

2. Criminal Writ Petition no.127/2017 along with Criminal Writ petition nos.106 and 107 of 2017 were decided by a common judgment and order dated 22.06.2018. The present applicant is

accused no.1, while the petitioners in the companion petitions are accused nos.2 and 3 against whom cognizance is taken by the learned Special judge by order dt. 9.12.2016 while refusing to accept the final summary report filed by the Investigating Officer. By a subsequent order dated 01/06/2017, the learned Special Judge has issued process against the present petitioner and the accused nos.2 and 3 for the offences punishable under sections 119, 120 ,420 read with section 120 B of IPC and section 13(1) (c) and (d) of the Prevention of Corruption Act (PC Act, for short).

3. By judgment and order dt. 22.6.2018, this court had partly allowed the three petitions. This court while setting aside the order issuing process under section 13(1) (c) and (d) of the PC Act, for want of sanction, has confirmed the order issuing process under sections 119, 120, 420 read with section 120B of the IPC. For the limited purpose of deciding this application, it would not be necessary to set out the facts which are extensively set out in the judgment, of which modification/partial recall is sought. In para 22 of the said judgment, this court observed thus :

“22. It is true that the complaint was not filed, invoking offences under the PC Act. Even when the order under Section 156(3) of Cr.P.C. was passed,

*there was no mention of the offence under the PC Act. The investigating agency subsequently invoked the offences under the PC Act. However, the fact remains that when the cognizance was taken by the learned Sessions Judge on 09.12.2016 inter alia for the offences under the PC Act, the petitioner was a public servant. Thus, the cognizance for the offences under the PC Act, could not have been taken in the absence of a sanction under Section 19 of the PC Act. The subsequent order, issuing process under Section 13(1)(c) and (d) of the PC Act would also be bad for want of sanction under Section 19 of the PC Act. The learned Sessions Judge has not considered this aspect and the effect of the decision in the case of **Anil Kumar** (supra)."*

4. However, in so far as the IPC offences are concerned this court found that there was *prima facie* case made out. It has also been found that the case being triable, as a warrant triable case instituted otherwise than on police report, the Magistrate will have to record evidence before charge and shall decide the issue of framing of charge on its own merits and in accordance with law.

5. The petitioner is seeking modification/recall of the said judgment to the extent it upholds issuance of process by the

Special Judge in respect of the IPC offences and transfer of the Criminal case no.2/2016 to the court of the learned Judicial Magistrate First Class at Mapusa.

6. Heard Shri Kantak, the learned Senior Counsel for the petitioner and the respondent no.1, who appears in person. I have also heard Shri Faldessai, the learned Additional Public Prosecutor. Perused record.

7. Shri Kantak, the learned Senior Counsel for the petitioner has raised a solitary contention. It is submitted that once it is held that the Special Judge could not have taken cognizance for the offences under the PC Act, the order taking cognizance and the subsequent order issuing process under the IPC offences would be bad for want of jurisdiction. It is submitted that the Special Judge can try IPC offences only if the offence/s under the PC Act are included in the case and not otherwise. In short, once the cognizance taken for the offences under the PC Act is found to be bad for want of sanction, the learned Special judge lacked jurisdiction to take cognizance and issue process for the IPC offences, which are otherwise triable by a Magistrate.

8. Shri Rodriques, the respondent no.1 in person has raised a preliminary objection to the maintainability of the petition as framed and filed. It is submitted that under section 362 of the Code of Criminal Procedure (Code, for short), the court has no jurisdiction to review or recall a judgment or an order, except to correct a clerical or an arithmetical error. Reliance in this regard is placed on the decision of the Supreme Court in ***Sankatha Singh and Others Vs. State of Uttar Pradesh***; AIR 1962 SC 1208, ***Smt. Sooraj Devi Vs. Pyare Lal and another***; (1981) 1 SCC 500, ***Sheo Nandan Paswan Vs. State of Bihar and others***; AIR 1987 SC 877, ***Minu Kumari and another Vs. State of Bihar***; (2006) 4 SCC 359, a decision of the Jharkhand High Court in ***Champa Devi and another Vs. State of Jharkhand***; 2013 SCC Online Jhar 1858 and an order dated 6th September 2012 passed by this court in Criminal Misc Application no. 198/2011 in Criminal Appeal no 29/2010 (***State versus Jitendra @ Jitu @ Ronak Shirodkar***). It is submitted that even otherwise no case for modification/recall of the judgment is made out.

