HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU
(through virtual mode)

Reserved on: 14.12.2020
Pronounced on: 22.12.2020

CRMC No.585/2017
IA No.01/2017

Farooq Ahmed Dar .....Petitioner(s)

Through :- Mr. Sunil Sethi, Sr. Advocate
Mr. Abhinav Sharma, Sr. Advocate
with Mr. Ravi Abrol, Advocate

V/s

State of J&K and others .....Respondent(s)

Through :- Mr. Raman Sharma, AAG

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. Through the medium of instant petition, the petitioner has challenged FIR No.31/2017 for offences under Sections 409 & 120-B RPC read with Section 5(2) of J&K Prevention of Corruption Act registered with Police Station, Crime Branch, Jammu.

2. As per the impugned FIR, a communication bearing No.47/GAZ/CIV/ PHQ/2017-6791-93 dated 17.07.2017 was received by the Crime Branch, Kashmir, which reads as under:-

"Subject: Complaint regarding abuse of official position by the officers of Armed Police J&K to confer undue benefit.

That the matter pertains to lending of Government premises to a private person for running eatery (food point) allegedly under so called PPP mode both at Srinagar and Jammu by Armed Police came under discussion of police Hqrs. The perusal of record in this behalf inter alia reveals that officers/officials of JKAP 9th Bn having dominion in the capacity of police servants over property to take view Golf Course-cum-Police Environmental & Training Park Boulevard Srinagar have under a well designed criminal conspiracy rented out (under the garb of joint venture) the above said property to Hotel Mughal Darbar through its Managing Director, Mr. Farooq Ahmed Dar S/o Mr. Habib Ullah Dar R/o Bandipora Anantnag. The public servants were found to have illegally and dishonestly by abuse of their official position resulted to execution of an illegal agreement in respect of the above said property in favour of Mr. Farooq Ahmed Dar Managing Director Hotel Mughal Darbar on 19th of May, 2014. The agreement was found executed by Officers/officials having knowledge that the property belongs to the Govt. and entrusted to them in capacity of public servants, having no authority/competence to rent out the property without proper approval from the competent authority (Govt.). Similarly, it has also revealed that the officers/officials of IRP 10th Bn having dominion in the capacity of public servants over property of the Govt. situated at Police Departmental Store, Gulshan Ground, Jammu have under a well designed criminal conspiracy rented out (under the garb of joint venture) the above said property to Hotel Mughal Darbar through its proprietor, Mr. Farooq Ahmed Dar by resorting to an illegal agreement dated 14th march, 2014 with above said Farooq Ahmed Dar for operating and managing a restaurant over the premises of police Departmental Store, Jammu under the name and style M/s Flavours of Kashmir and dishonestly allotted/rented the Govt. land/property to the beneficiary Farooq Ahmed Dar to confer undue benefit upon themselves

and the beneficiary. In both agreements entered into by the respective commandants of JKAP 9th Bn and IRP 10th Bn, the terms and conditions of the agreements have been structured in such a manner so as to cause undue benefit upon the proprietor of hotel Mughal Darbar. The correspondence made in this regard by the Armed Police headquarters reveals that instead of taking the matter/s with the competent authority i.e. Govt. the subordinate units have been directed to proceed further after observing all necessary codal formalities/financial implications. The acts omitted and committed on behalf of the officers of Armed Police Hqrs and Public servants/officers of JKAP 9th Bn and IRP 10th Bn prima facie constitute commission of offence punishable U/s 120-B r/w 5(2) P.C.Act Samvat 2006 and warrants cognizance. Since the occurrences are distinct i.e. one at Jammu and other at Srinagar and as such warrants registration of separate cases.

In view of the above, it is requested that formal cases into the allegations be registered under relevant provisions of law."

3. On the basis of aforesaid contents of the complaint and on the directions of the CHQ, J&K Srinagar, a case FIR bearing No.22/2017 for offences under Section 409 & 120-B RPC read with Section 5(2) of J&K Prevention of Corruption Act was registered at Police Station, Crime Branch, Kashmir with respect to lending of government property situated at Lake View Golf Course-cum- Public Environmental and Training Park, Boulvard and the investigation of the said case was entrusted to Deputy Superintendent of Police of Crime Branch, Mr. Farhat Jeelani.

4. So far as the allegation with regard to the lending of government property situated at Gulshan Ground, Jammu is concerned, a separate FIR bearing No.31/2017 for offences under Sections 409 & 120-B RPC read with

Section 5(2) of J&K Prevention of Corruption Act was registered at Police Station, Crime Branch, Jammu. In the said FIR it was alleged that the officers/officials of IRP 10th Bn having dominion in the capacity of public servants over the property of the government situated at Police Departmental Store, Gulshan Ground, Jammu had rented out the said property to the petitioner herein by resorting to illegal agreement dated 14.03.2014 and that the petitioner was running a restaurant under the name and style of M/s Flavours of Kashmir in the said rented property belonging to the government.

