IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.07.2015

DELIVERED ON : 7.09.2015

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

Crl.O.P.No.12748 of 2015
M.P.No.1 of 2015

The Superintendent of Police
Tiruvannamalai District
Tiruvannamalai. .. Petitioner

Vs

The Judicial Magistrate Court
Cheyyar
Tiruvannamalai District. .. Respondent

Prayer:- Criminal Original Petition filed under Section 482 Cr.P.C. to call for the records relating to STC No.221/2015 on the file of the Judicial Magistrate Court, Cheyyar, Tiruvannamalai District, Tiruvannamalai for offences under Sections 174, 175 and 176 IPC r/w 345, 349 and 350 Cr.P.C.

For Petitioner — Mr.S.Shanmugavelayutham
Public Prosecutor

Amicus Curiae — Mr.John Sathiyan

O R D E R

This petition has been filed by the Superintendent of Police, Tiruvannamalai District to quash the prosecution launched by the learned Judicial Magistrate, Cheyyar in STC No.221 of 2014 for offences under Sections 174, 175 and 176 IPC r/w 345, 349 and 350 Cr.P.C.

2. At the request of this Court, Mr.John Sathyan, learned Advocate acted as *amicus curiae* and assisted.

3. What are the avenues that are open to a Magistrate to lawfully rein in a recalcitrant and reticent police?, is the issue that falls for consideration in this case. The reaction of the learned Judicial Magistrate, Cheyyar who was pushed to the wall can be explained in no better terms than by extracting verbatim the complaint he drafted against the Superintendent of Police, which is as follows:

> "Complaint under section 190(1)(c) R/w 200(a)
>
> 1. The case in PRC 3/95 is pending for the past 20 years. NBW against the accused Tailor Vasu has not been executed for 20 years. This court is struggling for the last 20 years to commit this case to the Sessions Court. Neither the SHO, Cheyyar Police Station nor the Superintendent of Police, Tiruvannamalai has co-operated with this court to commit this case to Sessions Court for the past 20 years in spite of repeated communications. This Court is bound to commit this PRC case within six weeks under Rule 87(ii) of Crl.Rules of Practice. Since this case could not have been committed to Sessions Court within such period, finally on 05.02.15, this Court directed the Superintendent of Police, Tiruvannamalai to submit a report as to the action taken on the communication sent by this Court dated 16.11.07, 14.07.08, 30.04.08, 09.09.10, 22.11.10, 21.03.11, 07.02.11, 19.01.11, 20.10.11, 11.04.12, 08.12.12, 25.01.13 and 08.10.14. The said communication in Dis.No.188/15 was sent through Hon'ble Chief Judicial Magistrate, Tiruvannamalai. Despite the above referred communication dated 05.02.15, the Superintendent of Police, Tiruvannamalai has not filed any report before this Court in spite of repeated adjournments on 02.03.15, 03.03.15,

23.03.15. The Superintendent of Police, Tiruvannamalai is legally bound to give information/report being a public servant with regard to the apprehension of an offender in the present long pending 20 years PRC case and by failing to furnish such information/report to this Court, Prima facie the Superintendent of Police, Tiruvannamalai has committed an offence punishable under Section 176 IPC.

2. In another ten years long pending case in PRC 7/03, the Superintendent of Police, Tiruvannamalai has addressed a letter dated 12.04.08 as if a proposal of withdrawal of prosecution is pending before the District Collector, Tiruvannamalai. This court sent a communication to Superintendent of Police, Tiruvannamalai to submit a report with respect to the decision taken on the proposal for withdrawal of that case on 2-02-15 in Dis.No.165/15. The said communication was sent through Hon'ble Chief Judicial Magistrate, Tiruvannamalai. Said communication did not yield any positive result. Therefore, by a detailed order dated 23.02.15, this Court issued summons to the Superintendent of Police, Tiruvannamalai under Section 91 Cr.P.C. to produce the records relating to their own communication dated 12.04.08, on or before 23.03.15. There was no representation till 5.45 p.m. on 23.03.15. Once again this Court issued fresh summons dated 1.4.15 to the Superintendent of Police, Tiruvannamalai to produce the above records by Registered Post with Acknowledgment Due.

