s 173(2) of Cr.P.C., if the investigating agency comes into possession of further information or material, they need not register fresh FIR and they are empowered to make further investigation, normally with the leave of the court, and where during further

investigation they collect further evidence, oral or documentary, they are obliged to forward the same with one or more further reports: this is the import of Sub-section (8) of Section 173 of Cr. P.C.."

9. In *Mithabhai Patel* (supra) the Supreme Court in paragraph 16 observed thus:

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.

[emphasis supplied]

Further, the Supreme Court has quoted paragraphs 16 to 18 from *Rama Chaudhary*'s case (supra) which read thus:

16. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

17. From a plain reading of Sub-section (2) and Sub-Section (8) of Section 173, it is evident that even after submission of police report under Sub-section (2) on completion of investigation, the police has a right to "further " investigation under Sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "further" is additional, more, or supplemental. "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.

18. Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not fresh report regarding the "further" evidence obtained during such investigation.

(emphasis supplied)

In *Mithabhai Pashabhai Patel*'s case the Supreme Court was dealing with the question whether with the change of an investigating authority, police custody of the accused on remand can be sought for, although cognizance of the offence had already been taken. The Supreme Court while holding that "further investigation" and "reinvestigation" stand on different footing, observed that no superior court would ordinarily issue a direction of a reinvestigation.

10. In *Ram Lal Narang*'s case (supra), paragraphs-22 & 23, the Supreme Court observed thus:

22. ...We think that in the interests of the independence of the magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interests of the comity of the various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light.

23. ...In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted u/s 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation.

(emphasis supplied)

11. We have also noticed the observations made by the Supreme Court in A.S. Peter's case (supra), wherein after considering Ram Lal Narang's case, in paragraph-9 the Supreme Court held thus:

9. Indisputably, the law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out of a further investigation even after filing of the charge-sheet is a statutory right of the police. A distinction also exists between further investigation and reinvestigation. Whereas reinvestigation without prior permission is necessarily forbidden, further investigation is not.

(emphasis supplied)

We would also like to quote paragraphs-14 to 17 from the judgment of the Supreme Court in A.S. Peter's case, wherein a detail reference is made to the judgment in Ram Lal Narang's case, on which a heavy reliance was placed by the learned Counsel for the petitioner in the present case. Paragraphs-14 to 17, in A.S. Peter's case, read thus:

14. In Ram Lal Narang this Court was concerned with a case where two conspiracies were alleged; one being part of a larger conspiracy. Two investigations were carried out. This Court, while opining that further investigation is permissible in law, held that the Magistrate has a discretion in the matter to direct further investigation, even if he had taken cognizance of the offence, stating: (SCC pp.337-38, para 20)

20. The criticism that a further investigation by the police would trench upon the proceeding before the court is really not of very great substance, since whatever the police may do, the final discretion in regard to further action is with the Magistrate. That the final word is with Magistrate is sufficient safeguard against any excessive use or abuse of the power of the police to make further investigation. We should not, however, be understood to say that the police should ignore the pendency of a proceeding before a court and investigate every

fresh fact that comes to light as if no cognizance had been taken by the court of any offence. We think that in the interests of the independence of the magistracy and the judiciary, in the interest of the purity of the administration of criminal justice and in the interests of the comity of the various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light.

15. While acknowledging the power of the police authorities to carry out further investigation in terms of Section 173 of the Code of Criminal Procedure, an observation was made therein to the following effect: (Narang case, SCC p. 338, para 21)

21.. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted u/s 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the court by seeking its formal permission to make further investigation.

16. Even in regard to an independent investigation undertaken by the police authorities, it was observed: (Narang case, SCC p. 338, para 21)

21.. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted u/s 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the court by seeking its formal permission to make further investigation.