5. The petitioner has challenged the aforesaid FIR on the grounds that the subject matter of the impugned FIR involves a dispute, which is purely of a civil nature and the said dispute is arbitrable as per the Joint Venture Agreement executed by the petitioner with the authorities of the police department; that the impugned FIR is actuated with malice and though, the agreement, which is subject matter of the impugned FIR, was executed in the year 2014, no action was taken by the respondents for three long years; that the impugned FIR is a result of internal politics of police department and the real intent behind the FIR is to victimize certain police officers/officials, who were holding the office at the time of execution of the Joint Venture Agreement; that the petitioner has filed a Civil First Miscellaneous Appeal before the High Court and in order to defeat the decision in the said appeal, the respondents have resorted to lodging of the impugned FIR; that no offence is made out against the petitioner from a bare perusal of the contents of the FIR.

6. Respondents have resisted the petition by filing objections thereto. In their objections, the respondents have submitted that the Joint Venture Agreement, which is subject matter of the FIR, is void *ab inito* inasmuch as the

same has been executed without approval of the Competent Authority i.e. the Government. It is averred that the public servants, who had executed the aforesaid agreement with the petitioner had done so illegally, dishonestly and by abuse of their official position, as they had no authority to do so. According to the respondents, the petitioner hatched a criminal conspiracy with officers/officials of the Police Department, whereunder illegal agreement dated 14th March, 2014 came to be executed, which resulted in renting out of property of the Government in favour of the petitioner for running a restaurant and thus, undue benefit accrued to the petitioner. It is also averred by the respondents that the aforesaid agreement was, accordingly, cancelled vide communication dated 11.08.2014. Lastly, it has been contended that the investigation of the case is at its inception and the benefit, which has accrued to the petitioner under the aforesaid illegal agreement is yet to be ascertained. On the basis of the aforesaid facts, the respondents have sought dismissal of the petition.

7. The first ground that has been taken in the petition is that the subject FIR is actuated by malice and vengeance against the petitioner. In this regard it is pertinent to note that after cancellation of the Joint Venture Agreement, which is subject matter of the FIR in question, the petitioner had filed a petition under Section 9 of the J&K Arbitration and Conciliation Act for seeking an order of stay of the letter of cancellation, as the Joint Venture Agreement contained an Arbitration Clause. The said petition came to be dismissed by the learned Principal District Judge, Jammu vide his order dated 28.10.2016, which order is subject matter of challenge before this Court in CIMA No.236/2016 and vide order dated 29.11.2016, the impugned order of

cancellation has been made subject to the outcome of the appeal and the physical status on spot as on said date has been directed to be maintained.

8. The aforesaid appeal is stated to be still pending before this Court. It appears that the respondents, without waiting for the outcome of the said appeal, have resorted to initiation of criminal proceedings against the petitioner just to overreach the civil proceedings pending between the parties. The contention of the petitioner in this behalf appears to be well founded.

9. It is pertinent to mention here that the FIR No.22/2017 registered with the Police Station, Crime Branch, Kashmir, on the basis of same complaint, which formed the basis of the impugned FIR, came to be challenged by the petitioner before the Srinagar Wing of this Court by filing a petition bearing Pet. U/s 561-A No.176/2017 titled *Farooq Ahmed Dar v. State of J&K and others*. Similar grounds, as have been taken in the instant petition, were taken by the petitioner in the said petition. The said petition came to be decided by a Coordinate Bench of Srinagar Wing of this Court vide judgment dated 28.06.2018, whereby the petition was allowed and the FIR No.22/2017 registered with Police Station, Crime Branch, Kashmir was quashed.

10. The Court in the said case dealt with a similar contention, as the petitioner had challenged the action of his eviction from running the eatery point, which was allotted in his favour under a similar Joint Venture Agreement dated 19.05.2014, by way of a writ petition (OWP No.1482/2016). The Court after taking note of the order passed in the writ petition proceeded to deal with the contention of the petitioner, which was similar to the one raised in the instant petition, in the following manner:-

"14) The respondents, the protectors of the life and limb of the citizens of the State and the ace champions of the law and justice instead of complying with the mandate of the judgment/order detailed above that directed the respondent No.2 i.e., Director General of Police, J&K Government, to look into the grievances of the petitioner and to pass an appropriate order as warranted under law taking into account the entire case coupled with the fact that the petitioner has made huge investment in operating the restaurant for the last two years, which fact is not denied by the respondents flouted this order with impunity. The order also directed that the refusal of the respondents to allow the petitioner to run the canteen may have civil consequences including the claim for damages. The order also stated that the entire process shall be undertaken and finalized within a period of eight weeks from the date the copy of the order is served upon the respondents.

