

(2014) 08 AP CK 0074

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 2879 of 2013

Telangana Non-Gazetted Mutually Aided Co-operative
Housing Society Ltd.

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision : 28-08-2014

Acts Referred:

Andhra Pradesh Co-operative Societies Act, 1964 — Section 60
Andhra Pradesh Mutually Aided Co-operative Societies Act, 1995 — Section 10, 26, 29, 29(5), 38
Criminal Procedure Code, 1973 (CrPC) — Section 41
Penal Code, 1860 (IPC) — Section 409, 420, 468, 471

Citation : (2015) 1 ALD(Cri) 428

Hon'ble Judges : S. Ravi Kumar, J

Bench : Single Bench

Advocate : K. Vivek Reddy, Advocate for the Appellant; M.V.S. Sai Kumar, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S. Ravi Kumar, J.—This petition is filed to quash F.I.R. in Crime No. 169 of 2012 of Station House Officer, Begum Bazar Police Station, Hyderabad for alleged offences punishable under Sections 409, 420, 468 and 471 I.P.C. and also u/s 38 of A.P.M.A.C.S. Act (A.P. Mutually Aided Cooperative Societies Act. (herein after referred to as the Act for the sake of convenience.)

2. Petitioners are A.1 to A.13, A.15 and A.18 to A.26 in the above referred crime.

3. When this matter has come up for hearing, learned Advocate General appearing for State of Telangana represented that he was instructed by the State Government to appear on behalf of first petitioner and informed that he would submit arguments on behalf of first petitioner herein. For this, advocate appearing for fourth and fifth respondents raised objection on the ground that Advocate General cannot appear on behalf of one of the accused which would

amount to appearing against the State. For this, learned Advocate General replied that he received instructions from the State Government to appear and that he has right to defend 1st accused being now Chairman of Telangana State Legislative Council as he being member of it. Both sides have not invited any findings, on this subject, therefore, without going into the submissions of both sides on this aspect, by recording objection of the advocate for fourth and fifth respondents and leaving the matter to the wisdom of concerned, I feel that I should proceed to decide the matter by considering the merits and demerits of the case.

4. It is submitted on behalf of petitioners that this F.I.R. is registered as per orders of the single judge of this court in C.A. No. 426 of 2012 in C.C. No. 919 of 2011 dated 27-7-2012 but the said orders of the learned single judge are held as illegal by a Division Bench of this court by an order dated 23-11-2012 in Letter Patent Appeal No. 10 of 2012. He submitted that when orders of the Honourable Single Judge are set aside by a Division Bench, complaint lodged in pursuance of the Honourable single Judges orders cannot be continued, consequently, F.I.R. registered on the basis of such complaint has to be quashed. It is further submitted that to give a complaint u/s 38 of the Act, prescribed procedure is contemplated according to which there must be a preliminary enquiry report and thereafter, enquiry is to be conducted by Tribunal constituted under the Co-operative Societies Act and then only, a criminal case is to be registered, but in this case such procedure is not followed, therefore, F.I.R. as registered on the strength of order of a single judge dated 27-7-2012 cannot be sustained.

5. For this, learned Public Prosecutor submitted that in this case, an enquiry report was submitted and as per the decision of this court in Criminal Petition No. 4911 of 2009 dated 26-3-2013 fixing of liability u/s 60 of A.P. Cooperative Societies Act is not a condition precedent to set criminal law into motion, therefore, the objection with regard to procedure contemplated under the Co-operative Societies Act is not sustainable. It is further submitted that no doubt in the F.I.R. it is mentioned that crime is registered as per the directions of the Honourable single Judges order in C.A. No. 426 of 2012 in C.C. No. 919 of 2011 dated 27-7-2012, the fact remains that it is registered as per the provisions of Section 38 of the Act and that the police can be directed to proceed with investigation giving protection to the petitioners with regard to arrest, this petition can be disposed of.

6. Advocate respondents 4 and 5 submitted that both the Honourable single Judge and the Honourable Division Bench of this court clarified that the authorities are at liberty to pursue the remedies available under the Act and in view of such clarification, the objection of the petitioners is not sustainable. He further submitted that on 20-10-2011, an Enquiry Officer was appointed and he submitted a detailed enquiry report and the same is not quashed by any court or any competent authority. He submitted that enquiry Officer noticed several irregularities including misappropriation of society funds and unless a full-fledged

investigation is conducted, the truth will not come out. He further submitted that complaint is based on the enquiry report and the provisions of the Act, but not solely on the basis of single judges order therefore, the contention of petitioners for quashing the F.I.R. is not tenable.