17. It is not a case where investigation was carried out in relation to a separate conspiracy. As allegations had been made against the officer of a local police station in regard to the mode and manner in which investigation was carried out, a further investigation was directed. The court was informed thereabout. Although, no express permission was granted, but evidently, such a permission was granted by necessary implication as further proceeding was stayed by the learned Magistrate. It is also not a case where two charge-sheets were filed before two different courts.

The court designated to deal with the matters wherein investigation had been carried out by CID, is located at Chittor. It is in the aforementioned situation, the Sessions Judge transferred the case pending in the Tirupati Court to the Designated Court at Chittor. Cognizance of further offence had also been taken by the Chittor Court.

12. In Ram Lal Narang's case the Court was concerned with the case where two

conspiracies were alleged; one being part of a larger conspiracy. Two investigations were carried out. Subsequent investigation revealed that still more persons were involved. Therefore, a second case of conspiracy was initiated in a different court and the earlier conspiracy case was withdrawn. It was, therefore, held that the investigation and taking of cognizance in the second case was not without jurisdiction. It is against that backdrop, the Supreme Court observed as quoted above. It would be relevant to refer to the observations made by the Supreme Court in the very same judgment (Ram Lal Narang's case) in paragraph 15. In this paragraph the Supreme Court has considered the observations of the Privy Council in *King Emperor v. Khwaja Nazir Ahmed* and observed thus:

15. The police thus had the statutory right and duty to 'register' every information relating to the commission of a cognizable offence. The police also had the statutory right and duty to investigate the facts and circumstances of the case where the commission of a cognizable offence was suspected and to submit the report of such investigation to the Magistrate having jurisdiction to take cognizance of the offence upon a police report. These statutory rights and duties of the police were not circumscribed by any power of superintendence or interference in the Magistrate; nor was any sanction required from a Magistrate to empower the Police to investigate into a cognizable offence....

(emphasis supplied)

13. From perusal of the aforesaid judgments of the Supreme Court, it is clear that the law does not mandate taking of prior permission from the Magistrate for further investigation. It is a statutory right and duty of the police to further investigate as often as necessary when fresh information came to light after filing of the charge-sheet. These statutory rights and duties of the police cannot be circumscribed by any power of superintendence nor any sanction is required from a Magistrate to empower the police to investigate into a cognizable offence. However, it would be desirable to keep the Court informed about further investigation, more particularly where the charge has been framed. The objective for keeping the Court informed or for seeking formal permission to make further investigation is that the Court should know about it and should not proceed to hear the case. Further investigation after filing of the charge sheet is the continuation of the earlier investigation. Sub-section (8) of Section 173 of Cr. P.C., envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a further report regarding the further evidence obtained during such investigation. Therefore, what is necessary is only to keep the Magistrate informed about further investigation. In the present case, the prosecution has done so, and the learned Magistrate vide the order dated 6.8.2009 has taken notice of the same.

14. The petitioner has contended that under the garb of further investigation, the petitioner apprehends that the police are likely to reinvestigate the offence. This contention deserves to be rejected out right since in law a fresh or

reinvestigation is not sustainable without permission of the court. Though the learned Counsel for the petitioner submitted that the police are virtually carrying out a fresh investigation, he could not demonstrate as to why was he saying so. In this case, the charge-sheet has already been filed. In any case, reinvestigation is not permissible in law and, therefore, the apprehension expressed that the police are carrying out reinvestigation cannot be entertained at this stage. In a given case it may possible to examine such a contention after filing of the additional charge-sheet. Moreover, in the present case the prosecution has not taken any steps for seeking cancellation of bail or police custody of the accused so as to prima facie hold that they intend to reinvestigate the offence. The further investigation, which the investigating agency is carrying out in the present case, is nothing but the continuation of the earlier investigation and not reinvestigation as alleged by the petitioner. The contention of the petitioner that once having approached the Magistrate intimating him about the further investigation, without formal permission of the Magistrate, it is not open to the investigating agency to carry out further investigation, therefore, must be rejected.

With these observations, the writ petition is dismissed.