3. Even after receipt of the summons as evidenced from postal acknowledgment card, the records as required by this Court, has not been produced before this Court by the Superintendent of Police, Tiruvannamalai on 18.04.15. Moreover, there is no representation for prosecution till 4.45 p.m. on 18.4.15. The Superintendent of Police, Tiruvannamalai is not above the law. The Superintendent of Police, Tiruvannamalai has failed to attend this Court in person or by an agent and omitted to produce the records in obedience of summons issued by this Court. Therefore, this Court prima facie satisfied that the Superintendent of Police, Tiruvannnamalai has committed the offences under Section

174, 175 and 176 IPC.

4. The Hon'ble High Court, by its letter dated 25.03.05 in ROC No.4855(A)/2014/B5/Statistics has specifically directed this Court to dispose of 10 years and 20 years old cases within 3 months. Considering the same, in order to put an end to such 10 years and 20 year long pending cases in PRC Nos.3/95 and 7/03, this Court deems it appropriate to treat this facts as a complaint in writing made under Section 195(1)(a) of Crl.P.C.

5. Intentional disobedience of summons issued under Section 91 Cr.P.C., by this court and wilful omission to produce documents and to give information by the Superintendent of Police, Tiruvannamalai about the apprehension of absconding accused in PRC 3/95 and 7/03 cant be terms as acts done in discharge of official duty by the public servant for the purpose of Section 197 Cr.P.C. Therefore, this complaint is taken on file under Section 190(1)(c) R/w 200(a) Crl.P.C. for the offences punishable under Section 174, 175 and 176 IPC R/w 345, 349 and 350 Crl.P.C. against the Superintendent of Police, Tiruvannamalai. Issue summons to accused.

Sd/-
Judicial Magistrate
Cheyyar."

4. The learned Magistrate recorded the sworn statement of G.Mariyamma, the Magisterial Clerk of the Court and took cognizance of the offence referred to in the complaint and issued process to the Superintendent of Police, Tiruvannamalai on 27.04.2015. Challenging the complaint, the Superintendent of Police, Tiruvannamalai has filed the present quash petition. At the time of granting stay, this Court directed the Superintendent of Police to first appear before the learned

Judicial Magistrate, Cheyyar and submit the documents that were called for by him and report to this Court. In obedience to the orders passed by this Court, Mrs.Ponni IPS, the present Superintendent of Police, Tiruvannamalai appeared before the learned Judicial Magistrate, Cheyyar on 15.07.2015 and 13.08.2015 and submitted the records sought for by him, though she was not in office when cognizance was taken and summons issued. She was transferred to Tiruvannamalai in the place of Ms.Mutharasi and she joined duty as the Superintendent of Police, Tiruvannamalai on 19.06.2015. The quash petition was filed by Ms.Mutharasi and the burden fell on Mrs.Ponni, IPS to carry Ms.Mutharasi's cross, which she valiantly did. Now, what falls for consideration is the very maintainability of the complaint.

5. From the narration of facts in the complaint, it is seen that PRC No.3 of 1995 has been pending on the file of the learned Judicial Magistrate, Cheyyar for about 20 years. Similarly, PRC No.7 of 2003 is also pending for quite some time. For the disposal of PRC No.7 of 2003, the learned Magistrate issued summons to the Superintendent of Police, Tiruvannamalai under Section 91 Cr.P.C. on 23.02.2015 requiring the Superintendent of Police to produce the records relating to the communication dated 12.04.2008. Admittedly, this summon was received by the Superintendent of Police, but the records were not produced on 23.03.2015 nor was any

communication sent by the Superintendent of Police to the learned Judicial Magistrate in this regard. Section 91 Cr.P.C. reads as under:

> "***91. Summons to produce document or other thing***
>
> *(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.*
>
> *(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same*
>
> *(3) Nothing in this section shall be deemed—*
>
> *(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or*
>
> *(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."*

6. The learned Magistrate needed the proceedings dated 12.04.2008 for the purpose of taking a decision in PRC No.7 of 2003, and therefore it was very much within his powers to have issued summons under Section 91 Cr.P.C. to the Superintendent of Police, Tiruvannamalai to produce the file relating to the communication dated 12.04.2008. Hence, the action of the Magistrate in issuing summons under Section 91 Cr.P.C cannot be faulted.

