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Krishnakumar vs State of Kerala

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Court : Kerala Orders

Decided On : Apr-04-2022

Judge : Honourable Mr. Justice K.Haripal

Appeal No. : Crl.MC/539/2019

Appellant : Krishnakumar

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE K.HARIPAL MONDAY, THE 4TH DAY OF APRIL 2022 / 14TH CHAITHRA, 1944 CRL.MC NO. 539 OF 2019 [S.T.NO.4893/2018 OF JUDICIAL MAGISTRATE OF FIRST CLASS COURT-I, VARKALA] PETITIONER/ACCUSED: KRISHNAKUMAR AGED 48 YEARS S/O.VELAYUDHAN PILLAI, KRISHNATHEERAM RESORT, THIRUVAMBADY, VARKALA, THIRUVANANTHAPURAM-695 141. BY ADV R.T.PRADEEP RESPONDENTS/STATE & DE FACTO COMPLAINANT:

1 STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM -682031. 2 SECRETARY, VARKALA MUNICIPALITY, MUNICIPAL OFFICE, VARKALA,

THIRUVANANTHAPURAM-695 141. BY ADVS. SRI.V.RENJITH KUMAR, SC VARKALA MUNICIPALITY SHRI.K.SIJU, SC VARKALA MUNICIPALITY OTHER PRESENT: SRI. HRITHWIK C.S-SR.PP THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 09.03.2022, THE COURT ON 04.04.2022 PASSED THE FOLLOWING: :-2-:

O R D E R

Petitioner is the accused in S.T.No.4893/2018 on

the file of the Judicial First Class Magistrate Court, Varkala, which arose from the complaint preferred by the second respondent alleging offences under Sections 389 and 406 of the Kerala Municipality Act,1994 (hereinafter referred to for short as 'the Municipality Act') and Rules 4 and 159 of the Kerala Municipality Building Rules (hereinafter referred to for short as 'the Rules') and Section 188 of the Indian Penal Code.

2. The short facts of the case are as follows:- Petitioner is running a resort by name

'Krishnathreertham' in Thiruvambady beach at Varkala in Thiruvananthapuram district. According to the petitioner, he has 50 cents of land comprised in Sy.Nos.10 and 11 of Varkala Village. He has given two cents of land free of cost through the middle of the property for putting a walkway at a width of six feet which has virtually bifurcated his property; he has property on either side of

:-3-:

the walkway; the walkway was created for beautification of the beach; the walkway terminates at the beach. Ever since from the starting of the resort, a kitchen and open air restaurant are being functioned with sea view as integral part of the resort. The kitchen and open air restaurant are thatched with cadjan leaves and the structure is temporary, which was in existence from 2005 onwards. The second respondent Municipality has acquiesced with the temporary structure housing, open air restaurant and kitchen. In the torrential rain, the temporary

structure collapsed and hence, he resurrected it with RCC column footing and column pillars, which are also of temporary nature. The work was done as repair and maintenance, taking into account the fastly approaching season. Such temporary structures were built up in the place of the earlier structures existed at the place. While so, on 3.7.2018, he was served with a stop memo, Annexure-II for stopping the unauthorised construction.

3. According to the petitioner, Annexure-II was followed :-4-: by provisional order under Section 406(1) of the Municipality Act dated 9.7.2018 as Annexure-III. But he could not make his objection against the provisional order. Thereafter, Annexure-IV

order was passed with showcause notice as to why his resort shall

not be closed, cancelling the licence. While he was served with Annexure-V final order dated 27.7.2018 issued under Section 406(4) of the Municipality Act directing him to demolish and remove the structure within seven days from the date of receipt of the order, he gave Annexure-VI reply to the same and then moved the Tribunal for Local Self Government Institutions, Thiruvananthapuram with Appeal No.492/2018 and obtained an interim order staying the operation of Annexure-V final order, until further orders. According to the petitioner, Annexure-I complaint was preferred after obtaining Annexure -VII order from the Tribunal for Local Self Government Institutions. According to the petitioner, Annexure-I complaint was mischievous and all proceedings are liable to be quashed. :-5-:

