

(2019) 03 J&K CK 0013

In the Jammu And Kashmir High Court

Case No : Miscellaneous Criminal Cases (CRMC) No. 58 Of 2014, IA No. 69 Of 2014, 99001 Of 2015

Munish Bhatia And Anr

APPELLANT

Vs

State Of Jammu & Kashmir Anr

RESPONDENT

Date of Decision : 01-03-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 362, 482
Jammu And Kashmir Prevention Of Corruption Act, 2006 — Section 5(1)(d), 5(2)
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120B
Jammu And Kashmir Control Of Building Operations Act, 1988 — Section 7(1),
7(3)Jammu and Kashmir Control of Building Operations Rules, 1988 — Rule 11

Citation : (2019) 03 J&K CK 0013

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : Sunil Sethi, Mohsin Bhat, F.A. Natnoo

Judgement

1. In the instant petition filed under Section 561-A Cr.P.C, the petitioners inter alia seek quashment of FIR No.02/2014, registered at Police Station, Vigilance Organization, Jammu under Sections 5(1)(d) read with Section 5(2) of the J&K Prevention of Corruption Act, 2006 and Section 120-B RPC against the petitioners.

2. This court vide order dated 07.09.2018 passed in CRMC No.58/2014 already dismissed the petition for quashing the FIR No.02/2014, registered at Police Station, Vigilance Organization, Jammu under Sections 5(1)(d) read with Section 5(2) of the J&K Prevention of Corruption Act, 2006 and Section 120-B RPC against the petitioners.

3. The concluding paras 5 to 10 of the said order dated 07.09.2018 read as under:

5. The sum and substance of the argument of Mr Sethi, the learned senior counsel, representing the petitioners, is that since the violations made in the

construction work have been compounded by the learned Tribunal, by an order dated 16th of May, 2013, therefore, the initiation of criminal proceedings against the petitioners is neither justified nor warranted, but is liable to be quashed.

6. Per Contra, Mr Moza, the learned Additional Advocate General, appearing on behalf of the respondents, has stated that the order of the learned Tribunal, whereby the violations have been compounded, has, in fact, indicted not only the petitioners, but also the Officials/ Officers of the Jammu Municipal Corporation, Jammu and, therefore, they cannot take shelter or refuge under its shade and cover.

7. In order to arrive at a just conclusion, the relevant excerpts of the order dated 16th of May, 2013, passed by the learned Tribunal, require to be enumerated below, verbatim et literatim and these read as under:

"The records available on the file of the respondent/ JMC show that their Khilafwarzi Inspector of the area concerned made a report to JMC on 11-08-2012 that the appellant alongwith his brother namely Sidharth Bhatia have started removing the earth to construct the basement and further that the appellants have not raised the partition walls, so the building seems to be put for commercial use and on this report, the respondent/ JMC issued a notice against the appellant as required u/s 7(1) of the COBO Act. The impugned notice issued to the appellant u/s 7(3) of the COBO Act on the same grounds as mentioned in preliminary notice issued u/s 7(1) of the COBO Act, but in their objections/ written arguments, the respondent/ JMC has also shown the violations of set backs as well as the height of the building which were not covered in the impugned notice. It is now well settled law that the respondent/ JMC cannot go beyond the scope of their notices, but in the instant case, the respondent/ JMC has committed the same illegality as pointed out earlier in a number of similar circumstances cases. On this solid illegality committed by the respondent/ JMC, the appeal of the appellant is liable to be accepted and impugned order needs to be quashed, is quite surprising to note that the appellant must has taken at least months together to complete three storeyed building, but it appears that the respondent/ JMC have never raised a finger regarding the violation of Building plan which is a mystery. It is strange enough to note here that whey the respondent/ JMC has not initiated any action against the appellant when he has made deviations of the sanctioned plan at ground floor? It appears that the field agency of the JMC was hand in glue/ in active connivance with appellant in coming up this complex of three-storeyed building. The JMC remained silent spectator when all the violations were taking place from ground floor to the 2nd floor and now, when the entire complex has come up on the ground, they have issued notices under the COBO Act. Such type of altitude is neither expected nor desirable from the respondent side, so in my opinion, the appellant himself alone cannot be held responsible for the deviations made by him from the sanctioned plan. Be that as it may, since the appellant has admitted that he will not construct any basement and that the structure is meant for residential purposes

only, so there is no violation of land use of the area prescribed in the Master Plan. No doubt, there is violation of set backs committed by the appellant, but in my opinion, the respondent/ JMC is equally responsible for this violation, as mentioned above. The authority cited by the advocate for the appellant reported as AIR 2005 SC in case titled Kewal Kumar Gupta vs J&K Special Tribunal and others, in support of his arguments is quite applicable to the facts and circumstances of the present case. The relevant part of the said authority is reproduced as under:

".....It is unnecessary for permitting demolition of the structure even if it be in contravention of the provisions of the Act or the zoning provisions in the previous Master Plan."

In view of the discussion made hereinabove, in my opinion, the deviations made by the appellant from sanctioned plan are minor in nature, so the same can safely be regularized by way of compounding.

Accordingly, the undersigned while exercising powers as vested in me under Rule 11 of COBO Rules, 1998 hereby regularize the total deviations of 3916 sft @ Rs.20/- (Rupees Twenty Only) per sft by way of compounding. The appellants shall deposit the compounding fee with the respondent/ JMC within a period of two months from today failing which the appeal filed by the appellants shall be deemed to have been dismissed and the respondent/ JMC will be at liberty to remove the illegal structure as per their impugned order/ notice dated 17-12-2012. The status quo order/ stay order issued in this case by this Tribunal shall stand vacated. The records of the respondent/ JMC be returned alongwith copy of this order for follow up action."

8. What gets revealed from the perusal of the order passed by the learned Tribunal, which has been cited above, is that the Officials/ Officers of the Jammu Municipal Corporation, Jammu, suppressed the material facts in the notices sent to the petitioners under Sections 7(1) and 7(3) of the COBO Act. It was during the course of filing the objections/ written arguments before the learned Tribunal that they projected and portrayed the violations of setbacks as well as the height of the building which were not covered under the impugned notices. The learned Tribunal, on the face of above, opined that it is now settled that the Jammu Municipal Corporation cannot go beyond the scope of their notices. It is also stipulated in the order that the Jammu Municipal Corporation has committed the illegality of the suppression of material facts in a number of cases and on the basis of the illegality committed by them, the appeal of the appellant is liable to be accepted and the impugned notices quashed.

9. The learned Tribunal appears to have given the petitioners the benefit of the illegality committed and perpetuated by the Jammu Municipal Corporation, Jammu. The learned Tribunal, has indicted the petitioners and other Officials/ Officers of the Jammu Municipal Corporation, Jammu, as can be seen from the order aforesaid with a naked eye, which does not need to be repeated and

reiterated here. However, what cannot be lost sight of is that it is, perhaps, the order of the learned Tribunal, that has given the Vigilance Organization, Jammu, the teeth to register the FIR against the petitioners and other Officials/ Officers as the learned Tribunal, has pinpointed the illegalities committed by them. On the basis of the order aforesaid, the petitioners and other Officials/ Officers of the Jammu Municipal Corporation, Jammu, cannot take umbrage under the plea that the learned Tribunal has compounded the violations and, therefore, they should be allowed to go scot-free. The investigation, in a case like the present one, cannot be scuttled and truncated at the very threshold. The benefit sought to be derived by the petitioners from the order of the learned Tribunal, is misdirected. The present petition is grossly misconceived and does not merit any consideration. The law on the subject is that the Court has to ascertain whether the allegations made in the FIR do, or, do not, disclose the commission of offences attributed to the accused and, if it does so, then the investigation of the case cannot be aborted mid-way.

10. In view of the preceding analysis, the petition of the petitioners is found to be devoid of any merit. It being so, same entails dismissal and is, accordingly, dismissed with all connected MP(s). Interim directions, if any, in force, as on date, shall stand vacated.

3. After decision of CRMC No.58/2014 by this court dated 07.09.2018, the learned counsel for the petitioners filed an application for re-hearing of the petition on the ground that one letter annexed with the petition was not considered by this court while deciding the petition on 07.09.2018. That petition was allowed by this Court vide order dated 19.11.2018 by holding that the matter was required to be heard again.