9. Shri Kantak, the learned Senior Counsel for the

petitioner submitted that the original petition was filed under article 226 and 227 of the Constitution of India and as such the embargo under section 362 of the Code, would not apply in this case. Reliance is placed on behalf of the petitioner on the decision of this court in the case of ***Kalpana d/o Nilaram Harinkhede Vs. State of Maharashtra and others***; 1999(3) MhLJ 483 and ***Anil Prabhakar Naik Vs. Chandrakant B. Garware***; 2006 SCC Online Bom 518, in order to submit that in similar circumstances, this court had refused to accept that there was no power of review. It is submitted that the cases relied on behalf of the petitioner are distinguishable as they arose under the provisions of the Code. It is submitted that in the case of ***Sheo Nandan Paswan*** (supra), there was no specific issue or a point framed about maintainability of a review application.

10. I have carefully considered the circumstances and the submissions made. Following points fall for determination in this application.

1. *Whether the petition for modification/ recall as framed and filed is maintainable ?*
2. *If Yes, Whether a Case for modification/recall is*

made out on merits ?

POINT NO.1 :

11. This application is not filed quoting any specific provision and is styled as one for modification/partial recall of judgment and order dt. 22.6.2018. in Criminal Writ Petition No.127/2017. As noticed earlier, that was a petition filed invoking jurisdiction of this Court, under Articles 226 and 227 of the Constitution of India, seeking quashing of the order taking cognizance and issuing process against the petitioner and others for the Offences under sections 119, 120, 420 read with section 120B of IPC and section 13(1) (c) and (d) of the PC Act. The question is whether this Court can exercise powers for modification/recall of the said judgment dt 22.6.2018. Notwithstanding the fact that the petitioner is seeking modification/recall of the judgment, the application essentially seeks review of the said judgment. Now under section 362 of the Code, a Criminal Court is precluded from altering or reviewing any judgment, except to correct clerical or arithmetical errors. Obviously, the nature of the modification sought in this application is not of a clerical or an arithmetical nature and going by section 362 of the Code, an application for review would not lie. It is also

well settled that the inherent powers under section 482 of the Code cannot be invoked to override bar of review under section 362 of the code as held by the Supreme Court in the case of **Smt. Sooraj Devi** (supra). The question however is, whether section 362 of the Code, would be attracted or would apply, where the judgment, which is sought to be reviewed or modified, is rendered by this court invoking jurisdiction under article 226 or 227 of the constitution of India. The question appears to be no longer *res-integra*. A Constitution Bench of the Hon'ble Supreme Court in the case of **Shivdeo Singh And others versus State of Punjab**; AIR 1963 SC 1909 has held that the High Court has under Article 226 of the Constitution of India inherent power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. This court in the case of **Kalpana Harinkhede** (supra), relying on the decision in the case of **Shivdeo Singh** (supra) had allowed the application for review thereby recalling a judgment rendered under article 226 and 227 of the constitution of India. In yet another decision in the case of **Anil Prabhakar Naik** (supra), this court allowed an application for review holding that the order under review was passed in exercise of the constitutional

provisions and not under any provisions of the Criminal Procedure Code. It can thus clearly be seen that the question would depend on the facts and circumstances of each case. Where the judgment or an order which is sought to be modified/reviewed is passed in exercise of the constitutional provisions the bar under section 362 would not apply. In the present case, the judgment which is sought to be modified /reviewed is not passed in exercise of any appellate or revisional jurisdiction, under the Code and therefore in my humble opinion, the bar under section 362 of the Code would not be attracted.

12. In the case of ***Sankatha Singh*** (supra), which arose under the Code of Criminal Procedure 1898 (old Code), a criminal appeal filed against conviction was dismissed in default of the appearance of the appellants and their counsel. The learned Special Judge subsequently restored the appeal by recalling the earlier order. The supreme court held that section 369 read with section 424 of the old Code would make it clear that the judgment could not have been altered, except for the purpose of correcting a clerical error. The court also found that a criminal appeal could not be dismissed in default of the appellant or their counsel. It can

thus be seen that the case involved a claim for review of an order passed under the old Code. Similar is the case in Smt **Sooraj Devi** (supra). In the case of **Sheo Nandan Paswan** (supra), the issue was relating to withdrawal from prosecution. Para 49 of the Majority judgment would show that the review application was mainly dismissed on merits. In the case of **Minu Kumari** (supra) before the Supreme Court as well as in the case of **Jitendra** (supra), the order was sought to be reviewed, by invoking the inherent powers under section 482 of the Code. The case of **Champa Devi** (supra) before the Jharkhand High Court also turned on its own facts. In the result the point is answered in the affirmative.

POINT NO.2 :

13. In order to appreciate the contentions as raised, it is necessary to briefly consider the status and the nature of the jurisdiction exercised by a Special Judge under the PC Act. The Special Judges are appointed under the PC Act for trial of offences punishable under the said Act and any conspiracy to commit or any attempt to commit or any abetment of any of such offences under the said Act.