4. The second respondent/Secretary of the Varkala

Municipality filed a statement opposing the prayer for quashing the proceedings. According to him, the complaint was laid after giving memo to stop the unauthorised construction followed by the provisional order for demolishing the structure under Section 406(1) of the Municipality Act and then the final order under

Section 406(4). The Tribunal for Local Self Government Institutions had only stayed the operation of Annexure-V order; Annexure-I complaint was preferred by the petitioner alleging offence under Section 188 IPC and Rules 4 and 159 of the Rules; the second respondent is perfectly justified in preferring such a complaint, which is legally valid and maintainable and hence the Crl.M.C. is sought to be dismissed.

5. I heard the learned counsel for the petitioner

elaborately, besides the learned Public Prosecutor and also the learned Standing Counsel for the second respondent. Inviting my attention to Section 511 of the Municipality Act, learned counsel :-6-: submitted that Sections 389 and 406 of the Municipality Act do not fall within the scope of the 4th Schedule of the Act. Therefore, the Act does not contemplate initiation of criminal proceedings against the person, who violates provisions under Sections 389 and 406 of

the Act. According to him, even though the complaint was preferred on 17.9.2018 and the matter stood adjourned to 22.9.2018 for taking the sworn statement of the complainant, he did not turn up and the case was taken on file without examining the complainant on oath which is bad. In this connection he relied on the decision reported in Birla Corporation Limited v. Adventz Investments and Holdings Limited and others [(2019) 16 SCC 610]. According to him, Section 515 of the Act has been deliberately avoided, it can be invoked only in respect of a matter attained finality. More over, in the light of Annexure VII

order of the Tribunal for Local Self Government Institutions, the

second respondent is not justified in initiating criminal proceedings against the petitioner. According to him, Section 188 of IPC also is :-7-:

not attracted since it deals with disobedience of the order

promulgated by public servants under Sections 133,144,145 of Chapter X of the Code of Criminal Procedure. That the court had taken the case on file without proper application of mind.

6. On the other hand, learned Standing Counsel for the

second respondent pointed out that Annexure VII order stays only the order of demolition which does not stand on the way of initiating criminal proceedings against the petitioner. According to him, the Tribunal has not stayed the operation of the order. Referring to the decision reported in Anil Kumar v. State of Kerala [2012(2) KLT 360], he stated that incorporation of wrong provision of law has no significance, the second respondent had initiated proceedings on finding that unauthorised constructions were put up by the petitioner without obtaining licence under the Rules; then a provisional order was passed, showcause notice was also issued to the petitioner and thereafter, final order was passed directing him to demolish the unauthorised construction which was

:-8-: not complied with and criminal proceedings were initiated as the last resort. So he strongly pleaded for dismissal of the Crl.M.C.

7. One of the grounds attacking the Criminal proceedings is that the petitioner is entitled to seek permission from the Coastal

Zone Regulation Authority, that he had already moved the Authority, claiming that he is entitled to make use of the property by putting permanent structures despite the fact that the structure falls within 50 to 100 meters distance from the High Tide Line. According to the petitioner, once he gets sanction from the Authority, the allegations against him will pale into insignificance. When the matter was heard, the learned counsel for the petitioner was specifically asked as to whether he had obtained any favourable orders from the Coastal Zone Regulation Authority, he replied that the Authority has not yet taken up the matter. Anyhow, it does not seem that, that has any bearing in the question involved in the complaint and in the Crl.M.C. The Crl.M.C. is filed to quash Annexure-I complaint, which has nothing to do with the distance

:-9-:

rule followed by the Coastal Zone Regulation Authority. Even if it is beyond the ambit of the Coastal Zone Regulation, still so long as the alleged structure situates

in the limits of Varkala Municipality, the petitioner is liable to obtain a permit as provided under Section 389 of the Municipality Act and Rule 4 of the Rules. Petitioner has no case that he has obtained any such licence or permit for putting up a permanent structure.

