



CRL M.P.No.9285 of 2023

CRL M.P.No.9285 of 2023
in
CRL.O.P.No.539 of 2022

M.NIRMAL KUMAR, J.

This Criminal Miscellaneous Petition has been filed praying to recall the order, dated 21.01.2022 in Crl.O.P.No.539 of 2022.

2. The petitioner herein is the 2nd respondent in Crl.O.P.No.539 of 2022 and defacto complainant in Crime No.126 of 2021.

3. This Court, by an order, dated 21.01.2022, quashed the FIR in Crime No.126 of 2021 primarily on the ground that Memorandum of Understanding (MOU) entered into between the parties and the issues got resolved to the satisfaction of the parties, but with condition that the undertakings are fulfilled and complied within the stipulated period. The Memorandum of Compromise, dated 17.11.2021 and 25.12.2021 would be the basis for compromise and consent for quashing the FIR, thereafter, on such terms, this Court directed the respondents 1 and 2 herein, who earlier deposited a sum of Rs.2,00,00,000/-, to the credit of Crime No.126 of 2021, was directed to be returned to the petitioner herein, on filing of appropriate petition. Further, the 2nd respondent to give No Objection for lifting prohibitory orders by the Police, who earlier seized the Bank Accounts. Further, the Lookout Circular issued against A1, A2 and A3 in



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Crime No.126 of 2021 in Passport Nos.Z2382902, Z2382903 and Z2382901 to be withdrawn and the balance agreed amount of Rs.7,92,00,000/- to be paid on or before 21.03.2023. Thereafter, a compromise quash order passed. It is reminded that the quash order is not on merits. Subsequent to the order of this Court, a sum of Rs.2,00,00,000/-, as agreed received by the petitioner. Steps taken to issue Withdraw Lookout Circular and now, the Prohibitory Orders on the bank accounts lifted.

4. The contention of the petitioner is that the respondents 1 and 2 herein now failed to comply with the conditional order passed by this Court based on Memorandum of Understanding. The respondents 1 and 2 sold their house and became incommunicable, absconded, not traceable. Presently, they are using the office address, as communication address, where no activities is taking place. Their phone numbers are switched of. The whereabouts of the 1st and 2nd respondents kept in secret. After defreezing the bank accounts, transactions done to their benefits, the funds got transferred and concealed. As per the Memorandum of Understanding, agreement is to repay the amount of Rs.7,92,00,000/-, within one year i.e., on or before 20.01.2023. On that promise, the MOU was entered. The petitioner / defacto complainant given his No Objection



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for compromise quash of case in Crime No.126 of 2021, since the petitioner got deceived on the promise made by the respondents 2 and 3 to strictly adhere to MOU. But, now, it is found that they have no intention to repay and settle the dispute, as per their undertaking given to this Court. Thus, they cheated the petitioner as well as this Court by knowingly giving a false promise with no intention to comply with MOU.

5. Respondents 1 and 2, after obtaining favourable orders from this Court, in complete breach of the understanding are now gone scot-free and planning to flee away from the Country to Australia, where their son is residing. During earlier transactions, amounts already transferred to Australia. After obtaining the orders of this Court and defreezing all the bank accounts, the respondents 1 and 2 sold the property to the tune of Rs.29,00,00,000/- and concealed the amount and not paid the petitioner, as per the undertaking given before this Court. Hence, for non-compliance of the conditional order passed by this Court, defacto complainant filed the present petition to recall the order, dated 21.01.2022.



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6. The learned Senior Counsel appearing for the respondents 1 and 2 submitted that after compromise quash order passed by this Court on 21.11.2022, there have been further development, which created some impediment in complying the orders of this Court. The learned Senior Counsel raised three points, (i) Whether this Court has power to review the order already passed, if there is any breach or violation of agreement, the same would only result in consequential action in civil and criminal law and not by review of the earlier order passed. (ii) Whether quashing a case under Section 482 Cr.P.C., can be recalled and (iii) Whether it is an act of fraud or misrepresentation, further the only remedy available is to file the suit or other proceedings in a manner known to law. Section 362 Cr.P.C., is the absolute bar. He further submitted that India Cements has filed a petition before NCLT against the respondents and the petitioners herein are respondents in NCLT, who are aware about the proceedings initiated and pending from January 2023. Now, a Resolution Professional appointed, the Board suspended, Moratorium issued and no amount from the Company can be paid to the respondents, only by filing appropriate petition in NCLT proceedings, the condition can be complied. Hence, some delay occurred, which is beyond the control of the respondents 1 and 2. The respondents 1 and 2 placed considerable hope on Perumbakkam property to liquidate cash so that the petitioner could be



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paid, as per the undertaking. Due to the NCLT order, though the respondents 1 and 2 have property worth more than 100 crores, they are unable to liquidate any of them and make payments. The respondents 1 and 2 are confident that they would succeed in the NCLT proceedings, get appropriate orders, thereafter, comply with the undertakings. He further submitted that the respondents 1 and 2 are very much available, they have not travelled abroad till date and as of now, there is no contemplation of any travel. The apprehension of the petitioner that the respondents 1 and 2 are not available, intend to flee abroad, is unfounded, made for the purpose of the above petition to cast aspersion against them.

