

CRIMINAL REVISION

C.R. R. No. 1697 of 2010

Present :

The Hon'ble Mr. Justice **Prasenjit Mandal**

Judgment on 08.09.2010

Debabrata Ray Choudhuri.

Versus

State of West Bengal & anr.

Points:

Recalling of order: After surrender of accused person whether the Magistrate can recall his order of impounding if the learned A.P.P. did not raise any objection- Code of Criminal Procedure, 1973-S 362

Facts:

The de-facto complaint filed a petition under Section 406/408/120B/34 of the Indian Penal Code for sending the same to the Jadavpur P.S. for investigation. The learned Court issued warrant of arrest against the accused/opposite party no.2. But, since the opposite party no.2 is working abroad, the Magistrate, passed an order for impounding his passport to secure his attendance. In the meantime, the opposite party no.2 filed an application for anticipatory bail before the Hon'ble High Court and then the Hon'ble High Court granted anticipatory bail subject to the condition laid down in Section 438(2),(i),(ii) and (iii) of the Code of Criminal Procedure and that order remained valid for a period of four weeks. At the time of granting bail, the opposite party no.2 was permitted to leave India subject to the condition that he should attend this Court regularly on all subsequent dates of this case as well as when his presence was needed by the

investigating officer for the purpose of smooth progress of the investigating work. The order of impounding the passport was recalled by the impugned order. Being aggrieved by such orders, this application has been preferred by the de-facto complainant.

Held:

Anticipatory bail was granted by the Hon'ble High Court for a period of four weeks from the date of passing the order. So, after lapse of such period, the order does not remain in force and the order passed by the learned Magistrate confirming the bail remains valid and in disposing of the application by the impugned order, the magistrate is within his competence in permitting the accused/opposite party no.2 not to attend Court till investigation is completed in view of the decision reported in the case of Free Legal Aid Committee, Jamshedpur (supra). Para 12

Similarly, as regards recall of the order relating to impounding, actually the learned Magistrate did not pass any order for impounding the passport of the opposite party no.2. Impounding of passport is to be done as per Section 10 of the Passport Act, 1967. The magistrate gave the liberty to the I.O. to move the appropriate authority for impounding the passport of the opposite party no.2. Such orders were passed initially by the concerned magistrate to secure attendance of the accused person. Whenever the accused person surrendered before the learned Magistrate, then the magistrate was at liberty to consider his order and when the learned A.P.P. did not raise any objection, the concerned magistrate was within his right to recall the order of impounding of the passport and such order of recall does not come within the provisions of Section 362 of the Cr.P.C. Para 13

Cases cited:

Hari Singh Mann Vs. Harbhajan Singh Bajwa and ors., (2001) 1 SCC 169; Dharmeshbahai Vasudevhai and ors. vs. State of Gujarat and ors., (2009) 3 SCC (Cri) 76; Brij Nandan Jaiswal Vs. Munna Jaiswal and anr., (2009) 1 SCC (cri) 594; Lalita Kumari Vs. Govt. of Uttar Pradesh and ors., (2008) 3 SCC (Cri) 17; Nemai Chand Bose Vs. Modi Cement Ltd. & ors., 2002 (1) Crimes 369; H. R. Shetty and ors. Vs. Titas Farnandes, 2003 Cri.L.J. 1383 and Free Legal Aid Committee, Jamshedpur Vs. State of Bihar reported in AIR 1982 SC 1463.

For the petitioner: Mr. Debabrata Roychowdhury,
Mr. Jayanta Dutta.

For the Opposite parties: Mr. Sudipto Moitra,
Mr. S. K. Banerjee,
Mr. Ratan Pathak,
Mr. Ashok Das.

Prasenjit Mandal, J.: This application is at the instance of the de-facto complainant and is directed against the order dated March 15, 2010 passed by the learned Additional Chief Judicial Magistrate, Alipore in B.G.R. Case No.5842 of 2008 arising out of Jadavpur P.S. Case No.791(12) of 2008.

2. The short fact of the case is that the de-facto complainant filed a petition under Section 406/408/120B/34 of the Indian Penal Code before the learned Additional Chief Judicial Magistrate, Alipore for sending the same to the Jadavpur P.S. for investigation. On the basis of the order of the learned Additional Chief Judicial Magistrate, Alipore, the Jadavpur P.S. started the said case and investigation was going on. The learned Court issued warrant

of arrest against the accused/opposite party no.2 herein. But, since the opposite party no.2 is working abroad, the learned Additional Chief Judicial Magistrate, Alipore passed an order for impounding his passport to secure his attendance. In the meantime, the opposite party no.2 filed an application for anticipatory bail before the Hon'ble High Court and then the Hon'ble High Court granted anticipatory bail subject to the condition laid down in Section 438(2),(i),(ii) and (iii) of the Code of Criminal Procedure. Thereafter, the opposite party no.3 appeared before the learned Additional Chief Judicial Magistrate, Alipore and prayed for bail which was granted by the learned Additional Chief Judicial Magistrate, Alipore. At the time of granting bail, the opposite party no.2 was permitted to leave India subject to the condition that he should attend this Court regularly on all subsequent dates of this case as well as when his presence was needed by the investigating officer for the purpose of smooth progress of the investigating work. The order of impounding the passport was recalled by the impugned order. Being aggrieved by such orders, this application has been preferred by the de-facto complainant.