7. The next line of inquiry is, whether the penal provisions for which cognizance has been taken would apply to the facts of this case. For the sake of convenience, Sections 174, 175 and 176 of the IPC are extracted:

> ***"174. Non-attendance in obedience to an order from public servant***
>
> *Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same,*
>
> *intentionally omits to attend at that place of time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both,*
>
> *or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.*
>
> ***175. Omission to produce document or electronic record to public servant by person legally bound to produce it.***--
>
> *Whoever, being legally bound to produce or deliver up any document or electronic record to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;*
>
> *or, if the document or electronic record is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.*

176. Omission to give notice or information to public servant by person legally bound to give it.-

Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by .law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the notice or information required to be given is required by an order passed under sub-section (1) of section 565 of the Code of Criminal Procedure, 1898 (5 of 1898) with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

8. On the facts of this case, Section 174 IPC will not apply, because the learned Magistrate did not want the presence of the Superintendent of Police before him, but only wanted production of documents. Though Section 91(2) Cr.P.C. states that, if any person is required merely to produce documents, he shall be deemed to have complied with the requisition if he causes such documents to be produced instead of attending personally to produce the same, it is only an enabling provision which makes personal appearance of the person for production of the documents optional. Section 91 Cr.P.C. does not cast a duty on the person to personally produce the

document called for, and it would suffice if he were to send it through someone else. Therefore, in the opinion of this Court, Section 174 IPC will not stand attracted to the facts and circumstances of this case.

9. Section 175 IPC will stand attracted in the facts of this case. The illustration to Section 175 IPC would clinch the issue at hand.

"**Illustration**

A, being legally bound to produce a document before a District Court, intentionally omits to produce the same. A has committed the offence defined in this section."

10. Coming to Section 176 IPC, the reference to Section 565(1) of the Code of Criminal Procedure, 1898 in Section 176 IPC should be read as referring to Section 356(1) of the present Code. The question is, was the Superintendent of Police legally bound to furnish the information which is the subject matter of the case in PRC No.3 of 1995, to the learned Judicial Magistrate? The Investigating Officer who laid the Final Report in PRC Nos.3 of 1995 and 7 of 2003 is not the Superintendent of Police, but the Inspector of Police. Further, Section 176 IPC casts a duty upon the informant to give information to a public servant "in the manner and at the time required by law." So, there should be a law which should fix the manner and the time and only on failure of the person to give the said information in the

manner and at the time required by law, can he be prosecuted under Section 176 IPC. The second and third part of Section 176 IPC are disjunctive parts and they operate in their own fields. Part 2 of Section 176 IPC deals with notice or information relating to the commission of an offence or preventing the commission of an offence or apprehension of an offender. Though a Judicial Magistrate may be entitled to an information relating to the commission of an offence, but he will not be required to have the information for the purpose of preventing the commission of an offence or for the apprehension of an offender, because he cannot directly prevent the commission of an offence nor can he directly involve himself in the apprehension of the offender. He may, of course, be involved indirectly in the prevention of an offence or for the apprehension of an offender, but that hardly matters. Therefore, the provisions of Section 176 IPC will not stand attracted to the facts of the present case.

11. The Cr.P.C. provisions that have been relied upon by the learned Judicial Magistrate are Sections 345, 349 and 350, which are extracted here under:

> *"**345**. **Procedure in certain cases of contempt.***
>
> *(1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code (45 of 1860) is committed in the view or presence of any Civil, Criminal or Revenue Court, the court may cause the offender to be detained in custody and may at any time before the rising of the court on the same day, take*

cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to fine not exceeding two hundred rupees, and, in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) In every such case the court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(3) If the offence is under section 228 of the Indian Penal Code (45 of 1860), the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

349. Imprisonment or Committal of person refusing to answer or produce document.

If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such question as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not, after a reasonable opportunity has been given to him so to do, offer any reasonable excuse for such refusal such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime, such person consents to be examined and to answer, or to produce the document or thing and in the event of his persisting in his refusal, he may be dealt with according to the provisions of section 345 or section 346.

350. Summary procedure for punishment for non-attendance by a witness in obedience to summons.

(1) If any witness being summoned to appear before a Criminal Court is legally bound to appear at a certain place and time in obedience to the summons and without just excuse neglects or refuses to attend at that place or time or departs

from the place where he has to attend before the time at which it is lawful for him to depart, and the Court before which the witness is to appear is satisfied that it is expedient in the interests of justice that such a witness should be tried summarily, the Court may take cognizance of the offence and after giving the offender an opportunity of showing cause why he should not be punished under this section, sentence him to fine not exceeding one hundred rupees.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials."

