

Section 173(8) CrPC Gives Unfettered Right To Investigating Agency For 'Further' Probe, No Restrictions Exist: Delhi High Court

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IN THE HIGH COURT OF DELHI AT NEW DELHI

YOGESH KHANNA; J.

W.P.(CRL) 833/2021, CRL.M.A. 6005/2021; 25.11.2022; 25 November 2022

SRI DESARAJU VENUGOPAL versus CENTRAL BUREAU OF INVESTIGATION

Petitioner through: Mr.Suhail Dutt, Sr. Advocate with Ms.Anuradha Dutt, Mr.Ambar Bhushan, Mr.Kunal Dutt, Mr.Nishant Varun, Mr.Azhar Alam, Ms.Payal Nayak and Ms.Latika Malhotra, Advocates.

Respondent through: Mr.Sanjay Jain, ASG, Mr.S.V.Raju, ASG with Mr.Ripu Daman Bhardawaj, Mr.Neeraj Jain, SPPs, Mr.Yuvraj Sharma, Mr.Anupam Mishra, Advocates with Mr.Survinder Rohilla, DSP for CBI.

ORDER

1. This petition is filed with the following prayers:

“a. Issue a writ order and/ or direction calling for the record of CC No.03/19, CIS No.190/2019 pending before Shri Chandra Shekhar Ld. Special Judge, Rouse Avenue Court.

b. Issue a writ order and/ or direction directing the Ld. Special Judge Rouse Avenue Court to follow the judicial discipline in terms of Article 141 of the Constitution of India.

c. Issue a writ and/ or order and/ or quashing and/ or setting aside the Order dated 24.02.2021 passed by Shri Chandra Shekhar Ld. Special Judge, Rouse Avenue Court in CC No. 03/19, CIS No.190/2019. d. Costs;

e) pass such further and other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

2. The main grievance of the petitioner herein is without there being an end to an investigation the learned Special Judge has listed the case for hearing on framing of charges. This act of the learned Special Judge was challenged by the petitioner by moving an application but it was dismissed vide impugned order dated 24.02.2021.

3. In this case FIR was registered in the year 2015 and on 11.08.2016 chargesheet was filed wherein it was stated investigation is still going on and a supplementary chargesheet is going to be filed soon. On 08.01.2019 supplementary chargesheet was also filed mentioning investigation is going on. On 06.01.2020 the petitioner herein moved an application for clarification from CBI on this account. The CBI filed a reply stating *inter alia* investigation is still going on and supplementary chargesheet shall be filed soon. It is argued this is against the preposition of law settled by *Vinubhai Haribhai Malaviya vs. State of Gujarat* (2019) 17 SCC 1. The learned counsel for the petitioner argued the impugned order noted the finding in *Vinubhai (supra)* are *orbiter* in nature and not binding. The learned Special Judge relied upon *Hasanbhai Valibhai Qureshi vs. State of Gujarat and Others* (2004) 5 SCC 347 and *Rama Chaudhary vs. State of Bihar* (2009) 6 SCC 346. It is argued *Vinubhai (supra)* is of a larger Bench hence needs to be followed.

4. Thus the crux of the arguments is investigation cannot be carried on endlessly and it need to stop once the trial begin and can continue only if there are *exceptional* facts viz. a *fresh evidence* has come to light of the prosecution etc.

5. Reference was made to *Vinubhai Haribhai Malaviya vs. State of Gujarat* (2019) 17 SCC 1 wherein it was held:

“10. The question of law that therefore arises in this case is **whether, after a charge-sheet is filed by the police, the Magistrate has the power to order further investigation, and if so, up to what stage of a criminal proceeding.**

20. With the introduction of Section 173(8) in CrPC, **the police department has been armed with the power to further investigate** an offence even after a police report has been forwarded to the Magistrate. **Quite obviously, this power continues until the trial can be said to commence in a criminal case.** The vexed question before us is as to **whether the Magistrate can order further investigation after a police report has been forwarded to him under Section 173?**

