

Calcutta High Court

HON'BLE JUDGE(S): SUBHENDU SAMANTA , J

TAPAN KR. ROY V. STATE OF WEST BENGAL

C.R.R. - 47 of 2017, decided on 23/11/2022

Criminal P.C. (2 of 1974) , S.173(8)— Power of Magistrate - To direct further investigation - Informant and his wife went to house of accused to see their grand-child by virtue of Court order, but they were initially not allowed to meet him and then man- handled causing bleeding injuries - Alleged occurrence happened at house of accused, when he was not present at house - FIR did not disclose any overt act attributed to accused - Merely naming any person in FIR to be accused does not bind investigating agency to submit charge sheet against that person - Circumstances of case was not of such nature that warranted any further investigation - Magistrate rightly denied to pass order directing police to investigate matter further. AIR 2006 SC 1937 : 2006 Cri LJ 2468 (SC)-Followed 2013 Cri LJ 754 (SC) : 2013 AIR SCW 220-Followed

(Para 15, 17, 18)

Case Referred :

Chronological Paras

2019 CRI LJ 2578 (Kar)

Para No.(9)

AIROnline 2018 CAL 1670

Para No.(7)

AIROnline 2020 SC 900

Para No.(11)

2018 CRI LJ 4609

Para No.(8)

2013 Cri LJ 754 (SC) : 2013 AIR SCW 220 (Foll)

Para No.(13)

AIR 2006 SC 1937 : 2006 Cri LJ 2468 (SC) (Foll)

Para No.(13)

AIR 1997 SC 3876 : 1997 Cri LJ 4636 (SC) : 1997 AIR SCW 3801

Para No.(10)

Name of Advocates

Kamalesh Chandra Saha, Payel Mitra, for Petitioner; Swapan Banerjee, Suman De, Uday Sankar Chatterjee, Suman Sankar Chatterjee, Santanu Maji, Trisha Rakshit, for Respondent.

1. **ORDER** :-This is an application u/S. 401 of the Code of Criminal Procedure read with section 482 of the Criminal Procedure Code against an order dated 06.12.2016 passed by Learned Judicial Magistrate, 3 Court Serampore Hooghly in connection with GR Case No. 1389 of 2015 arising out of Serampore P.S Case No 367 dated 07.08.2015 u/S. 341/323/506/34 of IPC.

2. In a nutshell, the fact of this the case is that the petitioner lodged a written complaint with the I.C Serampore P.S on 07.08.2015 contending inter alia

commission of an alleged offence punishable u/S. 341/325/506 of IPC against the O.P. Nos. 2,3 and 4. Police conducted investigation and after completion of investigation, submitted charge sheet against two accused persons except O.P. No. 2. One protest petition (u/S.-173(8),Cr.P.C.) was filed by the present petitioner before the Magistrate. Learned Magistrate on hearing the parties passed the impugned order and rejected the application filed by the petitioner u/S. 173(8) of Cr.P.C..

3. Being aggrieved by and dissatisfied with the impugned order the instant criminal revisional application has been filed.

4. Learned Advocate for the petitioner submitted before this court that opposite party No. 2 is the principle accused of the alleged offence and he is FIR named accused. The ground to discharge him from the case by the I.O. is mala fide one. The police did not conduct the investigation in a perfunctory manner and submitted false charge sheet. The views of the Ld. Magistrate in the impugned order suffers illegality and impropriety. Learned Court below should have ordered further investigation under the Provision of Section 173(8) ,Cr.P.C.

5. Learned Advocate appearing on behalf of the opposite party submitted that the Learned Court below has committed no error in passing the impugned order. The impugned order is reasonable and a speaking order. He further pointed out that no materials were collected by the I.O. against the present O.P No. 2 thus, he was not sent up.

6. Learned Advocate appearing on behalf of the State submitted before this court that the impugned order suffers no illegality or impropriety.

7. Learned Advocate appearing on behalf of the petitioner cited some decisions in support of his contentions there Suman Bal v. The State of West Bengal reported in 2018(4)AICLR 406(CAL) : (AIR Online 2018 CAL 1670). In this cited case Hon'ble Calcutta High Court has held that

29. In the context of the above discussion, I am of the considered view that the learned Judge is called upon to consider the charge against the accused person based on the police report submitted under Section 173 of the Code upon giving an opportunity to the accused right of audience to address the Court for

their discharge as grant of such right to the accused person petitioner would be in their interest to have right to access to justice and fair trial as enshrined as fundamental rights under Article 21 of the Constitution of India.

8. Petitioner also cited another decision of this court reported in *Indranil Mukherjee v. State of West Bengal and another* 2018 (4) AICLR 395 (**2018 CRI L. J. 4609**)(CAL) in this citation Hon'ble Court has enumerated that Further investigation- Rejection of- Investigating agency perfunctorily conducted investigation without taking into account the medical evidence by not sending the accused in the charge sheet despite allegation levelled against him- Magistrate also overlooked the police papers placed on Case Dairy while taking cognizance against one charge sheeted accused and committed error by rejecting the application for further investigation- Charge sheet submitted against one accused and another accused was not sent up who allegedly assaulted the complainant- Complainant approached Magistrate only after having the information and notice with regard to the submission of charge sheet- Magistrate has ample power to direct further investigation after submission of the charge sheet by police even when cognizance has been taken on the charge sheet - Submission of a report under Section 173(2) does not preclude the power of the Magistrate to direct further investigation by the investigating agency and submission of supplementary charge sheet thereon- Imperative for Magistrate to grant further investigation because if the order impugned is allowed to be sustained, it will amount to arming police with unbridled power to exonerate any person from the periphery of the investigation and it would be playing into the hands of I. O. who submitted the charge sheet against one accused exonerating another by not sent up him in the charge sheet with an ulterior design.

