

(2018) 08 J&K CK 0087

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous Case No.255 Of 2010, Mp No.283 Of 2010

Krishan Kumar @APPELLANT@Hash Manmohan Choudhary

Date of Decision : 30-08-2018

Acts Referred:

Code of Criminal Procedure 1973, — Section 561A
Negotiable Instruments Act, 1881 — Section 118, 138, 139
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 420

Citation : (2018) 08 J&K CK 0087

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. The petitioner and his brother were owners and in possession of land measuring 07 Kanals 18 Marlas comprising Khasra No.468, 469, 470 min

situated at Bablaiana Tehsil and District Jammu.

2. The case of the petitioner is that respondent-Manmohan Choudhary who is dealing in sale and purchase of the land approached the petitioner for

purchase of the above said land, to which petitioner agreed and, accordingly, respondent on 30.09.2004 purchased the said land for a consideration of

Rs.13,82,500/- and paid Rs.1,00,000/- as advance money. It is stated that before getting the sale deeds registered, agreement to sell was executed on

4th November, 2004 and respondent paid the amount except an amount of Rs.2,86,000/- which was paid by way of bearer cheque dated 10.11.2004

drawn at J&K Bank Nai Basti. On 04.11.2004, respondent handed over a bearer cheque of Rs.2,86,000 as balance amount of sale consideration to

petitioner and asked the petitioner to execute sale deeds. Thereafter, petitioner under the impression that the said cheque will be cashed on its due

date i.e. 10.11.2004 agreed to execute the sale deeds. It is stated that petitioner

presented the aforesaid cheque to the J&K Bank on 20.11.2004, for encashment, but the cheque was returned with an endorsement "Payment stopped by the drawer". It is further stated that petitioner apprised the respondent about the encashment of the cheque, and the respondent told him that he could not arrange the cheque money on the due date, petitioner was asked to present the cheque again. Petitioner again presented the cheque for encashment, but the same was again returned unpaid. The petitioner served a notice on 29.03.2005 calling upon the respondent to make the payment of Rs.2,86,000/- within 15 days, however, payment was not made.

3. Learned counsel for the petitioner states that petitioner filed a complaint under Section 138 Negotiable Instruments Act against the respondent and trial Court took cognizance u/s 138 Negotiable Instruments Act, and issued process. It is stated that respondent also filed a petition under Section 561-A Cr.P.C. bearing No.48/2006 in this Hon'ble Court which came to be disposed of on 25.03.2008 and the matter was remanded back to learned Magistrate. The operative part of the said judgment reads as follows:-

"Accordingly and in given circumstances of the case the petition is allowed and the order of Learned Magistrate below taking cognizance of offences under Section 138 Negotiable Instrument Act against the petitioner accused on the above said complaint is overruled. The matter is remanded back to learned Magistrate for allowing respondent an opportunity to show prima facie commission of some other offence against the petitioner in given set of allegations, or at his option allow him liberty to institute a fresh complaint for that purpose, only where after he would consider proceeding ahead in the matter, which would come up between him on 22nd of April, 2008. The matter stands, accordingly, disposed of. Registry to follow up."

4. After remand of the case, the learned Sub-Judge, Railway Magistrate, Jammu vide order dated 22.05.2009, took the cognizance against the respondent under Section 420 R.P.C.

5. It is stated that thereafter, respondent challenged the above said order dated 22.05.2009, before 3rd Additional Sessions Judge, Jammu by filing a revision petition. The 3rd Additional Sessions Judge, Jammu vide order dated 04.10.2010 held that order taking cognizance under Section 420 RPC

is not passed in accordance with law and direction passed by the Hon'ble High Court and thus is not sustainable. Operative part of the order dated

04.10.2010, reads as under:-

“Hence, for the reasons given herein above, I am of the view that the impugned order is not passed in accordance with law and direction of the

Hon'ble High Court and thus is not sustainable. The revision is therefore allowed and consequently the order impugned is set aside with the

direction to the learned magistrate that he shall proceed further with the complaint in accordance with the direction of the Hon'ble High Court.

Parties are directed to cause their appearance before the learned Magistrate on 11.10.2010. Court below file along with copy of this order be sent back

and revision petition file be consigned to records after due compilation.”

6. Petitioner has now challenged the order dated 25.3.2008 passed by High Court in 561-A CRPC No.48/2006 as well as order dated 04.10.2010

passed by 3rd Additional Sessions Judge, Jammu.