42. There is no good reason given by the Court in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an Accused appearing before the Magistrate, while concomitantly, **the power of the police to further investigate the offence continues right till the stage the trial commences.** Such a view would not accord with the earlier judgments of this Court, in particular, *Sakiri (supra)*, *Samaj Parivartan Samudaya (supra)*, *Vinay Tyagi (supra)*, and *Hardeep Singh (supra)*; *Hardeep Singh (supra)* having clearly held that a **criminal trial does not begin after cognizance is taken, but only after charges are framed.** What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod Under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an Accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the Code of Criminal Procedure, as has been noticed hereinabove, and **would be available at all stages of the progress of a criminal case before the trial actually commences.** It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, **fresh facts** come to light which would lead to inculcating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in *Hasanbhai Valibhai Qureshi (supra)*. Therefore, to the extent that the judgments in *Amrutbhai Shambubhai Patel (supra)*, *Athul Rao (supra)* and *Bikash Ranjan Rout (supra)* have held to the contrary, **they stand overruled.** Needless to add, *Randhir Singh Rana v. State (Delhi Administration)* MANU/SC/0161/1997 : (1997) 1 SCC 361 and *Reeta Nag v. State of West Bengal and Ors.* MANU/SC/1486/2009: (2009) 9 SCC 129 also stand overruled.”

6. Thus it was argued the statement of law in *Vinubhai (supra)* is very clear the investigation has to precede the trial/till the charges are framed.

7. He then referred to *Tofan Singh vs. State of Tamil Nadu* 2020 SCC Online SC 882 wherein the Court held:

“144. A three-Judge Bench of this Court in *Vinubhai Haribhai Malviya v. State of Gujarat* 2019 SCC OnLine SC 1346 **held** that the power to further investigate an offence would be available at all stages of the progress of a criminal case before the trial actually commences - see paragraph 49. If, as is contended by *Shri Lekhi*, that the officer designated under section 53 can only file a “complaint” and not a “police report”, then such officer would be denied of the power to further investigate the offence under section 173(8) after such “complaint” is

filed. This is because section 173(8) makes it clear that the further report can only be filed after a report under subsection (2) (i.e. a police report) has been forwarded to the Court. However, **a police officer**, properly so-called, who may be investigating an identical offence under the NDPS Act, **would continue to have such power, and may, until the trial commences, conduct further investigation so that, as stated by this Court in Vinubhai (supra), an innocent person is not wrongly arraigned as an accused, or that a prima facie guilty person is not so left out. Such anomaly - resulting in a violation of Article 14 of the Constitution of India - in that there is unequal treatment between identically situated persons accused of an offence under the NDPS Act solely due to the whether the investigating officer is a police officer or an officer designated under section 53 of the NDPS Act, would arise only if the view in Raj Kumar Karwal (supra) is correct.**"

8. Further in *Arjun Padnitrao Khotkar vs. Kailash Kushanrao Gorantyal and Others* (2020) 7 SCC 1 the Court held as under:

"55. In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, **concertised its case against an accused before commencement of the trial. It is further settled law that the prosecution ought not to be allowed to fill up any lacunae during a trial.** As recognised by this Court in *CBI v. R.S. Pai*, the only exception to this general rule is if the prosecution had **"mistakenly"** not filed a document, the said document can be allowed to be placed on record."

9. It is argued the above judgments were followed in *Saroj Bhola vs. State of NCT of Delhi and Others* 2021 SCC Online Delhi 1497. It relied upon para 42 of *Vinubhai (supra)*.

10. Further reference was made to *Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and Others* (1985) 1 SCC 260; *Suganthisuresh Kumar vs Jagdeeshan* (2002) 2 SCC 420; *Municipal Committee, Amritsar vs Hazara Singh* (1975) 1SCC 794 and *Peerless General Finance and Investment Company Ltd vs. Commissioner of Income Tax* 2019 SCC OnLine SC 851. In *Peerless (supra)* it was held:-

"13. xxx We reiterate that though the Court's focus was not directly on this, **yet, a pronouncement by this Court, even if it cannot be strictly called the ratio decidendi of the judgment, would certainly be binding on the High Court.** Even otherwise, as we have stated, it is clear that on general principles also such subscription cannot possibly be treated as income."

