M.C. Abraham And Another, A.K. Dhote, ... vs State Of Maharashtra And Others on 20 December, 2002

Equivalent citations: AIRONLINE 2002 SC 789

Author: B.P. Singh

Bench: N. Santosh Hegde, B.P. Singh

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           CASE NO.:
Appeal (crl.)  1346-1347 of 2002
Appeal (crl.)  1348-1349 of 2002
Appeal (crl.)  1350-1351 of 2002
Appeal (crl.)  1352 of 2002
Special Leave Petition (crl.)  231-232 of 2002
Special Leave Petition (crl.)  301-302 of 2002
Special Leave Petition (crl.)  310-311 of 2002
Special Leave Petition (crl.)  868 of 2002

PETITIONER:
M.C. Abraham and another, A.K. Dhote, J.F. Salve and another

RESPONDENT:
State of Maharashtra and others

DATE OF JUDGMENT: 20/12/2002

BENCH:
N. SANTOSH HEGDE & B.P. SINGH.

JUDGMENT:
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J U D G M E N T B.P. SINGH, J.

Special leave granted in all matters.

These appeals arise out of three orders passed by the High Court of Bombay, Nagpur Bench, Nagpur in Writ Petition (Crl.) No. 380/2001, a writ petition filed in public interest, dated 10th, 11th and 16th January, 2002. The aforesaid writ petition has been filed by the Maharashtra Antibiotics & Pharmaceuticals Employees Association and others in which a grievance has been made that though the Provident Fund Commissioner has lodged a complaint against several Directors of the Maharashtra Antibiotics & Pharmaceuticals Ltd. (hereinafter referred to as 'MAPL'), the investigation has made no progress on account of the fact that the Directors are government servants and enjoy considerable influence. In the aforesaid writ petition the impugned orders have been passed on different dates which are the subject matter of challenge before this Court. Criminal Appeals arising out of S.L.P. (Crl.) Nos.301-302 of 2002; Criminal Appeals arising out of S.L.P.

(Crl.) Nos.310-311 of 2002 and Criminal Appeals arising S.L.P. (Crl.) Nos.231-232 of 2002 are directed against the orders of the Court dated 10th January, 2002 and 11th January, 2002. Shri A.K. Dhote, appellant in Criminal Appeals arising out of S.L.P. (Crl.) Nos.301-302 of 2002 is the Managing Director of MAPL. The appellants in Criminal Appeals arising out of S.L.P. (Crl.) Nos.310-311 of 2002, Shri J.F. Salve and Sh. Vijay Khardekar are the Directors on the Board of MAPL nominated by the State Industrial and Investment Corporation of Maharashtra Ltd. (hereinafter referred to as the SICOM). Similarly the appellants in Criminal Appeals arising out of S.L.P. (Crl.) Nos.231-232 of 2002, Sh. M.C Ambraham and Sh. J.K. Dattagupta are part time Directors of MAPL having been appointed as part time Directors on the Board of Management by the President of India.

Criminal Appeal arising out of SLP (Crl.) No.868 of 2002 is directed against the order of the High Court dated 16th January, 2002 and the appellants therein are Shri J.F. Salve and Sh. Vijay Khardekar, who are nominees of SICOM on the Board of MAPL.

MAPL is a joint venture of the Government of India and the State of Maharashtra and it is not in dispute that it has been declared to be a sick industry by the Board for Industrial and Financial Reconstruction (hereinafter referred to as the BIFR) on 14th January, 1997. It appears that a complaint has been lodged by the Provident Fund Commissioner against the Directors of MAPL alleging offences under sections 406 and 409/34 IPC.

It appears that some of the accused persons had moved the High Court for grant of anticipatory bail under section 438 of the Code of Criminal Procedure being Criminal Application Nos. 940, 975 and 976 of 2001. Those petitions were rejected by the High Court by its order dated 7th September, 2001. The orders rejecting those petitions have not been appealed against.

On 10th January, 2002 the High Court passed the first impugned order observing that it was shocking that the writ petitioners had to approach the High Court seeking directions against the State to act on the complaint lodged by the Provident Commissioner against the Directors of MAPL. Despite the fact that their applications for grant of anticipatory bail had been rejected by the High Court, by a reasoned order, they had not been arrested. The High Court, therefore, felt that in the circumstances, the only course open to the respondent-State was to cause their arrest and prosecute them. The High Court thereafter passed the following order :-

> "We therefore, direct the respondent-State to cause arrest of those accused and produce them before the Court on or before 14.1.2002. On their failure to do so we will be constrained to summon the Commissioner of Police, Nagpur, Pune and Mumbai to appear before this Court in person and explain that as to why they are not able to cause arrest of these persons.
>
> Merely because accused are government servants/officials they do not enjoy any immunity from arrest if they have committed an offence. It is expected of the State to be diligent in prosecuting such offenders without discrimination.