9. He also cited another decision reported in 2019 (2) AICLR 874 :(**2019 CRI L J 2578**)(KAR) *M. Rubin Britto v. Inspector of Police, Kuduthini Police Station, Ballari and Others*. In this citation it has held that-

27. it is clear that even the Magistrate and higher Courts can exercise the powers under Section 173(8) of Cr.P.C. for further investigation of the matter and while ordering for further investigation also it must be in order to collect the materials

and to punish the person who is culprit and if any investigation is defective, it is the Magistrate or the higher Courts of jurisdiction would direct further investigation

10. Learned Advocate for the petitioner cited another decision reported in (1997) 7 SCC 614 : (AIR 1997 SC 3876). In this cited judgment Hon'ble Supreme Court has held that-

Magistrate has the power to direct further investigation after acceptance of final report and closer of case. Short comings necessitating re- investigation brought to the notice of the Magistrate by the informant but he reads to direct investigation holding that he had no power to review the earlier order. It is held that the Magistrate failed to exercise jurisdiction vested in him by law. He was not required to review the order to two orders. Further investigation into which he was competent to do u/S. 173(8) of the Code.

11. Learned Advocate for the petitioner further argued that the Learned Magistrate has failed to appreciate the differences between section 149 and 34 of the IPC.. Common intention and common object are there in committing alleged offence by O.P. No. 2. Thus Learned Magistrate need to re-visit the matter. In support of his contention he cited a decision reported in 2021(1) AICLR 363(SC) : (AIR Online 2018 CAL 1670). Hon'ble Apex Court in the above citation has held that-

There are differences between section 149 and section 34 of IPC. Difference between common intention and common object are moods of appreciating vicarious liability of individual members of a group, they are existed differences in these two provisions. Section 34 ,IPC requires active perception and a prior meeting of minds, section 149,IPC assigns liability merely by membership unlawful assembly. Such common intention is usually indirectly inferred from conduct of individuals and only seldom it is done through direct evidences.

12. I have gone through the citations the principal laid down in the citations; They are well expected. Let me consider whether the principles are applicable in the present facts and circumstances of the case.

13. It appears from the impugned judgment that Learned Magistrate has passed

the impugned order by virtue of the principles laid down in (2006) 4 SCC 359 : (AIR 2006 SC 1937)(Minu Kumari and Anr. v. State of Bihar and Ors.) and also in 2013(5)SCC762 : (2013 Cri LJ 754) (SC)(Vinay Tyagi vs. Irshad Alia Alias. Deepak and Ors.) Learned Magistrate is of view that justice would not fail if he does not direct the investigating agency to conduct further investigation.

14. It is a cardinal principle of every Criminal investigation that the de- facto complainant should have to be heard. The free and fair trial of a Criminal Case is only possible when there is free and fair investigation. It is true, I.O. has the sole domain to conduct investigation, but it does not mean that the de- facto complainant shall remain unheard. The circumstances, when during the course of investigation, it appears to the I.O. that the FIR required to be clarified or need some explanation, the I.O. must proceed to hear the de- facto complainant. Recording subsequent statements of De- facto in every Criminal investigation may destroy the prosecution case or may lead to false implication. Investigating agency is duty bound not to proceed beyond the scope of investigation of the particular criminal case. Thus, I.O. may be directed to conduct further investigation in those special cases if it appears that there are latches on the part of I.O. and when it is so glaring which will make improbable the very notion of fair investigation leading to failure of Justice.

15. C.D is placed before this court. Perused the C.D. carefully. It appears from the FIR that the de facto complainant and his wife went to the house of O.P. No. 2, to see their grand child by virtue of order of the Hon'ble High Court but they are initially not allowed to meet their grand child and when attempt was made by them; they were man- handled and subsequently assaulted to which they sustained bleeding injuries. It has further alleged that the O.P. Nos. 3 and 4 abused the wife of de facto complainant with filthy languages.

16. The petition of complaint does not disclose the presence of O.P. No. 2 at the time of occurrence. The statement of neighbouring people were recorded by the I.O. during the course of investigation of this case wherein it also appears that the Op. No. 2 was not at the house at the time of alleged commission of offence. So, considering the police report it appears that the allegation against the O.P. 2 is

not supported by any evidence. Thus, the police report regarding the opinion of investigating officer, not finding prima facie materials against the O.P. No. 2 is not at all baseless.

17. The entire circumstance of this case is goes to show that the alleged occurrence happened at the house of O.P. No. 2 when the O.P. No. 2 was not present at his house. The available witnesses also support the fact that O.P. No. 2 was not present. FIR does not disclose any overtact by O.P. No.-

2. Merely naming any person in the FIR to be accused is not ipso facto bound investigating agency to submit charge sheet against the said accused person.

18. Considering the materials on record considering the principles laid down by the Apex Court and Hon'ble High Court I am of a clear view that the impugned order passed by the Learned Magistrate is a speaking order and it founds on reasonable appreciation and law. The circumstances of this case is not such a nature which warrant an order of further investigation.

19. Thus I find no merit to entertain the instant criminal revision.

20. In result thereof, the instant criminal revision is dismissed.

21. The connected CRAN applications if any are also disposed of.

22. Any order of stay passed by this Court during the pendency of the instant criminal revision is also vacated.

23. Accordingly, the Criminal revision is disposed of.

Petition Dismissed