11. In *M3M India Pvt. Ltd. v. Dinesh Sharma* AIR 2020 Del 23 and *Mahua Bindal and Ors. vs. Guru Gobind Singh Indraprastha University and Ors.* 2020 SCC OnLine Delhi 874 the above proposition of law was followed.

12. Thus, it is argued a statement of law, even an *obiter*, shall be binding upon the lower Courts and High Court, is a conclusive position of law whereas the learned Trial Court vide its impugned order held otherwise in its para No.(g) as under:-

(g)Therefore, a bare perusal of section 173 Cr.P.C. and an analysis made herein above, distinctly demonstrate that the submissions made by Ld. Sr. Counsel on behalf of accused No.8 and 9 are not in accordance with the provisions u/s 173 Cr.P.C. since the section does not impose any statutory or legislative limitation on the power(s) of Magistrate or the officer in charge of a police station, their power regarding 'further investigation' is open ended.

13. It is alleged impugned order is nothing but a bare misreading of the judgments quoted to him. It is alleged even if case falls in any of the exceptions viz. **(a)** fresh evidence or **(b)** defective investigation; then also the Investigating Officer shall have

to seek an approval for such fresh investigation and till such time trial shall remain stayed.

14. The learned counsel then referred to *National Human Rights Commission V. State of Gujrat & Ors.* (2009) 6 SCC 342, wherein the Supreme Court held as follows:

11. xxxxxxx *We find that the course would not be appropriate because if the trial continues and fresh evidence/materials surface, it would require almost a de novo trial which would be not desirable.*

15. and in *Smita Pansare V. State of Maharashtra* 2016 SCC Online Bom 1539 it was held as under :

3. xxxxx *If further investigation in the matter is in progress, then the **Court is expected to defer the hearing** of the case and give some more time to the investigating agency. Prosecuting Agency in Pansare murder case is directed to make an application before the concerned Sessions Judge seeking adjournment on the next date. The learned Sessions Judge shall pass appropriate order keeping in mind that the further investigation into the matter is in progress.*

16. The learned senior counsel for the petitioner submitted the trial and investigation cannot go parallel, side by side and if the charges are allowed to be framed then, of course, the investigation should end as *later* the prosecution cannot be allowed to fill lacunas in its case. Reference was made to para no.16(2) and 16(156) of the first chargesheet and even supplementary chargesheet annexure-P3 viz. para nos.16 and 49 as also para 8 of the status report saying investigation still continues; hence trial should not continue. Para 8 of the status report says:

“8. Presently, further investigation of the case is still continuing on the issues of FDI received by M/s Devas Multimedia Pvt. Ltd (A-4) from M/s Columbia Capital Devas Mauritius Ltd, Port Louis, Mauritius ; M/s Telecom Devas Mauritius Limited, Port Louis, Mauritius ; M/s Devas Employees Mauritius Pvt. Ltd, Port Louis, Mauritius and M/s Deutsche Telekom Asia Pte Ltd, Singapore ; funds transferred from the accounts of M/s Devas Multimedia Pvt. Ltd into the foreign accounts and the affairs of M/s Forge Advisors, USA.”

17. It was further submitted **a)** the accused has a right to know the entire case against him; **b)** the prosecution cannot be permitted to fill up the lacuna and **c)** the Court is obligated to see the entire material before framing charge or discharging the accused.