3. Mr. Roychowdhury submits that a magistrate cannot recall his order and any order passed by the magistrate shall remain in force unless and until it is set aside or modified by the higher forum, such as, the District Judge, the High Court or the Apex Court. In the instant case, initially, the learned Additional Chief Judicial Magistrate, Alipore passed the order directing the I.O. to impound the passport by the order dated September 9, 2009. It has not been set aside by any higher forum, but, by the impugned order, the learned Additional Chief Judicial Magistrate, Alipore has recalled that order. He also contends that a magistrate cannot also recall and modify either of his own order or any order passed by the higher forum. In the instant case, the

learned Magistrate has set aside the order of the Hon'ble High Court by permitting the opposite party no.2 to leave India which was prohibited by the Hon'ble High Court at the time of grant of the anticipatory bail. Therefore, the order impugned cannot be supported. It must be set aside.

4. On the other hand, Mr. Moitra, learned Advocate appearing on behalf of the opposite party no.2, submits that the learned Additional Chief Judicial Magistrate, Alipore is within his right in passing the impugned order. He contends that at the time of investigation, the concerned magistrate can permit the accused not to attend Court on the date fixed for report of the investigation. The opposite party no.2 is a service holder at Ireland and from the early part of his service career, he has been working abroad. Previously he was at Johannesburg at the time of marriage. So, he is a service holder. If he is unable to attend his office for the reasons of this case, he would lose his service. In consideration of such position, the Court recalled the order of impounding the passport of the opposite party no.2 and also permitted him to leave India. So, there is no illegality or irregularity in passing the order impugned.

5. Thus, the point for decision that arises is whether the impugned order can be sustained.

6. Upon hearing the learned Advocate for both the sides and on perusal of the materials on record, I find that previously by the order dated September 9, 2009 the learned Additional Chief Judicial Magistrate, Alipore issued warrant of arrest against the accused/opposite party no.2 herein. At the same time, the concerned magistrate gave liberty to the I.O. to approach the appropriate authority for impounding his passport. Such measures were taken by the learned magistrate to ensure attendance of the opposite party no.2 in the said B.G.R. Case No.5842 of 2008 under Section

406/408/120B/34 of the I.P.C. Subsequently, the accused /opposite party no.2 was granted anticipatory bail by the Hon'ble High Court, Calcutta subject to the conditions as laid down under Section 438 (2), (i), (ii) and (iii) of the Code of Criminal Procedure meaning thereby in short that the accused / opposite party no.2 shall not leave India as one of the conditions for grant of anticipatory bail. Such an order of anticipatory bail was granted by the Hon'ble High Court, Calcutta on October 9, 2010 and that order remained valid for a period of four weeks meaning thereby that after lapse of the said period, the condition of 'not to leave', as passed by the Hon'ble Court, shall not remain in force unless such type of condition is incorporated by the order of the learned magistrate at the time of granting the regular bail. Subsequently, the opposite party no.2 surrendered before the learned Additional Chief Judicial Magistrate, Alipore and the warrant of arrest issued against him was recalled and the interim bail, as granted against him, was confirmed.

7. Mr. Roychowdhury has referred to the following decisions:-

1. Hari Singh Mann Vs. Harbhajan Singh Bajwa and ors. reported in (2001) 1 SCC 169. By referring this decision he submits that the magistrate had no jurisdiction to alter or review its own judgment or order except to the extent of correction of any clerical or arithmetical error. Relevant paragraph is no.8.
2. Dharmeshbahai Vasudevhai and ors. vs. State of Gujarat and ors. reported in (2009) 3 SCC (Cri) 76 By referring this decision Mr. Roychowdhury submits that the concerned magistrate has no jurisdiction to recall the said order.
3. Brij Nandan Jaiswal Vs. Munna Jaiswal and anr. reported in (2009) 1 SCC (cri) 594. Mr. Roychowdhury submits that the complainant can always

question the order of granting bail if the said order is not validly passed and

4. Lalita Kumari Vs. Govt. of Uttar Pradesh and ors. reported in (2008) 3 SCC (Cri) 17. Thus, he submits that inaction of police to record FIRs and in cases FIRs recorded on court directions, apathy to investigate the case, such an incidence is to be brought to the notice of the Court. In order to curb this malady, the Court may give necessary directions. Thus, he submits that in the instant case investigation is not being properly made. Police did not recover all the articles claimed and the case is still pending at the stage of investigation though it was lodged in 2008.