4. Learned counsel for the petitioners while arguing the matter have reiterated all the grounds taken in the previous petition CRMC No.58/2014 and has stated that letter dated 02.03.2017 by virtue of which AIG HQ Vigilance wrote that matter has been approved closed, which has been placed on record during argument, was not considered by court; whereas learned counsel for the respondents has vehemently argued that this court cannot review its own order because the criminal court has no power to review the same.

5. Heard learned counsel for the parties and perused the case file. I have also gone through the law on the subject.

6. In 2008 (3) SCC (CRIMINAL) 600 in case titled State Rep. by DSP., S.B.C.I.D., Chennai vs. K.V Rajendran and Ors., it has been held as under:-

"12. We have heard the learned counsel for the parties and examined the impugned order as well as the final order dated 1st of March, 2001 rejecting the prayer of the respondents to hand over the investigation to the CBI authorities and other materials on record.

13. In our view, the learned Judge of the Madras High Court had fallen in error in

passing the impugned order. The following questions need to be considered by us :

(I) Whether the High Court had become functus officio with the disposal of the criminal petition by the judgment and order dated 01st of March, 2001?

(II) Whether the High Court, in exercise of its inherent power under Section 482 of the Code can modify its earlier judgment and order?

14. Before we take up the questions for our decision, we may look into the law on the questions posed before us.

15. In the case of Hari Singh Mann vs. Harbhajan Singh Bajwa & others (2001) 1 SCC 169, this Court held:

"There is no provision in the Code Of Criminal Procedure authorizing the High Court to review its judgment passed either in exercise of its appellate or revisional or original criminal jurisdiction. Such a power cannot be exercised with the aid or under the cloak of Section 482 of the Code. Section 362 CrPC has extended the bar of review not only to judgment but also to the final orders other than the judgment.

Section 362 is based on an acknowledged principal of law that once a matter is finally disposed of by a court, the said court in the absence of statutory provision becomes functus officio and is disentitled to entertain a fresh prayer for the same relief unless the former order is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or an arithmetical error."

16. Yet, in the case of Simrikha vs. Dolley Mukherjee and Chhabi Mukherjee & Anr, (1990) 2 SCC 437, this court held:

"The inherent power under Section 482 is intended to prevent the abuse of the process of the Court and to secure ends of justice. Such power cannot be exercised to do something, which is expressly barred under the Code. If any consideration of the facts by way of review is not permissible under the Code and is expressly barred, it is not for the Court to exercise its inherent power to reconsider the matter and record a conflicting decision. If there had been change in the circumstances of the case, it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court.

Where there is no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under Section 362."

17. Keeping the principles, as laid down by the aforesaid decisions of this Court

in mind, let us now look to Section 362 of the Code, which expressly provides that no Court which has signed its judgment and final order disposing of a case, shall alter or review the same except to correct clerical or arithmetical error saved as otherwise provided by the Court. At this stage, the exercise of power under Section 482 of the Code may be looked into.

18. Section 482 enables the High Court to make such order as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The inherent powers, however, as much are controlled by principle and precedent as are its express powers by statutes. If a matter is covered by an express letter of law, the court cannot give a go-by to the statutory provisions and instead evolve a new provision in the garb of inherent jurisdiction.

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:

"It is true that the prohibition in Section 362 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 authorised 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."

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.

22. In the present case, we find that the High Court, in the original final order, disposing of the petition under Section 482 of the Code has specifically given reasons for rejecting the prayer for handing over the investigation to the CBI authorities.

23. That apart, after the final order was passed rejecting the prayer of the respondent to hand over the investigation to the CBI authorities, by which, the criminal petition filed under Section 482 was practically rejected, it was not open to the High Court to pass a fresh order in the disposed of petition or even in the pending petition of the DSP (SB CID) Nagapattinam, directing investigation to be made by the CBI authorities.

24. As noted herein earlier, Section 362 of the Code prohibits a Court from making alternation in a judgment after the final order or Judgment was signed by

the Court disposing of the case finally except to correct clerical or arithmetical errors. In our view, therefore, Section 362 of the Code cannot apply in the facts and circumstances of the present case. There was no clerical or arithmetical error in the order."

7. In view of settled law as discussed above, it is held that petition CRMC No.58/2014 cannot be heard again and court cannot pass an order otherwise. However, concerned police is directed to conclude the investigation preferably within 6 weeks and while concluding the investigation in either way shall consider two letters dated 02.03.2017 and 15.05.2018, the photocopies of which have already been placed on record.