> The order be communicated to the Principal Secretary, Home Department, Government of Maharashtra and also to the Commissioner of Police of three cities who will be solely responsible for failure to comply with the orders of this Court. Learned A.P.P. is directed to communicate the orders by Fax, Wireless message in addition to other mode of service and even inform them on telephone S.O. 16.1.2002. Authenticated copy be furnished to A.P.P.".

This is the first order challenged by the appellants before us.

It appears that on the next date i.e. 11th January, 2002 an application filed on behalf of respondents 1 & 2 in the writ petition for modification of the order dated 10th January, 2002 came up for hearing before the Court in which certain additional facts were sought to be brought to the notice of the Court, namely - that the complainant himself had written to the investigating officer by his letter dated 1st August, 2001 that Shri M.C. Abraham, Chairman of MAPL and part time Director Shri J.K. Dattagupta were appointed by the Government of India and as such they were not concerned with day to day working of the establishment and therefore the complaint should be restricted to other accused persons excluding these two. The High Court was surprised as to how such a letter could be issued to the investigating officer, because the question as to whether they were concerned with day to day affairs of the company was a matter which had to be considered by the Court taking cognizance of the offence. Some other submissions were also urged on the basis of Section 41-A of the State Financial Corporation Act but the same were also rejected. Lastly, it was urged before the High Court that the investigating officer had taken an opinion from the Assistant Director and Public Prosecutor, Nagpur who was of the view that the matter deserved to be treated as 'C' summary as no funds have been found to be misappropriated. The High Court observed that this could not be the reason for not proceeding further in the matter particularly in view of the observations made by the Court in the order dated 7th September, 2001 rejecting the applications for grant of anticipatory bail. The application for modification was accordingly dismissed.

The third order was passed on 16th January, 2002. It appears that the order directing arrest of the appellants herein was appealed against before this Court and this Court by order dated 14th January, 2002 passed an interim order staying the directions of the High Court to arrest the appellants. The High Court noticed the order passed by this Court. It directed the respondent/State to take necessary steps in the matter subject to interim order passed by the Supreme Court. In this connection it was observed :-

> "Our anxiety is to see that the State expeditiously conclude the investigation in the case and file Chargesheet. We may again remind the State of the order passed by this Court while rejecting the pre-arrest bail application on 7.9.2001 and should not show any laxity in the investigation".

Counsel for the appellants submitted before us that the orders dated 10th January, 2002 and 11th January, 2002 result in unjustified interference with the investigation of the case, and having regard to the well defined para-meters of judicial interference in such matters, the directions made by the High Court deserve to be quashed. He submitted that the High Court in exercise of its writ

jurisdiction, cannot direct the investigating officer or the State to arrest the accused in a case which is still at the stage of investigation, nor can it direct the investigating agency to submit a report before the Magistrate as directed by the High Court. We find considerable force in the submission urged on behalf of the appellants. The observations of the Supreme Court in State of Bihar and another Vs. J.A.C. Saldanha and others : (1980) 1 SCC 554 in this regard deserve notice. In that case, on the basis of the first information report, the case was investigated and a final report was submitted exonerating the accused. The matter had engaged the attention of the Government and even while the matter was under consideration of the Government, the final report was submitted. The investigating officer who had taken over from the earlier investigating officer moved the Court with a prayer that the final report already filed, may not be acted upon and that the report of the police, after completion of further investigation, which had been directed by the government in the case, be awaited. The Chief Judicial magistrate passed an order whereby he decided to await the report of further investigation. This order was challenged before the High Court and a Full Bench of the High Court allowed the writ petition and gave various directions to the learned Additional Chief Judicial Magistrate how to dispose of the case. It further held that the Additional Chief Judicial Magistrate was in error in postponing the consideration of the final report already submitted.

The contention before this Court was that the High Court was in error in exercising jurisdiction under Article 226 of the Constitution at the stage when the Additional Chief Judicial Magistrate who had jurisdiction to entertain and try the case, had not passed upon the issues before him, by taking upon itself the appreciation of evidence involving facts about which there was an acrimonious dispute between the parties and giving a clean bill to the suspects against whom the first information report was filed. In this connection this court relied upon the observations of the Privy Council in King Emperor Vs. Khwaja Nazir Ahmad : 1944 LR 71 IA 203, which reads thus:-

> "In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it, and not until then".

Reference was also made to the observations of this Court in S.M. Sharma Vs. Bipen Kumar Tiwari : (1970) 3 SCR 946, wherein this Court observed:

> "It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a

> remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal power".

This Court held in the case of J.A.C. Saldanha (supra) that there is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved by the executive through the police department, the superintendence over which vests in the State Government. It is the bounden duty of the executive to investigate, if an offence is alleged, and bring the offender to book. Once it investigates and finds an offence having been committed, it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take congnizance of the offence under section 190 of the Code of Criminal Procedure, its duty comes to an end. On a cognizance of the offence being taken by the Court, the police function of investigation comes to an end subject to the provision contained in Section 173(8), then commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime. In the circumstances, the judgment and order of the High Court was set aside by this Court.