15) The respondents did not pass any order in tune and in line with the aforesaid judgment. They did not settle or circle out the grievances of the petitioner. They frustrated the judgment passed by the Writ court by registering an FIR against the petitioner and others on the 25th July, 2017 i.e. after an approximate period of two months and two days from the date of the passing of the order aforesaid. The respondents in registering the FIR against the petitioner did not even have scant and subtle respect for the order dated 24.05.2017 passed by this Court. The respondents gave a complete goby to the said order. They failed to abide by its terms and instead of seeking its compliance devised ways and means to wreak vengeance against the petitioner by registering a case against him and in doing so they succeeded in hoodwinking the process of law."

The aforesaid observations are applicable with full force to the facts of the instant case because in the instant case also this Court vide order

dated 29.11.2016 passed in CIMA No.236/2016 had directed the respondents to maintain the physical status as on the said date and the cancellation of the Agreement was made subject to outcome of the appeal, which is still pending. Therefore, the Court has absolutely no hesitation in holding that respondents have acted with malice against the petitioner while initiating criminal proceedings against him, so as to circumvent the outcome of the civil appeal pending before this Court.

11. The next contention raised by the petitioner is that the dispute between the parties is purely of civil nature, as such, the subject FIR is liable to be quashed. As already noted, the Joint Venture Agreement between the parties, which is subject matter of the FIR, contains an Arbitration Clause, which provides for reference of disputes arising between the parties to a panel of Arbitrators; one each to be appointed by the parties. This clearly shows that the disputes between the parties are essentially of a civil nature, which could be resolved/adjudicated by having recourse to the forum of Arbitration. The respondents, as such, could not initiate criminal proceedings against the petitioner in respect of the dispute.

12. This Court in the case filed by the petitioner before the Srinagar Wing of the High Court, which came to be decided on 28.06.2018, dealt with the aforesaid issue that had arisen in the said case, as a similar Arbitration Clause was there in the Joint Venture Agreement, which was subject matter of the FIR registered with Crime Branch, Kashmir, in the following manner:-

> *"17) On the face of this arbitration clause and the agreement entered into by the parties what can be inferred is that the registration of the FIR against the petitioner is totally*

unwarranted, unjust and against the law for the elementary reason that the case has a civil lineage and it involves a civil dispute. It had to be referred to an Arbitrator for an effective adjudication in terms of the conditions incorporated in the agreement. Therefore, on the analogy of what has been stated above, even if the allegations made in the FIR are taken at their face value and accepted in their entirety, these do not constitute an offence or make out a case against the accused. Respondents in pursuing their claim had to knock at the doors of the civil Court or to refer the matter to arbitration. They cannot set the criminal law into motion in implicating the petitioner for the commission of the offences for which the FIR has been registered against him. In "Joseph Salavaraj Vs. State of Gujrat & Ors." reported in "2011 7 SCC 59", the Supreme Court has viewed that a purely civil dispute can be given a colour of a criminal offence to wreak the vengeance against the applicant and it is necessary to draw a distinction between a civil wrong and a criminal one and the applicant cannot be allowed to go through the rigmarole of a criminal prosecution for a long number of years, even when admittedly a civil suit has been filed."

13. It has been next contended by the petitioner that, at best, the act of execution of the Joint Venture Agreement in question without approval of the Government would constitute an illegality but the same does not constitute a criminal act. In this regard it is to be noted that respondents in their reply to the petition filed by the petitioner under Section 9 of the Arbitration and Conciliation Act did not utter even a word to even remotely suggest that the execution of the Joint Venture Agreement involved exchange of bribe or embezzlement but now they have come up with a contention that the transaction involves misappropriation and conferment of undue benefit upon the petitioner.

14. A contention similar to the above was raised by the petitioner in the petition filed by him before Srinagar Wing of the High Court. The Court, while relying upon the ratio laid down by the Supreme Court in the case of **C.K.Jaffer Sharief v. State (2013) 1 SCC 205**, held that mere allegation of illegality does not amount to the commission of offences under which the FIR has been registered. The aforesaid observation of the Court squarely applies to the instant case, as the facts of this case are identical to the facts of the case decided by the Srinagar Wing of the Court.

15. Lastly, it is contended by the petitioner that in the instant case there has been a delay of more than three years in lodging of the FIR and the respondents without there being any explanation for the delay and without conducting preliminary enquiry, straightway registered the impugned FIR, which shows the malice and vengeance of respondents against the petitioner.

16. In the instant case, the Joint Venture Agreement was executed on 14th March, 2014 and the same was cancelled on 11.08.2014. The FIR in this case has been registered on 25.07.2017 i.e., almost after three years. Admittedly, there is no explanation in the FIR regarding the delay in lodging the same. It is also an admitted fact that preliminary enquiry has not been conducted and the subject FIR has been registered on the basis of a communication dated 17.07.2017 of Police Headquarter.