12. Section 345 Cr.P.C. will apply only when offences under Sections 175, 178, 179, 180 and 220 IPC are committed *in facie curiae*, i.e., "in the view or presence" of the Court. Though this Court has held that the act complained of, will fall within the meaning of Section 175 IPC, yet Section 345 Cr.P.C. cannot be invoked, as it was not committed "in the view or presence" of the learned Judicial Magistrate, Cheyyar. Hence, Section 345 Cr.P.C cannot be invoked in this case.

13. Sections 349 Cr.P.C. has two limbs:

(a) if a witness refuses to answer questions put to him; and

(b) if a person who is called upon to produce a document or thing that is in his possession or power does not produce the same.

14. In this case, the Superintendent of Police did not produce the records that were called for, in obedience to the summons

issued under Section 91 Cr.P.C. by the learned Magistrate. But before proceeding under Section 349 Cr.P.C., it is imperative for the Court to give a reasonable opportunity for the person to produce the document. Despite such an opportunity, if the person does not offer any reasonable excuse for such refusal, the Court can proceed against him. Therefore, it is incumbent on the part of the Court to inform the person that action will be initiated under Section 349 Cr.P.C for not obeying the summons that was issued under Section 91 Cr.P.C.

15. In this case, the Magistrate has only sent reminders to the Superintendent of Police, but had not informed the Superintendent of Police that he would initiate action under Section 349 Cr.P.C for failure to obey the summons that was issued under Section 91 Cr.P.C. Had the Magistrate followed the provisions of Section 349 Cr.P.C., in letter and spirit, the Superintendent of Police would not have had any escape route.

16. Section 350 Cr.P.C. also will not apply to the facts of this case, because the Magistrate had not issued any summons for the attendance of the Superintendent of Police as a witness. The Magistrate had only issued summons under Section 91 Cr.P.C. to the Superintendent of Police for production of documents. For initiating action against a public servant under Sections 344, 345, 349 and 350 Cr.P.C., no sanction is required, because these provisions do not

create an offence, *per se,* and such powers have been conferred on the Court for taking summary action in order to uphold the majesty of the judicial process and for effective administration of justice. Action under Sections 344, 345, 349 and 350 Cr.P.C. can be taken only by the Court whose orders have been flouted or in whose presence the said offence has been committed, as the case may be.

17. The next question that falls for determination is, can the Magistrate take *suo motu* cognizance of an offence under Section 175 IPC on his own complaint? Section 195(a)(i) Cr.P.C. reads as follows:

> *"**195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence –***
>
> *(1) No Court shall take cognizance—*
> *(a) (i) of any offence punishable under sections 172 to 188 (both inclusive)of the Indian Penal Code (45 of 1860).*

18. Section 175 IPC falls within the net of Section 195(a)(i) Cr.P.C. Therefore, for an offence under Section 175 IPC, the public servant concerned or some other public servant to whom he is administratively subordinate, should alone lodge a complaint. Here, the learned Judicial Magistrate is a public servant himself. The complaint could, therefore, be lodged either by himself or through his Court Officer.

19. The seminal question is; Can the Judicial Magistrate, Cheyyar, act in a dual capacity, namely as Complainant/Public Servant and as a Judicial Officer to take cognizance of the offence ? It may be profitable to refer to Section 352 Cr.P.C., which reads as follows:

> ***"352. Certain Judges and Magistrates not to try certain offences when committed before themselves.***
>
> *Except as provided in sections 344, 345, 349 and 350, no Judge of a Criminal Court (other than a Judge of a High Court) or Magistrate shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such judge or magistrate in the course of a judicial proceeding."*

20. From a reading of Section 352 Cr.P.C. it is clear that, the learned Judicial Magistrate, Cheyyar has no power to try the Superintendent of Police for the offence under Section 175 IPC for disobeying and committing contempt of his authority, by not answering to the summons issued under Section 91 Cr.P.C. Section 352 Cr.P.C. only bars trial or committal and it does not speak about cognizance. Therefore, can it be said that the learned Judicial Magistrate, Cheyyar can take cognizance of the offence under Section 175 IPC on his own complaint and later make over the case to another Magistrate for trial? Taking of cognizance is not an idle formality, but a sacrosanct judicial act as reiterated by the Supreme Court in **Sunil Bharati Mittal v. CBI [2015 (1) Scale 140]**. Therefore, though