18. Reference was also made to *Vinay Tyagi vs. Irshad Ali* (2013) 5 SCC 762; *Luckose Zacariah vs. Joseph Joseph*, 2020 SCC OnLine 241. In latter it was held:

*“10 In the judgment of this Court in Vinay Tyagi (supra) it has been held that a further investigation conducted under the orders of the court or by the police on its own accord would lead to the filing of a supplementary report. The supplementary report, the Court noted, would have to be dealt with **“as part of the primary report”** in view of the provisions of sub-Sections 3 to 6 of Section 173.”*

19. It was argued there is no bar for the investigating agency to file a supplementary report under Section 173(8) Cr.P.C. which in fact is an exception to Section 173 itself and not to the entire code, but the Court when is going to frame charges need to look into not only to final report (primary) but also of supplementary reports which in fact is a part of primary report. It is argued once the Court comes to a conclusion the accused is entitled to discharge, subsequently the police cannot further investigate the matter to fill up the lacuna and if this is allowed to continue, it would be violative of Article 21 of the Constitution.

20. It was argued 311 CrPC is in different context and has to apply at a different stage of criminal trial and cannot be used prior to a trial and further Section 244 Cr.P.C. is applicable in a case other than the case on police report but whereas the present case is based on a police report.

21. Heard.

22. No doubt to the law propounded above, but it is also correct in *Vinubhai* (supra) the main issue was as to *if the learned Magistrate has any power to order investigation after the cognizance is taken, but before the trial begin*, which the Hon'ble Supreme Court answered in the affirmative. In the said judgment reference was also made to the power of police to further investigate an offence which power continues till the stage of trial of offence. Certainly it was an *orbiter* since main issue was different but *per law* even such an obiter is binding upon the Courts below and there is no second argument for it. However since the main issue in *Vinubhai* (supra) was different, hence it would also be appropriate to examine some other judgments in this context, which may throw light upon the powers of police to investigate.

23. In *State of West Bengal vs. Salap Service Station*, 1994 Supp (2) SCC 318 it was held the Magistrate has no power to refuse supplementary chargesheet but to accept the same and would see the consolidated effect of the final report and supplementary reports and then proceed to frame charges. Hence, if the investigation is going on, a supplementary charge sheet is filed, the accused must have the supplementary charge sheet to know the entire case against him since the supplementary charge sheet is also to be considered as a part of the final report *viz.* the primary report.

24. In *Samaj Parivartan Samudaya vs. State of Kerala* (2012) 7 SCC 407, the three Judge Bench held if the Officer in Charge of the police station obtains further evidence, it is incumbent upon him to forward the same to the Magistrate with a further report with regard to such evidence in the form prescribed. It was held investigation is permissible though reinvestigation is prohibited and to carry out further investigation *even after* filing of the charge sheet is a *statutory right* of the police. It held the mere fact there may be further delay in concluding the trial, would not stand in the way of further investigation if that would help the Court in arriving truth and to do real, substantial as well as effective justice. The statutory duty of police to investigate *includes* its right to further investigate *though* the Magistrate has a right to agree or disagree with its report.

25. In *Abhinandan Jha and Others vs. Dinesh Mishra* 1967(3) SCR 668 the Hon'ble Supreme Court held the Magistrate can agree with the report filed under Section 173 Cr.P.C. and may issue summons and/or he may disagree and direct further investigation but cannot direct the Investigating Officer to file a chargesheet in a particular manner.

26. In *Ram Lal Narang vs. State (Delhi Admn.)* 1979 (2) SCC 322, the Court held there is no provision in Cr P C which expressly or by necessary implication barred the right of the police to *further* investigate after cognizance of the offence. The practice, convenience and preponderance of authorities permit repeated investigation on discovery of *fresh facts*. Even in *State of Bihar vs. J.A.C. Saldanha*, (1980) 1 SCC 554, the Court held the power of the Magistrate under Section 156(3) Cr P C to direct further investigation is an independent power and it does not stand in conflict with the power of the State Government. Moreso, in *Hasanbhai Valibhai Qureshi vs. State of*

Gujarat (2004) 5 SCC 347, the Court held the hands of the investigating agency or the Court should not be tied down on the ground further investigation may delay the trial, as ultimate object is to arrive at the truth. If the police is not satisfied of the propriety or the manner and nature of the investigation already conducted, it would not stop the police under section 173(8) Cr PC to further investigate the matter. In *State of Orissa vs. Mahimananda Mishra and Others* (2007) 15 SCC 580, it was held the investigating agency will be at liberty to investigate further in the manner as it deems fit and proper in accordance with law. Similarly, in *State of Andhra Pradesh vs. A.S.Peter*, (2008) 2 SCC 383, it was held re-investigation without prior permission is necessarily forbidden, whereas further investigation is not.