7. Now the point that would arise for my consideration in this petition is whether the F.I.R. No. 169 of 2012 can be quashed or not? POINT:

From the submissions of both sides, the simple point involved is whether the F.I.R. can be quashed in the light of orders of the Division Bench of this court in L.P.A. No. 10 of 2012.

8. As seen from the material papers, filed along with quash petition, C.A. No. 426 of 2012 is an application filed to reopen C.C. No. 919 of 2011, Telangana non-gazetted Officers Union (TNGO) filed writ petition No. 14702 of 2010 for a writ of mandamus to declare the action of Government of A.P. represented by its Chief Secretary for not initiating action against first petitioner herein on the representation made by petitioners in the writ petition dated 19-9-2008 as illegal and arbitrary. That writ petition was disposed of by an order dated 8-12-2010 with the following observations and directions:

In my opinion, when certain allegations of commissions and omissions are brought to the notice of respondent No. 1, in the matter of allotment of house sites, it is incumbent upon it to examine and take remedial steps if it finds truth in such allegations. Non-disposal of the petitioners representation dated 19-9-2008 cannot therefore be appreciated. Respondent No. 1 is accordingly directed to consider the representation of the petitioners and take appropriate action if it is satisfied that any irregularities were committed in the matter of allotment of plots by respondent Nos. 7 and 8, in accordance with law after notice to respondent Nos. 7 and 8. Needless to observe that respondent No. 1 will act expeditiously in this regard.

9. Writ petitioner filed C.C. No. 919 of 2011 alleging that the above referred direction was not complied. Honourable single Judge by considering the affidavit of the Chief Secretary closed the said C.C. Thereafter, C.A. No. 426 of 2012 is filed to reopen the closed C.C. and the Honourable single judge considered the reopen application and made some observations which are as follows:

Admittedly, in the case on hand, the District Co-operative Officer, Hyderabad (U), in her expansive inquiry report running to 102 pages submitted u/s 29(5) of the MACS Act found the Managing Committee of the Housing Society having committed several illegalities. For the purpose of the present case, I refrain from delving into these details except to observe that the inquiry officer has indicted the Managing Committee of the Housing Society for several commissions and omissions, including large scale irregularities in the allotment of plots and various financial irregularities in entrusting the works relating to development of land to contractors without following a transparent process by calling for tenders by giving wide publicity etc., In my opinion, it is the bounden duty of the State and

its agencies to take appropriate action in accordance with law, which includes prosecution of those who are responsible for the mismanagement of the Housing Society and various illegal acts found to have been committed in relation thereto in the enquiry report. I have no hesitation in my mind that these actions include the penal action as envisaged u/s 38 of the MACS Act.

10. From the discussion undertaken above, I am of the opinion that the undertaking given by the respondent in his affidavits filed in the Contempt Case that appropriate action in accordance with law will be taken, is not fully complied with. However, I am inclined to give a benefit of doubt to the respondent as non-compliance with the said undertaking is obviously on account of incorrect appreciation of the scope of the provisions of Sections 29 and 38 of the MACS Act. Therefore, this Court hopes that the State Government will issue necessary instructions to the competent authority to initiate action in all respects under the provisions of the MACS Act against those who are found responsible in the inquiry report for the commissions and omissions, including prosecution u/s 38 of the MACS Act. If such action is not taken within one month from today, the petitioners shall be free to avail appropriate legal remedies available to them in law.

11. Subject to the above observations, the Contempt Application is disposed of.

12. Challenging the same, first petitioner herein filed letter patent appeal to the Division Bench contending that once C.C. is closed, the court has no power and jurisdiction to reopen the same and accepting the said contention, Honourable Division Bench passed the following order:

13. Having heard the learned counsel for the parties, we are of the view that under the Contempt of Courts Act, 1971 (for short the Act), we do not find that there is any jurisdiction to the Court to reopen the application, which has already been closed by it. On the contrary, it appears to us that when a contempt case is closed, it cannot be revived by an application of party and no adverse findings or orders can be passed against third parties, who are not impleaded. Therefore, it appears to us that when the Court cannot reopen the matter in question, the Hon"ble Single Judge could not have passed the impugned order, in fact, it is the second point, which was urged by the learned Senior Counsel appearing on behalf of the appellants. Even on that score, the order so passed by the Hon"ble Single Judge is not sustainable in the eye of law and the order of the Hon"ble Single Judge is liable to be set aside on that ground. We further keep it on record that at the time of closing the contempt case by the Hon"ble Single Judge, the power which has been granted by the statute u/s 10 of the Act to punish the contemnors has already been exhausted and thereby, it appears to us that once when an order was passed by the Hon"ble Single Judge by closing the said contempt case, it has to be taken into account that that proceedings for all the purposes has already been concluded and cannot be reopened again.

14. Therefore, on question No. 1, which was urged before us on such analogy,

we come to the conclusion that the Hon'ble Single Judge has no power even to reopen the contempt case as sought to be done in these proceedings on the application so filed by the respondents.

15. On these three points which we have discussed in the preceding paragraphs of our judgment, it cannot be said that the order so passed by the Hon'ble Single judge can be sustainable in the eye of law and hence we set aside the same. Further, we have been able to find out from the MACS Act, that the remedies are already provided in MACS Act and the authority concerned is at liberty to pursue such remedies, if any warranted under law.

16. Now on a plain reading of the above referred orders of this court, it is clear that the Honourable single judge of this court observed that State Government to take necessary action under the provisions of the Act against the persons who are found responsible by the enquiry Officer for commissions and omissions including prosecution u/s 38 of the said Act and the Honourable Division Bench also recorded that liberty is given to the authority concerned to avail the remedies provided in the Act which clearly classifies that the authorities can invoke the provisions of the Act and take action against the persons responsible.

17. One of the contention of the petitioners is that F.I.R. is registered only on the basis of the orders of the learned single judge dated 27-7-2012. But as seen from the complaint, such contention cannot be accepted because while referring to the orders of the learned single judge, the allegation in respect of commissions of offences referred in the complaint are narrated. To appreciate the same, I feel it necessary to extract the relevant portions from the complaint and they are as follows:

5. Allotment of plots to employees of Govt. of Andhra Pradesh.

(a) In violation of Byelaw No. 3(i)(a) i.e., allotting plots to those employees who have put in less than five years of Govt. Service.

(b) In violation of Byelaw No. 3(i)(a) i.e., allotting plots to those who are not working under the area of operation of the society which is twin cities and Ranga Reddy District.

(c) In violation of Bye law No. 3(i)(a) i.e., allotting plots to those who are not approved probationers.

(d) In violation of Byelaw No. 3(i)(a) i.e., allotting plots to those employees who are not affiliated to TNGO _____s Union. In other words allotting plots to Gazetted Employees, Retired employees, last grade employees at the time of admission.

(e) In violation of Byelaw No. 3(i)(b) i.e., allotting plots to those employees already owning a plot or house in his or her name or spouse or family member name (some even availed H.B.A. for purchasing or constructing the same.)

(f) In violation of Byelaw No. 3(iii)(a) i.e., allotting plots to those employees who

have not submitted an affidavit on non-judicial stamp paper with notary giving an undertaking that they do not own a house or plot/house.

(g) In violation of Byelaw No. 3(i)(c) i.e., allotting plots to those employees who are already allotted a housing plot or house in other housing societies (which were sanctioned Government land).

6. Records maintained u/s. 26 of AP MACS Act, 1995 and byelaw No. 44 are not in proper shape.

7. The society has constructed 7 model houses costing to Rs. 1,69,42,000/- without approval from General body and Managing Committee as provided under Byelaws No. 13 and 20.

Construction of 7 model houses at such huge cost in a housing venture meant for lower middle income group employees is nothing but an extravaganza amounting to wasteful expenditure.

8. Society engaged the services of M/s. V.G. Constructions on nomination basis for executing the work of road formation and site leveling of 90 Acres in Phase-1 at a cost of Rs. 4.32 crores.

Society engaged the services of M/s. Sri Bhavani Engineering Constructions on limited tendered basis for executing the work of road formation and site leveling in Phase-II at a cost of Rs. 1.18 Crores.