Section 352 Cr.P.C. does not speak about cognizance, yet applying the principle *nemo index in causa sua - No man shall be a Judge in his own cause,* which is a golden thread that runs through the judicial system, it will not be appropriate for the Magistrate to act in his capacity as a Public Servant and also take cognizance of the offence under Section 175 IPC. A similar view has been expressed by a learned single Judge of the Andhra Pradesh High Court in **S.Dashmantha Reddy and others v. State of Andhra Pradesh through Public Prosecutor [AIR 1996 Crl.LJ 1804]**. What the Cheyyar Magistrate should have done is, he should have drafted a complaint as a Public Servant for the offence under Section 175 IPC and should have forwarded it to the Chief Judicial Magistrate for taking cognizance and proceeding with the trial. Section 352 Cr.P.C. itself has provided certain exceptions where a Judicial Officer can act as the complainant and the Judge. Hence, in the opinion of this Court, the learned Magistrate erred on this aspect.

21. Coming to the question of sanction under Section 197 Cr.P.C. for the offence under Section 175 IPC, the Superintendent of Police is a person who can be removed only by the Government. Here, even according to the learned Magistrate, the offence is not committed by an individually named person, but by an Officer, namely the Superintendent of Police. In this case, the act of an individual is not in question, but the failure of the Officer to produce the document is

under enquiry. In the discharge of his official duties, the Superintendent of Police is required to submit the documents called for by the learned Judicial Magistrate. Thus, there is a nexus between the official duty and the act complained of. That apart, Section 175 IPC requires that a person should have intentionally omitted to produce the documents. Therefore, *mens rea* is essential. In the absence of naming the Superintendent of Police and alleging that he or she had intentionally omitted to produce the document, the prosecution under Section 175 IPC, without sanction under Section 197 Cr.P.C., against the office of Superintendent of Police is not maintainable. Let us take the facts of this case itself to appreciate this aspect. Ms.Mutharasi was the Superintendent of Police when the events under enquiry took place. But, before the actual hearing date, Mrs.Ponni, IPS joined duty. The complaint of the Magistrate had not named the accused, which is indeed essential in offences where *mens* rea is a specific precondition. If the trial had proceeded as it is, Mrs.Ponni, IPS could never have been convicted for the alleged sins of Ms.Mutharasi. Therefore, the complaint drafted by the learned Judicial Magistrate, Cheyyar cannot be legally sustained and has to be quashed.

22. This Court cannot leave it at that and be like an Advaitic Philosopher, who would say, "not this, not this, and not this", when questioned, what soul is ? It is imperative for this Court to

provide a solution to the nagging problem of Police Officers not obeying Court directions by not serving summons, executing warrants, producing documents, etc., that plague the Judicial system throughout the Country and consequently resulting in huge number of cases remaining static without any progress. This Court has a duty to provide guidance to the subordinate Courts to tackle the day to day issues that they confront in the administration of criminal justice. In ***Raghuvanth Dev Chand v. State of Maharashtra [(2012) 3 MLJ (Crl) 689 (SC)]***, the Supreme Court has directed all the Courts to maintain a Warrant Register for recording and keeping track of all warrants that are issued day in and day out. This judgment has been circulated to all the Courts, but still the dictum of the Supreme Court has not been assimilated and implemented by the trial Courts in the State.

23. Section 21 of the Tamil Nadu District Police Act, 1859 reads as under:

> *"**21. Duties of Police-officers.**-- Every Police-officer shall, for all purposes in this Act contained, be considered to be always on duty and shall have the powers of a Police-officer in every part of the General Police District. It shall be his duty to use his best endeavours and ability to prevent all crimes, offences and public nuisances; to preserve the peace; to apprehend disorderly and suspicious characters; to detect and bring offenders to justice; to collect and communicate intelligence affecting the public peace; and*

promptly to obey and execute all orders and warrants lawfully issued to him."

This is the source of power for the police to bring offenders to justice and it also casts a duty upon the police to primarily execute a lawful warrant.