27. The crux of these judgments is it is not mandatory to take prior permission from the Magistrate for *further* investigation even after the filing of the charge sheet as it is the statutory right of the police. The material collected in further investigation cannot be rejected merely because it has been filed at the stage of trial.

28. Undoubtedly, the right to investigate includes the right to *further* investigate. Section 156 Cr.P.C. exists prior to the induction of Sub-Section 8 of Section 173 Cr.P.C. The Section 173(8) Cr.P.C. gives an unfettered right to Investigating Agency with no conditions and cannot be restricted in time since such restrictions does not exist in Statute. The Statute does not limit the right to investigate under Section 173(8) Cr.P.C. only till the trial begun.

29. Though, the argument of the learned senior counsel for petitioner is *Vinubhai* (supra) is a clear authoritative pronouncement of law and was followed in *Tofan Singh* (supra) but admittedly *Vinubhai* (supra) also notes two exceptions i.e. *defective investigation* or *fresh material* which may warrant *further* investigation.

30. Now, admittedly, the petitioner has already been chargesheeted and a supplementary chargesheet has been filed against him and the investigation is now left only *qua* two accused person who are not available and are residing in USA. Though the supplementary chargesheet says certain letters were written to US Authorities but during arguments it appears the investigating agency itself is doubting the possibility of getting answers to its queries made to foreign authorities, hence it would not be appropriate to stall the trial only on this ground. Even otherwise, the framing of charge only require a *grave suspension* and a prima facie case against the accused *to proceed with*. It is the case of the prosecution they have got sufficient evidence to proceed with against the petitioner. Presently, the respondent submit there is no *fresh* evidence and they are only making efforts. There is nothing in the Code to stop them. No prejudice shall be caused to the petitioner if the respondent is seeking queries from its counter parts in foreign jurisdiction as, even otherwise, those investigations are presently targeted against two co-accused person. Such information may or may not come and on mere possibilities the trail cannot be stalled. Even otherwise, the stay of the trial shall be against the binding decisions of the Hon'ble Supreme Court; moreso when the loss to the tune of Rs.400 to Rs.500 Crores is alleged to have incurred to ISRO by actions of petitioner and his co-accused person. It being a serious economic offence, CBI is rather handicapped since most of the evidence lies in foreign countries.

31. Thus, per law discussed above, though there is no bar for the investigating agency to *further* investigate the matter, but it would only be when some fresh evidence would come to its fore. Such fresh evidence would not come if the agency

is sitting idle. For it the respondent shall have to make efforts, like in present case it has written letters to its foreign counterparts. Such evidence may come or not, one cannot predict at this moment, hence in case any fresh evidence is found which may be used against the petitioner it would certainly then be incumbent upon the respondent to inform the learned Special Judge and to seek its permission to *further* investigate the matter against petitioner. Such right admittedly can be exercised by it even after trial begins. Thus while the observations of the learned Trial Court *qua* applicability of principle of *obiter*, is set aside but the trial must proceed and in the event any *fresh/new* material is found by the prosecution against the petitioner, it shall bring it to the notice of the Court to seek permission to *further* investigate, if necessary. The learned Trial Court would then decide the matter in accordance with law. However, presently since no fresh evidence is forthcoming and the respondent being only seeking queries, *which may or may not come*, and such queries being predominantly *qua* co-accused person, the petitioner cannot be allowed to stall the proceedings.

32. In view of above observation, the petition stands disposed of. Pending application, if any, also stands disposed of. No order as to costs.

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