8. On the other hand, Mr. Moitra, learned Advocate appearing on behalf of the opposite party no.2, has referred to the following decisions:-

1. Nemai Chand Bose Vs. Modi Cement Ltd. & ors. Reported in 2002 (1) Crimes 369. He submits that the Court cannot recall any order which has been finally passed. Embargo under Section 362 of the Cr.P.C. does not operate against an interlocutory order and the magistrate can pass a different order at a later stage.

2. H. R. Shetty and ors. Vs. Titas Farnandes reported in 2003 Cri.L.J. 1383. (Karnataka High Court) By referring this decision he has submitted that Court can recall of an earlier order which is not a judgment and for that reason the provision of Section 362 of the Cr.P.C. is not attracted.

3. Free Legal Aid Committee, Jamshedpur Vs. State of Bihar reported in AIR 1982 SC 1463.

9. Thus, he has referred to the ratio of the decision that the accused released on bail need not be required to appear before the Court until chargesheet is filed and process is issued by the Court. Thus, from the above facts and circumstances and the decisions referred to I find that the decision of Hari Singh Mann (supra) relates to alter or review the judgment or order

passed by a Court and thus, the Hon'ble Apex Court observed that save and except correction of clerical or arithmetical error a judgment or final order passed cannot be altered or reviewed as per Section 362 of the Cr.P.C. This is not the exact situation in the instant case. Therefore, I am of the view that this decision is not relevant in the instant case.

10. In the case of Dharmeshbahai Vasudevhai (supra) the Apex Court held that whenever the magistrate passed an order for investigation of a case under Section 156(3) he has no authority to recall the order for investigation or withdrawal of the investigation. This is not the situation in the instant case and so this decision will not be applicable.

11. As regards the case of Brij Nandan Jaiswal (supra) the Apex Court observed that the complainant can make a submission at the time of passing orders on the bail condition but such submission must be forwarded through the learned A.P.P. who was conducting the case. The de-facto complainant got the opportunity of hearing the application for bail but at the time of passing the impugned order it appears that the misc. case filed by the de-facto complainant before the District Judge against the order of the learned Magistrate was not pending and so the concerned magistrate could well pass the impugned order. Moreover, at that time, the learned A.P.P. did not raise any objection in allowing the application filed by the accused person. So, the concerned magistrate was appropriate to deal with the application when no objection is raised on behalf of the learned Assistant Public Prosecutor.

12. As stated earlier, the anticipatory bail was granted by the Hon'ble High Court for a period of four weeks from the date of passing the order. So, after lapse of such period, the order does not remain in force and the order passed by the learned Magistrate confirming the bail remains valid and in disposing of the application by the impugned order, the magistrate is within

his competence in permitting the accused/opposite party no.2 not to attend Court till investigation is completed in view of the decision reported in the case of Free Legal Aid Committee, Jamshedpur (supra).

13. So, I am of the view that there is no illegality in permitting the accused/opposite party no.2 to leave India particularly when he is a service holder abroad. Similarly, as regards recall of the order relating to impounding, I find that actually the learned Magistrate did not pass any order for impounding the passport of the opposite party no.2. Impounding of passport is to be done as per Section 10 of the Passport Act, 1967. The magistrate gave the liberty to the I.O. to move the appropriate authority for impounding the passport of the opposite party no.2. Such orders were passed initially by the concerned magistrate to secure attendance of the accused person. Whenever the accused person surrendered before the learned Magistrate, then the magistrate was at liberty to consider his order and when the learned A.P.P. did not raise any objection, I am of the view that the concerned magistrate was within his right to recall the order of impounding of the passport and such order of recall does not come within the provisions of Section 362 of the Cr.P.C. and the decisions referred to by Mr. Roychowdhury are not applicable in the instant situation.

14. As per materials on record, police seized some of the ornaments from the house of the opposite party no.2, situated under the P.S. Jadavpur. Police also submitted chargesheet on August 18, 2010 under Section 406/408/120B/34 of the I.P.C.

15. In view of the above discussions, I am of the view that there is no illegality or impropriety in the order impugned. The learned Magistrate has not exceeded his jurisdiction in passing the impugned order. Therefore, there

is nothing to interfere with the impugned order. Accordingly, this application is dismissed.

16. Considering the circumstances, there will be no order as to costs.

17. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

(Prasenjit Mandal, J.)