7. The learned Senior Counsel further submitted that as per the Memorandum of Understanding, the balance amount of Rs.7,92,00,000/- was agreed to be paid on or before 21.03.2023. For which petitioner was to cooperate for the sale of Perumbakkam property. On 12.02.2023, the respondent No. 1 had a meeting at Taj Coromandel, appraised the efforts taken by him including his efforts to arrive at a compromise with the Delhi investor who had been preventing the sale of said Perumbakkam property belonging to Call Express Construction India Private Limited (CEC). The representative of the Delhi investor had come to Chennai on 02.03.2023,



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met all the creditors of CEC individually. This discussion took place to work out a way to amicably settle all creditors of CEC, including the petitioner. In the meanwhile, M/s.India Cements Ltd., a creditor of CEC had initiated the proceedings under Section 9 of Insolvency and Bankruptcy Code before the NCLT, Chennai, seeking initiation of CIRP process against CEC. The said application filed by India Cements was admitted on 05.07.2023 and the powers of the 1st and 2nd respondents, as Directors now superseded by appointing a Interim Resolution Professional(IRP) by NCLT and a moratorium commenced for CEC, which effectively prohibits CEC from transferring, encumbering, alienating or disposing off CEC's assets and further prohibits recovery of any property by any owner or lessor where such property is occupied or in possession of the respondent. Due to the said order, it has become legally impossible to comply with the terms of MOU by operation of law.

8. Both the properties of CEC not sold and presently, they are under the control of Interim Resolution Professional, as per the orders of the NCLT. Sofar, the respondents 1 and 2 had paid an amount of Rs.8,00,00,000/- towards total dues, they are unable to pay the balance agreed due of Rs.7,92,00,000/- for the above said reasons. The respondents after the compromise quash order passed by this Court,



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never left this Country and they are facing proceedings before NCLT, NCLAT, Madras High Court, Delhi High Court and other places. All notices and summons received and responded by the respondents 1 and 2, who are taking legal course in defending and pursuing their cases. The respondents 1 and 2 deny the allegation that they have sold the house where they are staying. The respondents are staying in No.20, Poes Road, 1st Street, Teynampet, Chennai, for over 60 years and continue to stay there. The respondents 1 and 2 could not comply with the order passed by this Court in Crl.O.P.No.539 of 2022, dated 21.01.2022, due to subsequent development which is beyond their control.

9. In support of his contention, the learned senior counsel relied upon the Judgments of the Apex Court in the case of ***Hari Singh Mann Vs. Harbhajan Singh Bajwa and Others*** reported in ***(2001 (1) SCC 169)***; ***Nazma Vs. Javed Alias Anjum*** reported in ***(2013 (1) SCC 376)*** and ***State of Kerala Vs. M.M.Nambiar Nayar*** reported in ***(AIR 2001 SC 2145)***; ***Gimpex Private Limited Vs. Manoj Goel*** reported in ***(2022 (11) SCC 705)***. Further, relied on the Judgment of this Court in ***Aathi Sankar Vs. State and Ors*** reported in ***2022 (2) MLJ (Crl) 459*** and the order of this Court in the case of ***R.Sivakala Vs. D.Sethuram*** made in ***Crl.O.P.No.13894 of 2019***. He further submitted that the



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Apex Court in ***Hari Singh Mann's*** case (*cited supra*) held that, 'the practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance, it is the abuse of the process of the court. Further, stressed the point that the High Court either in exercise of appellate or revisional jurisdiction, cannot entertain review or revision against that judgment, there is no provision in the Criminal Procedure Code which would enable the High Court to review the same or to exercise the revisional jurisdiction. This principle followed in the case of ***Nazma's case*** (*cited supra*). Further, referring to the ***Gimpex*** case, (*cited supra*) the learned Senior Counsel submitted that in the event of any violation of agreement, the same may result in consequential action in civil and criminal law. Further, once the compromise was agreed and complaint has been quashed the parties must proceed with the remedies available in law under the settlement agreement and any violation of the agreement, the same may result in consequential action in civil and criminal law. This principle followed in ***Aathi Sankar*** case (*cited supra*) and thus submitted that in this case Section 362 Cr.P.C., is bar and no review or revision is permissible. Hence, prayed for dismissal of the above petition.