24. Whenever a Court issues a warrant, it should make an entry in the Warrant Register and record the name of the Station House Officer to whom the warrant is directed to be executed. The warrant should bear a formal date for the police to report to the Court. On the specified date, the Court shall call for a report from the Police Officer about the steps that have been taken for executing the warrant. At this juncture, it may be relevant to quote Section 44 of the Tamil Nadu District Police Act, 1859:

*"**44. Penalties for neglect of duty, etc.**--*

Every Police-officer who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by competent authority or who shall cease to perform the duties of his office without leave, or without having given two months' notice as provided by this enactment, or engage without authority in any employment other than his Police duty, or who shall maliciously and without probable cause prefer any false, vexatious or frivolous charge or information against any individual, or who shall knowingly and wilfully and with evil intent exceed his powers, or shall be guilty of any wilful and culpable neglect of duty, in not bringing any person who shall be in his custody without a warrant before a Magistrate as provided by law, or who shall offer any unwarrantable

> *personal violence to any person in his custody, shall be liable, on conviction, before a Magistrate, to a penalty not exceeding three months' pay, or to imprisonment with or without hard labour not exceeding three months or both."*

25. A combined reading of Sections 21 and 44 of the Tamil Nadu District Police Act, 1859 would show that, a duty has been cast upon the police to execute warrants and if there has been a violation of the duty, the Police Officer can be convicted under Section 44 of the Act. For prosecuting a Police Officer for neglect of duty, no sanction is required. Sanction is required only for commission of an offence in discharge of a duty. The Police Act itself prescribes certain duties and provides punishment for neglect of the duty. It will be ludicrous on the part of the Police Officer to contend that, he committed neglect of duty while discharging his duty, for one is antithetical to the other. The question, whether sanction is necessary for prosecution under Section 44 of the Tamil Nadu District Police Act, 1859, is no longer *res integra*. In ***In Re S.A.A.Beyabani (AIR 1953 Madras 1002)***, a learned single Judge of this Court had considered this question and has held as follows:

> "4. The third contention is that there was no sanction given by the District Superintendent of Police to prosecute this person. So far as the Act is concerned, there is no provision of law under which sanction is necessary. He relies upon a G.O., according to which it is stated that it is the District Superintendent of Police that must sanction the prosecution against the Police Officer. It is not a

> provision in the Act. In the absence of any provision providing for sanction in the Act itself, I do not think that any sanction is necessary under the Act for prosecuting the accused. So long as the provisions of this Act do not require that sanction by the District Superintendent of Police is necessary, the prosecution does not become invalid without such sanction. That contention fails."

Beyabani's case went to the Supreme Court, but the conviction and sentence was reversed on facts and not on the ground of want of sanction. **See: Beyabani v. State of Madras [AIR 1954 SC 645].**

26. One other provision under the Tamil Nadu District Police Act, 1859 may be relevant in the present context:

> *"**53**. **Limitation of action.**-- All actions and prosecutions against any person which may be lawfully brought for anything done or intended to be done, under the provisions of this Act, or under the provisions of any other law for the time being in force conferring powers on the Police shall be commenced within three months after the act complained of shall have been committed and not otherwise;"*

27. From the above, it is apparent that a Judicial Officer has two courses open: (i) To proceed under Section 349 Cr.P.C., or (ii) Lay a prosecution under Section 44 read with Section 21 of the Tamil Nadu District Police Act, 1859. Under Section 349 Cr.P.C. an opportunity should be given to the Police Officer, and if he does not

offer any reasonable excuse, he can be sentenced to simple imprisonment for a period of seven days only. In my opinion, the ambiguity created by Section 349 of the Code, on the quantum of sentence, is on account of the omission of the punctuation "comma" after the expression "commit him to the custody of an officer of the Court". Had the punctuation "comma" been added after the expression "commit him to the custody of an officer of the Court", as found in Section 485 of the Code of Criminal Procedure, 1882, (*in pari materia* with Section 349 of the 1973 Code), there would have been no room for any ambiguity. Section 485 of the Cr.P.C., 1882 reads as follows:

> "***485.*** *If any witness before a Criminal Court refuses to answer such questions as are put to him, or to produce any document in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court, for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.*"
>
> *(Emphasis supplied)*

28. For punishing a person under Section 349 Cr.P.C., summary procedure should be adopted by giving a show cause notice, since it does not create a distinct offence warranting a regular trial. In fact, if the person sentenced to simple imprisonment comes forward to produce the document consequent upon his conviction, the sentence can be recalled. If he persists in his refusal, he can be proceeded with under section 345 or 346 Cr.P.C. Form No.39 in Schedule-II of the Code of Criminal Procedure prescribes a form, under which a person can be committed to custody under Section 349 Cr.P.C.