7. Learned counsel for the petitioner states that learned Single Judge of this Court while passing the order dated 25.03.2008 has not afforded any

opportunity of being heard to the petitioner and the petition filed by the respondent was allowed on the ground that cheque was returned due to

prohibition of its encashment by respondent, which is not a reason acknowledged under Section 138 Negotiable Instruments Act. As per counsel for

petitioner, this Court has not applied correct law while allowing the petition. Had the Court heard petitioner, then correct law would have brought to

the knowledge of the Court that whatever the reason for dishonor of cheque that amounts to offence under section 138 of N. I. Act.

8. So main thrust of argument of counsel for petitioner is that, this Court while passing the order dated 25.03.2008 in petition u/s 561-A Cr.P.C. filed

by respondent did not hear counsel for petitioner and that order has been passed in clear violation of settled law; so there is error apparent on the face

of record.

9. I have considered the rival contentions. I have also gone through the law on the subject and facts of case.

10. Firstly petitioner has challenged the order dated passed by this court on 25.03.2008 in a petition filed u/s 561-A No.48/2006, by virtue of which,

Court quashed the process of taking cognizance under section 138 of N.I. Act on

the ground that stopping of the payment? does not amount to an offence; although this order may be wrong on the ground of nonapplication of correct law. But that cannot be considered error apparent on the face of record; that order cannot be quashed by virtue of filing a fresh petition under section 561A Cr.P.C., especially when the order has already been acted upon and the trial court in compliance to that order has passed a fresh order dated on 22.05.2009 and took cognizance under section 420 RPC; that order too has been set aside by 3rd Additional Sessions Judge, Jammu on 04.10.2010.

11. The ground taken by petitioner that he was not heard at the time of passing of the order dated 25.3.2008 by this court in a petition filed u/s 561-A

Cr.P.C. No. 48/2006, is not tenable, because High Court in a fresh petition under section 561-A Cr.P.C. cannot review and reverse its own

judgment passed earlier except error apparent on the face of record or some clerical or arithmetical mistake.

12. In 2008 (3) SCC (criminal) 600 in case titled State v. K. V. Rajendran, in similar facts Apex court has held as under:-

In this case in a criminal petition under Section 482 of the Code was filed by the respondents for transfer of the investigation which had been

initiated for an offence under Sections 177, 186 and 506(ii) of the Indian Penal Code to the CBI. In the year 1998, the said criminal petition was

disposed of by the High Court refusing to transfer the investigation to CBI. By the said order the High Court, while disposing of the said criminal

petition, held that it was not necessary to hand over the investigation to CBI in the facts and circumstances of the case and the SBCID was directed

to continue with the investigation. After more than 3 years of the final order refusing to transfer the investigation to CBI, an Interlocutory

Application was filed in the disposed of criminal petition by the complainant/respondents but this time, the learned Single Judge of the Madras High

Court transferred the investigation to the CBI and directed the State Police to hand over the records to CBI forthwith. -----

19. In the case of Smt Sooraj Devi vs. Pyare Lal & Anr, AIR 1981 SC 736, this Court held "that the inherent power of the Court cannot be exercised

for doing that which is specifically prohibited by the Code"

20. Similar view was expressed in the case of Sankatha Singh vs. State of U.P.

[1962] Supp 2 SCR 817, in which it was held:Â

It is true that the prohibition in Section 362Â against the Court altering or reviewing its judgment is subject to what is ""otherwise provided by this

Code or by any other law for the time being in force"". Those words, however, refer to those provisions only where the Court has been expressly

authorized by the Code or other law to alter or review its judgment. The inherent power of the Court is not contemplated by the saving provision

contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail.""Â

21. As noted herein earlier, Section 362 of the Code prohibits reopening of a final order except in the cases of clerical or arithmetical errors. Such

being the position and in view of the expressed prohibition in the Code itself in the form of Section 362, exercise of power under Section 482 of the

Code cannot be exercised to reopen or alter an order disposing of a petition decided on merits.Â

13. Section 369 of Central Code is not same to Section 369 of State Code, but effect of either section is same, this High Court like other High Courts

has no power to alter or review a judgment passed in exercise of criminal jurisdiction. In view of this, present petition is not maintainable. So far order

dated 04.10.2010 passed by 3rd Additional Sessions Judge, Jammu is concerned, that order has not decided any right of the parties. By virtue of said

order, 3rd Additional Sessions Judge has directed the trial court to pass fresh order as per law. Petitioner has remedy to argue the matter.

14. In view of what has been discussed above and law on the point, this petition is dismissed as not maintainable.Â Â