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10. Considering the submission and on perusal of the materials it is not in dispute that this Court had quashed the Crime No.126 of 2021 on the basis of Compromise and MOU entered between the petitioner and the respondents 1 and 2 herein, who are defacto complainant and accused in Crime No.126 of 2021. The compromise quash order was passed only on terms and conditions. The Joint Compromise submitted before this Court is to the effect that the parties shall agree and adhere strictly to the MOU, dated 17.11.2021 and 25.12.2021, as recorded by the sole Arbitrator in his Award. On the undertaking given by the respondents 1 and 2 to strictly follow, comply and make future payment of Rs.7,92,00,000/- on or before 20.01.2023, this Court had passed the compromise quash order. As per the order, whatever may come, the conditions to be complied on or before 20.01.2023.

11. In this case, the contention of the learned Senior Counsel that NCLT proceedings had intervened and that is the reason they could not comply to the MOU and undertaking given before this Court, is not an acceptable reason. According to the 2nd respondent, the Indian Cements Ltd., a Creditor of CEC initiated the proceedings under Section 9 of the Insolvency and Bankruptcy Code before the NCLT, Chennai in



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(CP/IB/17/(CHE)/2023) on 05.07.2023, which is six months beyond the period by which the conditions ought to have complied with. For non-compliance within the stipulated period, the respondents 1 and 2 cannot now take shelter citing NCLT order, it is well beyond the stipulated period of one year. Nothing has been disclosed by the respondent about India Cements Company being a creditor. This credit liability was within the knowledge of the respondents, knowingly had given undertaking entered into MOU to settle all the issues with the petitioner. It is seen that the respondent 1 and 2 are liable to India Cements to a tune of Rs.1,02,00,000/- lending between 02.04.2017 and 02.08.2018, which is acknowledged by the respondents' letter dated 19.11.2019. This fact is neither disclosed nor mentioned in MOU. It is not known who are the other creditors. If the respondents 1 and 2 contention is to be accepted, then MOUs and undertaking to discharge liabilities all will remain in paper. This cannot be entertained or encouraged. The MOU and compromise projected is nothing but a ploy, facilitating the respondents to tide over and get relived from criminal case and liabilities. This Court had passed only a conditional order on the undertaking of the respondents 1 and 2, it is seen that the the conditional order not complied, compromise and MOU not honoured and fulfilled.



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12. The contention of the respondents 1 and 2 is that NCLT proceedings had caused an obstacle for non-compliance and making payment of Rs.7,92,00,000/- to the petitioner within the stipulated time, it is the making of the respondents 1 and 2, for which they are only to be blamed. The other contention recalling the earlier order of this Court is not permissible in view of the bar under Section 362 of Cr.P.C., is also not acceptable. It is a settled legal position that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order.

13. The Hon'ble Apex Court in the case of "***State of Punjab Versus Davinder Pal Singh Bhullar and others reported in (2011) 14 Supreme Court Cases 770***" held that the High Court not denuded of inherent power to recall a judgment or order, which is consistently followed and recently in the case of "***Daxaben Versus The State of Gujarat and Ors., reported in 2022 SCC OnLine SC 936***" the Hon'ble Apex Court had reiterated the principle and held that High Court was not denuded of inherent power to recall a judgment and/or order which was without jurisdiction, or in violation of principles of natural justice, or



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passed without giving an opportunity of hearing to a party affected by the order or where an order was obtained by abusing the process of Court which would really amount to its being without jurisdiction. Inherent powers can be exercised to recall such orders. In this case, the citations relied upon by the learned Senior Counsel for the respondents 1 and 2 on the facts of the cases therein were decided on merits and not on compromise quash. In the **Bhullar** case (cited supra), the Hon'ble Apex Court had held that the power of recall is different from the power of altering/reviewing the judgment. The party seeking recall/alteration has to establish that it was not at fault.

14. In this case, the petitioner/defacto complainant is not at fault for non-compliance of the consequential undertaking given by the respondents 1 and 2 in the compromise quash proceedings. To secure the ends of justice and to prevent the abuse of process of Court, this Court is conferred with the inherent jurisdiction under Section 482 Cr.P.C., to do the right and undo a wrong in the course of administration of justice. Hence, the order passed by this Court in Crl.O.P.No.539 of 2022, dated 21.01.2022 is hereby recalled and this petition is allowed. The investigation in Crime No.126 of 2021 is restored to the date of 21.01.2022 and now the investigation to resume.



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15. The respondent police is directed to proceed with the investigation, take appropriate steps by issuing request, directions, orders to the banks, Passport Authorities and others, as per the requirement of investigation and as per the Code. Moratorium is not applicable and cannot be a reason to stall the investigation of the crime. The respondent Police to continue with the investigation and complete the same and file the final report, without further delay, as expeditiously as possible.

29.09.2023

Index : Yes / No
Internet : Yes / No

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