29. Coming to the applicability of Section 44 r/w Section 21 of the Tamil Nadu District Police Act, 1859, these provisions apply to throughout Tamilnadu, even in cities where the City Police Act is in vogue (See: ***In Re Baggiam, AIR 1953 Madras 507 & In Re B.N.Ramakrishna Naidu, AIR 1955 Madras 100***). There is a consensus of judicial opinion that for prosecuting a Police Officer under Section 44 of the Act, the limitation prescribed under Section 53 is applicable (See: ***Maulud Ahmad Vs. State of U.P., 1964 (2) Crl.L.J 71 & Pritam Singh v. State of Haryana, AIR 1973 SC 1354***, which arose under the *in pari materia* provisions of Indian Police Act, 1861). The contra view that Section 53 will not apply to a prosecution under Section 44 has been expressed by a learned single Judge of this Court in ***In re S.A.A.Beyabani (AIR 1953 Madras***

1002). But in view of the law laid down by the Supreme Court in **Maulud Ahmad v. State of U.P. (1964 (2) Crl.L.J.** 71) and ***Pritam Singh v. State of Haryana (AIR 1973 SC 1354)*** the contra view in ***S.A.A.Beyabani's case*** may not be good law now. Therefore, if action is proposed to be taken under Section 44 r/w Section 21 of the Tamilnadu District Police Act, it should be commenced within three months after the act complained of has been committed.

30. In cases involving failure to execute non-bailable warrant or summons, a reasonable opportunity should be given to the Police Officer to explain his position, and after determining that there is a *prima facie* case to show that there has been violation of duty, the Presiding Officer of the Court shall prepare a complaint within three months, and send it to the Chief Judicial Magistrate or Chief Metropolitan Magistrate, as the case may be, for taking cognizance of the offence under section 44 r/w 21 of the Tamil Nadu District Police Act. The offence under section 44 r/w 21 will fall within Entry-III in Classification-2 of Schedule-I of the Code of Criminal Procedure, viz., non-cognizable, bailable, triable by any Magistrate. The procedure for trial can either be under Chapter-XX Trial of Summons-Cases by Magistrate, or Chapter-XXI dealing with Summary Trials.

31. An interesting question arose before the Calcutta High Court as to whether the provisions of Section 29 of the Indian Police

Act, 1861, which is *in pari materia* with Section 44 of the Tamil Nadu District Police Act, 1859, creates an offence within the meaning of Section 8 of the Cr.P.C., 1872, which is similar to Section 4 of the Cr.P.C., 1973. Though Section 29 of the Indian Police Act, 1861 and Section 44 of the Tamilnadu District Police Act, 1859 use the word 'penalty', yet the delinquencies mentioned therein are offences, since the aforesaid sections use the expression 'conviction' as a precondition for imposition of penalty (See: ***The Queen Vs. Golam Arabee, Calcutta DB Judgment dated 16.2.1876, 1876 The Weekly Reporter (Criminal) 20***).

32. Before parting, this Court is constrained to place on record its appreciation to Mr.S.Annamalai, learned Judicial Magistrate, Cheyyar, for not simply ruing in despair at the recalcitrance of the Police, but for being intrepid and proactive, though in that process he had stirred the hornet's nest in the District by launching a prosecution against the District Superintendent of Police. It is reported that several good things also followed inasmuch as the District Police Administration took up all the old cases and started clearing the dust that had gathered on the stock pile. This Court also places on record its appreciation for Mr.John Sathyan, learned *Amicus Curiae*.

33. In the result, this petition is allowed and the proceedings in STC No.221 of 2015 on the file of the learned Judicial Magistrate Court, Cheyyar, Tiruvannamalai are quashed. Consequently, connected miscellaneous petition is closed.

Index : Yes/No. 7-09-2015

gms/vr

To

1. The Superintendent of Police, Tiruvannamalai District, Tiruvannamalai.

2. The Judicial Magistrate, Cheyyar, Tiruvannamalai District.

3. The Public Prosecutor, High Court, Madras.

P.N.PRAKASH, J.

gms/vr

Pre-delivery order in

Crl.O.P.No.12748 of 2015

7-09-2015