

(2019) 04 J&K CK 0053

In the Jammu And Kashmir High Court

Case No : Miscellaneous Criminal Cases (CRMC) No. 99 Of 2019, IA No. 01 Of 2019

Manzoor Ahmad Burza Vs Gulzar Enterprises?

Date of Decision : 10-04-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482
Negotiable Instruments Act, 1881 — Section 138
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 420
Code Of Criminal Procedure, 1898 — Section 561A
Code Of Criminal Procedure, 1973 — Section 200, 202, 242, 482
Constitution Of India, 1950 — Article 226, 227

Citation : (2019) 04 J&K CK 0053

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Salih Pirzada

Final Decision : Dismissed

Judgement

1. Process issued by the learned Magistrate(court of 1st Additional Munsiff, Srinagar) on 22.06.2016 and the proceedings initiated thereupon, along-with order dated 26.05.2017 and 01.04.2019(for short impugned orders) on the complaint filed by the respondent herein, is sought to be quashed in terms of the instant petition while putting forth:-

"i) that the cognizance taken by the learned trial court in one of the complaints pending in the court of learned Sub-Judge/Special Mobile Magistrate, Srinagar, at the relevant point of time has been upheld with the direction that the ingredients of the offence under Section 420 RPC are different and distinct from Section 138 Negotiable Instruments Act can be looked into by the trial court at the appropriate stage.

ii) that upon culmination of proceedings in 561-A petition, the petitioner entered appearance before the trial court where it was learnt that a fresh cognizance has been taken vide order dated 26.05.2017 for offence under Section 138 NIA. Prefaced with double cognizance not envisaged under the provision of Cr. P.C,

objection was raised before the trial court regarding irregularity of proceedings however while remaining oblivious to the procedural defect the proceedings have been maintained and case fixed for recording of statement of petitioner under Section 242 Cr. P.C. on 20.04.2019.

iii) that material irregularity in the proceedings has been noticed after the disposal of petition by this Court. The proceedings in the trial court have been maintained on double cognizance which has resulted in severe prejudice to the petitioner.

iv) that primarily double cognizance is not permissible under Cr. P.C. as such the proceedings suffers the compliant of respondent under Section 138 NIA read with 420 RPC and the second cognizance is for 138 NIA, thereby expressively excluding the offence under Section 420 RPC.

v) that both the orders are operating against the petitioner, as such subjected to severe prejudice therefore to prevent miscarriage of justice the proceedings are liable to be quashed."

2. It has been admitted in the averments that earlier petition i.e. 561-A No.304/2017(lead case CRMC No.298/2017) was disposed of by the order dated 18.09.2018 by the co-ordinate Bench. The pleas taken therein, as is gathered from the perusal of the said order are:-

"The case of the petitioner, herein this petition, is that by order dated 22nd of June, 2016, the Court of learned Sub- Judge/Special Mobile Magistrate, Srinagar, has taken cognizance of an offence under section 138 Negotiable Instruments Act reads with Section 420 RPC and, accordingly, issued process against the petitioner. The petitioner is aggrieved of the aforesaid order dated 22nd of June, 2016 and the proceedings initiated thereunder on the grounds, inter alia, that the learned trial Court has not conducted any enquiry as required under Section 200 and 202 of the Cr. P.C. before taking cognizance of offence involving commercial transaction. The order impugned has been passed in a most perfunctory manner. The compliant has been filed through counsel and no personal knowledge or awareness about the facts is narrated in the memo of complaint; that the trial Court has failed to record any satisfaction about the competence of the counsel to file the complaint on behalf of complainant. The complaint is not filed by the complainant purporting to be the payee nor any power of attorney authorizing the counsel to frame and present the complaint has been relied upon for taking cognizance of complaint. The cheques are not shown to be issued towards the liquidation of debt or liability, but shown to have arisen as a result of an un-matured deal regarding sale of land. There is no determined liability in furtherance of which the cheque is shown to have been issued by the petitioner. Since the matter related to commercial transaction, as such, it was imperative to conduct enquiry before issuing process against the petitioner. The offence under Section 420 RPC cannot be tried together with Section 138 Negotiable Instruments Act. In this regard, it is stated that the contractual relationship is admitted and it is only the cheques which are alleged