Tested in the light of the principles aforesaid, the impugned orders dated 10th January, 2002 and 11th January, 2002 must be held to be orders passed by over-stepping the para-meters of judicial interference in such matters. In the first place, arrest of an accused is a part of the investigation and is within the discretion of the investigating officer. Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the Court has no role to play. Since the power is discretionary, a police officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection.

In the instant case the appellants had not been arrested. It appears that the result of the investigation showed that no amount had been defalcated. We are here not concerned with the correctness of the conclusion that the investigating officer may have reached. What is, however, significant is that the investigating officer did not consider it necessary, having regard to all the facts

and circumstances of the case, to arrest the accused. In such a case there was no justification for the High Court to direct the State to arrest the appellants against whom the first information report was lodged, as it amounted to unjustified interference in the investigation of the case. The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest. In the very nature of things, a person may move the Court on mere apprehension that he may be arrested. The Court may or may not grant anticipatory bail depending upon the facts and circumstances of the case and the material placed before the Court. There may, however, be cases where the application for grant of anticipatory bail may be rejected and ultimately, after investigation, the said person may not be put up for trial as no material is disclosed against him in the course of investigation. The High Court proceeded on the assumption that since petitions for anticipatory bail had been rejected, there was no option open for the State but to arrest those persons. This assumption, to our mind, is erroneous. A person whose petition for grant of anticipatory bail has been rejected may or may not be arrested by the investigating officer depending upon the facts and circumstances of the case, nature of the offence, the background of the accused, the facts disclosed in the course of investigation and other relevant considerations.

We have, therefore, no doubt that the order dated 10th January, 2002, in so far as it directs the arrest of the appellants, must be set aside. So far as the order dated 11th January, 2002 is concerned, it gives an impression that the High Court has held that it was not open to the investigating officer, in view of the order passed by the High Court dated 7th September, 2001 rejecting the anticipatory bail petitions of some of the appellants, to treat the case as 'C' summary as it has been found that no funds had been misappropriated. By the impugned order dated 16th January, 2002 the High Court has in fact shown its anxiety to see that the "State expeditiously conclude the investigation in the case and file charge-sheet". We are afraid, such a direction cannot be sustained in view of the settled principle of law on the subject. It is not necessary for us to multiply authorities but we may only refer to Abhinandan Jha and others Vs. Dinesh Mishra : AIR 1968 SC 117, where this Court observed thus:-

> "Then the question is, what is the position, when the Magistrate is dealing with a report submitted by the police, under Section 173, that no case is made out for sending up an accused for trial, which report, as we have already indicated, is called, in the area in question, as a 'final report'? Even in those cases, if the Magistrate agrees with the said report, he may accept the final report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case, in our opinion, the Magistrate will have ample jurisdiction to give directions to the police, under S. 156(3), to make a further investigation. That is, if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation, under Section 156(3). The police, after such further investigation, may submit a charge-sheet, or, again submit a final report, depending upon the further investigation made by them. If ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute

> an offence, he can take cognizance of the offence, under section 190(1) (b), notwithstanding the contrary opinion of the police, expressed in the final report.The functions of the Magistracy and the police, are entirely different, and though, in the circumstances mentioned earlier, the Magistrate may or may not accept the report, and take suitable action, according to law, he cannot certainly infringe (sic impinge?) upon the jurisdiction of the police, by compelling them to change their opinion, so as to accord with his view.
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> Therefore, to conclude, there is no power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge-sheet, when they have sent a report under section 169 of the Code, that there is no case made out for sending up an accused for trial".

The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to dis-agree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation.

In the instant case the investigation is in progress. It is not necessary for us to comment on the tentative view of the investigating agency. It is the statutory duty of the investigating agency to fully investigate the matter and then submit a report to the concerned Magistrate. The Magistrate will thereafter proceed to pass appropriate order in accordance with law. It was not appropriate for the High Court in these circumstances to issue a direction that the case should not only be investigated, but a charge sheet must be submitted. In our view the High Court exceeded its jurisdiction in making this direction which deserves to be set aside. While it is open to the High Court, in appropriate cases, to give directions for prompt investigation etc., the High Court cannot direct the investigating agency to submit a report that is in accord with its views as that would amount to unwarranted interference with the investigation of the case by inhibiting the exercise of statutory power by the investigating agency.

In these circumstances, therefore, we set aside the direction contained in the order of the High Court dated 10th January, 2002 directing the arrest of the appellants. We also set aside the direction made by the High Court directing the investigating agency to submit a charge-sheet. However, the investigating agency must promptly take all necessary steps, conclude the investigation and submit its report to the concerned Magistrate. It is open to the investigating agency to submit such report as it considers appropriate, having regard to the facts and circumstances of the case and result of the investigation. After such a final report is submitted by the investigating agency, the concerned Magistrate will proceed to deal with the matter further in accordance with law without being

influenced by any observation made by the High Court in the impugned orders.

The appeals are allowed in the above terms.