The process of finalizing the contractor/developer for executing the above said works is not transparent and did not allow for fair competition. It resulted in unnecessary and wasteful expenditure to the society. No record of measurement books and quality monitoring is available. Moreover, the agencies entrusted with the execution of work do not have a proven track record for executing work of such magnitude. The Inquiry Officer found that the work allotted to M/s. V.G. Constructions on nomination basis at a cost of Rs. 4.32 Crores is on a higher side by Rs. 1.32 Crores.

9. As per G.O.Ms. No. 244, dated 28-2-2005 of Revenue (Assignment-I) Dept., the size of the plot to be allotted to the Non-Gazetted Officers is 175 sq. yards only. In the instant case, plots of varying sizes ranging from 167 to 330 sq. yards were allotted. This resulted in shrinking of opportunity to a large no of eligible non-gazetted employees.

18. The above irregularities attract punishment under Sec. 38(2), (3),(4) of AP MACS Act, 1995 and the byelaws made there under and relevant sections of I.P.C.

19. So as rightly pointed out by advocate for R.4 and R.5, this F.I.R. is not solely based on the orders of the learned single judge but it is given in compliance of provisions of the Act.

20. According to advocate for petitioners, when initial action is not in consonance with law, subsequent proceeding cannot be continued. To support his argument,

he placed reliance of the judgment of Supreme Court in Chairman-Cum-Managing Director, Coal India Limited and others vs. Ananta Saha and others () and relied on the following para No. 32 of the said judgment which reads as follows:

32. It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim *sublato fundamento cadit opus* is applicable, meaning thereby, in case a foundation is removed, the superstructures falls.

21. But as already observed above, F.I.R. is not solely registered on the basis of orders of the learned single judge but it is in pursuance of the provisions of the Act and even Honourable Division Bench of this court also gave liberty to the authorities concerned for invoking provisions of the Act. Therefore, decision of the Honourable Supreme Court relied on by the petitioners has no application. Further, even by the date of disposal of LPA, this FIR is already registered and if really, the F.I.R. is registered only on the basis of orders of the learned single judge, the first petitioner herein who challenged that order ought to have brought this fact to the notice of Honourable Division Bench and the very fact of not bringing this fact to the notice of the Honourable Division Bench, by the petitioners is a circumstance against them.

22. Next contention of the petitioners is that procedure contemplated u/s 60 of the Andhra Pradesh Co-operatives Societies Act, 1964 is not followed, therefore F.I.R. has to be quashed.

23. But the learned Public Prosecutor submitted that said objection is not tenable in view of the decision of Division Bench of this court dated 26-3-2013 in Crl. P. No. 4911 of 2009. In that case, a reference was made to a Division Bench as there is conflicting opinion with regard to compliance of Section 60 of the A.P. Co-operative Societies Act and the Division Bench of this court while answering a reference passed the following order:

24. In view of the reasons as mentioned herein before, we hold as follows:

(a) Prosecution of the person accused of an offence can be proceeded with both under General Law and Special Law;

(b) Fixing the liability u/s 60 of the Andhra Pradesh Co-operative Societies Act, 1964 is not a condition precedent to set the criminal law into motion;

(c) Even after fixing no liability u/s 60 of the Andhra Pradesh Co-operative Societies Act, 1964, still, the prosecution under General Law viz., the Indian Penal Code, 1860, can be proceeded with subject to the facts constituting an offence;

(d) It must be shown that the ingredients for the offence under General Law and Special Law are one and the same, and the accused shall not be liable to be punished twice for the same offence;

(e) If the ingredients for the offences punishable under General Law and Special Law are distinct and different, then there is no impediment to proceed with the case under two enactments.

25. From the above order, it is clear that fixing liability u/s 60 of the A.P. Co-operative Societies Act is not a condition precedent to set criminal law into motion and here in this case besides the offences under the A.P. Co-operative Societies Act, there are I.P.C. offences also and therefore, the objection of the petitioners is not sustainable.

26. For these reasons, I am of the view that grounds urged for quashing are not tenable and as the complaint disclosed prima facie material for offences alleged and therefore, it is a fit case where matter requires thorough investigation. With regard to suggestion of the learned Public Prosecutor of protecting the petitioners from arrest, I feel that police can be directed to follow section 41 of Cr.P.C. at the time of arrest of the petitioners.

27. With this observation, this Criminal Petition is dismissed. As a sequel to the disposal of this Criminal petition, the Miscellaneous Petitions, if any, pending, shall stand dismissed.