14. Under subsection 2 of section 3 of the PC Act, a Special Judge has to be a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure. Section 4(3) of the PC Act provides that when trying any case (relating to the offences under the PC Act), the Special Judge may also try an offence other than an offence as specified in section 3, with which the accused is charged under the Code. Thus there cannot be any manner of dispute with the proposition that the existence of an offence, as is specified under section 3 of the PC Act, is a *sine qua non*, for the Special judge to be clothed with the jurisdiction to try non-PC offence/s. Section 5 of the PC Act would show that a Special Judge exercises original criminal jurisdiction, in as much as the Special Judge can take cognizance of offences without the accused being committed to him for trial. The Special Judge has to follow the procedure prescribed by the Code for trial of warrant cases by the Magistrate. Subsection 3 of section 5 of the PC Act provides that subject to subsections 1 and 2 thereof, a Special Judge shall be deemed to be a Court of Sessions while subsection 4 declares that without prejudice to the generality of the provisions contained in subsection 3 the provisions of

section 326 and 475 of the Code shall apply to the proceedings before the Special Judge and for the purpose of the said provisions a Special Judge shall be deemed to be a Magistrate. It can thus be seen that a Special Judge is a court of original criminal jurisdiction and subject to the provisions of the PC Act, the trial before the Special Judge is governed by the Code of Criminal Procedure. A Special Judge gets jurisdiction to 'try' non-PC offences along with the offences under the PC Act but not bereft of it.

15. Coming to the present case, the respondent no.1 filed the complaint before the Magistrate alleging commission of offences only under the Indian Penal Code. In pursuance of an order under section 156(3) of the Code, CID crime Branch invoked offences under the PC Act also, as the accused were found to be public servants. In view of this, the Magistrate, who was monitoring the investigation, made over the matter to the Special Judge. Before the Special judge, a final summary report came to be filed, to which an objection was raised by the respondent no.1. The ld. Special Judge, after hearing the parties, by an order dt. 1.6.2017 refused to accept the final summary report and took cognizance of the matter under section 190(1) of the Code. The ld.

Special Judge recorded the statements of the respondent no.1 along with three witnesses and by an order dt. 1.6.2017 issued process against the applicant and the co-accused for the offences under sections 119, 120, 420 read with section 120B of IPC and section 13(1)(c) and (d) of the PC Act. Both these orders were challenged before this court by the applicant and the co-accused. This court, placing reliance on the decision of the Supreme Court in the case of **Anil Kumar & Others Vs. M. K.Aiyappa and Another**; (2013) 10 SCC 705 found that cognizance of the offences under the PC Act could not have been taken in the absence of a sanction. Hence, that part of the order taking cognizance and issuing process for the offences under the PC Act was set aside. While doing so, this court found that there is prima facie case made out so far as IPC offences are concerned. The question is whether the order passed by the Special Court taking cognizance and issuing process for the IPC offences would be bad for want of jurisdiction. In my considered view, the answer has to be in the negative. As noticed earlier, at the time when the Special Judge took cognizance and issued process under the PC Act, the Special Judge had found prima facie case for the offences under the PC Act also. That part of the order has been set aside only on account of

the absence of sanction and in view of the law laid down by the Supreme Court in the case of **Anil Kumar** (supra). Thus, in my considered view, merely because the part of the order has been set aside that too for want of sanction cannot have the effect of nullifying the order in so far as the offences under the IPC are concerned. It is now well settled that the trial of the warrant case starts when the charge is framed and the accused pleads not guilty. The proceedings antecedent to the framing of charge are in the nature of an inquiry. (**Ratilal Bhanji Mithani Vs. State of Maharashtra**; (1979)2 SCC 179. Thus, the learned Special Judge, while taking cognizance and issuing process, was not holding any trial.

16. The matter can be looked at from another angle. The Special Judge and this court has already found that there is *prima facie* case made out for issuance of process for the IPC offences. Thus, it would be futile to set aside the order issuing process and to ask the Magistrate to reconsider the question of issue of process for the IPC offences. Such an exercise would be an empty formality. In the judgment, of which modification/recall is sought, I have already indicated that the Magistrate will have to record evidence

before charge as it is a warrant triable case instituted otherwise than on police report, where the applicant and the co-accused would get an opportunity to show that no case for framing of charge is made out and to seek their discharge.

17. I have gone through the judgment and order dated 22.6.2018 in the context of the grounds as raised in this application and I do not find that the judgment demonstrates any error apparent on the face of the record, so as to require its review/modification or recall. The point is accordingly answered in the negative. The application is without any merit and is accordingly dismissed.

C. V. BHADANG, J.

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