to be dishonoured. Since no predisposition is shown existing towards the development of contractual relationship before the breach occasioned in the performance of obligations, therefore, the learned trial Court has erred in taking cognizance of the complaint. Such ingredients are absent as per the contents of complaint, therefore, the cognizance suffers material illegality, as such, the complaint needs to be rejected and the order impugned liable to be quashed. The alleged dishonour of each cheque drawn on different dates constitutes separate offence, as such, cannot be tried together especially when cheating is alleged to be exercised while extending cheques on different dates, therefore, the proceedings are liable to be quashed. The respondent has suppressed the material facts and has tried to mobilize prosecution to enforce an illusory liability. It is stated that it was contemplated to purchase land at Jammu belonging to one Mr. Sunil Kumar Thusoo and a substantial amount was credited into his account, however, the vendor committed breach in respect of which enquiry is pending before the Crime Branch/Vigilance Organization and the respondent has also participated in the enquiry. Incidentally, the deal for purchase of land at Khanmoh for the brother of the petitioner also could not materialize and under compelling circumstance the seven post-dated cheques were procured from the petitioner for being drawn in the name of M/s Gulzar Enterprises (Respondent herein). The petitioner has not received any amount from the respondent, but money has been remitted to the vendor instead of the petitioner. There is no settled amount which the petitioner has owned to liquidate, but, under duress, the cheques were obtained by the respondent, since the cheques have not been drawn to liquidate a lawfully recoverable debt or liability, as such, the complaint is not maintainable."

3. The learned co-ordinate Bench after considering the merit of the contentions of the case supra held that no irregularity appears to have crept in passing the order impugned and so does not call for any interference.

4. The impugned orders herein dated 22.06.2016 & 26.05.2017 admittedly have been passed prior to the disposal of the said 561-A No.304/2017 along-with lead case CRMC No. 298/2017.

5. Learned counsel for the petitioner when asked to state as to whether a fresh petition would lie when earlier the propriety of the order in terms of which cognizance has been challenged before the Court and the same was not successful, submitted that there would be no bar for entertaining a second petition and the principle of res- judicata will not apply to the instant case. In this regard he took reliance on the judgment of Hon'ble Apex Court in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr.

6. On perusal of the said judgment, however, it is clear that the earlier petition moved therein had been dismissed as withdrawn while leave having been granted to avail the appropriate remedy. Their lordships on taking note of the same and the principle of law laid down in Simrikhia Vs. Dolley Mukheerjee, (1990) 2 SCC 437 observed that in such factual situation a fresh petition could

lie. In the judgment of the Hon'ble Apex Court in Simrikhia's case their lordships had enumerated that inherent power cannot be exercised for doing that which cannot be done on account of the bar under other provisions of the Code. Second application was held to be not maintainable as its maintainability would virtually amount to review of the earlier order in the specific bar created under Cr.PC.

7. The petitioner herein had almost taken the same grounds in the instant petition with a little addition that order dated 01.04.2019, impugned herein, also could not follow and the order dated 26.05.2017 causes prejudice to him.

8. In the given circumstances, I am of the opinion that it would be against the public policy to entertain a fresh petition. If allowed to re-agitate the issues in piece-meals, same would tantamount to disrespect of the earlier judgment passed, and when the parties could avail opportunity to agitate any other ground too. There is no special circumstance thereafter which would impel this Court to deviate from the sound principle and general practice adhered to by the courts that the judgment once passed even in a criminal matter needs to be revered by all concerned on attaining finality.

9. In *Pratibha Vs. Rameshwari Devi & Ors.*, 2007 (12) SCC 369, their lordships have held:-

"that before parting with this judgment, "we may also remind ourselves that the power under Section 482 of the Code has to be exercised sparingly and in the rarest of rare cases".

10. In *State of Maharashtra Vs. Arun Gulab Gawali*, AIR 2010 SCC 3762, their lordships held that:-

"the power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the FIR/Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can 'soft-pedal' the course of justice at a crucial stage of investigation proceedings. The provisions of Articles 226, 227 of Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as 'Cr. PC.') are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers."

11. In the instant case observations of the learned Magistrate in the order dated 26.05.2017 that the cognizance had not been taken against the accused, would not suffice for this Court to invoke the inherent jurisdiction. Cognizance vividly has been taken in terms of the order dated 22.06.2016, impugned, when the learned Magistrate applied his mind to the facts and circumstances and directed process be issued for other side. This Court in terms of earlier judgment has not found any erroneousness or illegality in the order so passed and the petitioner as stated above cannot be allowed to re-agitate the matter. No miscarriage of justice is shown to have occurred by passing of said orders, which necessitates the petitioner to answer the accusations by causing his appearance before the trial Magistrate or by showing a cause as to why he be not punished.

12. Petition, as such, dismissed along-with connected IA.

13. Copy of this order be furnished to the learned trial court for information.