17. There cannot be different yardsticks in respect of registration of a case on the basis of a complaint made by a common man and complaint lodged by high ranking police officers. The procedure in both the cases has to be the same. The Constitution Bench of the Supreme Court in the case of ***Lalita Kumari v. State of U.P. (2014) 2 SCC 1***, while making it incumbent upon the

Incharge of a Police Station to register FIR in all cases where a complaint discloses commission of cognizable offences, has stressed upon the need for holding a preliminary enquiry in certain categories of cases including the cases where there is delay/laches in initiating criminal proceedings, for example three months' delay in reporting the matter without satisfactorily explaining the reason for delay. The fact that in the instant case the respondents did not feel it necessary to conduct preliminary enquiry even when the complaint was delayed by about three years, shows that the launching of criminal prosecution against the petitioner is motivated with malice.

18. The aforesaid issue was also a subject matter of discussion in the case decided by the Srinagar Wing of the High Court (supra). The Court while, relying on certain observations of the Supreme Court in the case of **Priyanka Srivastava and anr. V. State of U.P. and others, (2015) 6 SCC 287**, in which ratio laid down by the Supreme Court in *Lalita Kumari's* case has been explained, concluded as under:-

> *"21) Testing the instant case on the touchstone of the above, it was on 25.07.2017 that the authorities of Police Station Crime Branch Kashmir registered an FIR against the petitioner and others and that too on the directions of the higher ups as gets revealed from the perusal of the FIR itself. SHO Police Station Crime Branch Kashmir did not conduct any independent enquiry into the matter as provided in the law laid down above before registering the FIR. He buckled under the pressure of his superiors who addressed a communication directing him to register an FIR. The petitioner had executed the agreement with the police department on 19th of May, 2014 under the shade and cover of which he started running the eatery (Food*

Point). The respondents did not think it expedient to evict the petitioner from the eatery for a long span of more than three years. The respondents did not feel the need to close down the eatery at any point of time during this interregnum. They after rising from a deep slumber and after a great lull forced out and dislodged the petitioner from the premises and took umbrage under the plea that the agreement did not have the backing and support of the competent authority, although the contention of the petitioner, that the respondents have been running a canteen in the Police Headquarters at Jammu through M/S Shakti Sweets and Sh. Suhail Ahmad Mir and the PHQ Canteen is being run by Sh. Abdul Aziz Chashoo has not been denied by the respondents. It is also contended that in making these allotments no tenders have been invited, meaning thereby that the case of the petitioner has been treated as a sui-generis one and it is only he who has been discriminated against by taking shelter under a plea which is unwarranted when tested on the strength of the allotments made in favour of the aforesaid persons. Ours is a welfare state in which every person has to be looked after on the same pedestal. The respondents showed the door to the petitioner only after this Court directed them to accord consideration to his grievances and pass an appropriate order in consonance with the law. The FIR as is reiterated here was registered much after the time specified in the law laid down above, which emphatically provides that an inquiry requires to be made where there is abnormal delay/laches in initiating the prosecution. No reason has been spelt out as to how and why this delay occurred in filing the complaint before the Court though the respondents were acquainted and familiar with the contents of the agreement and running of the eatery by the petitioner from the very inception."

19. By virtue of the aforesaid judgment, the FIR that was subject matter of the petition before the Srinagar Wing of this Court stands quashed. The said judgment has acquired finality, as the Special Leave Petition (Diary No.32682/2019) filed by the respondents against the said judgment stands dismissed by the Supreme Court vide its order dated 06.07.2020.

20. In view of the fact that FIR arising out of the complaint, which has given rise to the impugned FIR, stands quashed by this Court, no fruitful purpose would be served by allowing the investigation in the impugned FIR to go on, particularly when the allegations made in the complaint pertaining to the Joint Venture Agreement pertaining to the property situated at Jammu are exactly in similar terms to the allegations made against the petitioner regarding a similar Joint Venture Agreement pertaining to the property that was rented out to him at Srinagar. The aforesaid judgment, therefore, applies on all fours to the instant case and for the reasons discussed in the foregoing paras, there is no scope for this Court to take a different view in the matter.

21. For the foregoing reasons, the petition is allowed and the FIR No.37/2017 registered with Police Station, Crime Branch, Jammu as well as the proceedings emanating therefrom are quashed.

(SANJAY DHAR)
JUDGE

Jammu
22.12.2020
Vinod

Whether the order is speaking: Yes
Whether the order is reportable: Yes

VINOD KUMAR
2020.12.23 11:39
I attest to the accuracy and
integrity of this document