8. Petitioner wanted to convince the court that in the place

of a temporary structure, in the nature of kitchen and open air restaurant, which were made of cadjan leaves, when it fell down, he wanted to put up another temporary structure. According to him, the Municipality is acquiesced with temporary structure from 2005 onwards. It does not stand to law that principle of acquiescence would work against a statutory body like the Municipality. Secondly, and more importantly, in the place of a structure made of cadjan leaves, the petitioner has put up RCC column footing and column pillars, which according to him, are :-10-:

temporary structures. At no stretch of imagination, it could be said that the structures put up with RCC column and RCC column footing and column pillars are temporary structures. It appears from the face of the statements of the petitioner itself that he had put up structures without obtaining permit and licence from the Municipality.

9. Thus, the Municipality had at first issued a stop memo,

followed by provisional order of demolition, which was not responded. Thereafter, a show cause notice was served on him and then Annexure V final order was passed directing him to demolish the new construction made in his property measuring 16.5 m x 12 m foundation column footing and RCC column up to roof being limited to 15 in numbers and partition was made with solid blocks. Those are permanent structures and he was directed to demolish and remove within seven days from the date of receipt of the notice which was not complied with. Then he moved the Tribunal for Local Self Government and obtained an order of stay of

:-11-: demolition. As already stated, Annexure I complaint was preferred after issuance of Annexure VII order issued by the Tribunal for Local Self Government

Institutions.

10. But the order passed by the Tribunal has nothing to

do with the criminal proceedings initiated against the petitioner. There is substance in the contention of the learned counsel for the petitioner that Sections 389 and 406 are not falling within the scope of Section 511 of the Act as the 4th Schedule does not take in Sections 389 and 406 of the Act. All the same, as rightly pointed out by the learned counsel for the second respondent, incorporation of a wrong provision of law cannot obliterate the entire proceedings initiated against the petitioner.

11. There are reasons to believe that the petitioner had put

up permanent structures in his property without obtaining valid sanction and permission from the Municipality, which is in violation of the statutory provisions. He had also not obeyed the direction issued by the second respondent public servant to :-12-: demolish and remove structures. Therefore, invocation of Section 188 of IPC cannot be faulted.

12. At this stage, learned counsel relying on Birla

Corporation Limited (supra) contended that in the absence of examination of the complainant under Section 200 Cr.P.C., the court ought not to have taken the complaint on file. But, the second respondent had preferred a complaint in his capacity as the Secretary of the Municipality. He is a public servant as defined in Section 21 of the IPC. Of course, Section 200 of Cr.P.C. mandates that when a complaint is preferred, the complainant has to be examined, but proviso to the Section says that when the complaint is made in writing, the Magistrate need not examine the complainant and witnesses, if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the

complaint. As the second respondent preferred Annexure-I complaint in his capacity as the Secretary of the Municipality, therefore clause (a) under the proviso to Section 200 saves his :-13-: examination on oath. That means, non-examination of the Secretary prior to taking cognizance has no legal

consequences.

13. Referring to Section 515 of the Act, learned counsel submitted that the proceedings can be initiated only on completion of the alleged construction and therefore, Section 515 also cannot

be attracted. As already pointed out, incorporation of a wrong provision of law has no legal consequence. Here it is a summons trial proceedings. More over a reading of Section 515(a) makes it clear that where the construction or reconstruction of any building or digging of any well " (a) is commenced without the permission of the Secretary", even that would attract the penal provisions under the section.

14. On consideration of all these aspects, I have no doubt that the initiation of proceedings under Annexure-I cannot justifiably be called in question. :-14-: Crl.M.C. is devoid of merit and is dismissed. When the order was pronounced, the learned counsel for

the petitioner submitted that the dismissal of this Crl.M.C. may not stand on the way of compounding the offences under the Kerala Municipality (Compounding of Offences) Rules,1996. If the offences alleged against the petitioner are compoundable under the above Rules, it is made clear that this order shall not stand on the way of such compounding.

sd/- K.HARIPAL, Judge MBS/ :-15-: APPENDIX OF CRL.MC 539/2019 PETITIONER ANNEXURES ANNEXURE I TRUE COPY OF COMPLAINT DATED NIL BY 2ND RESPONDENT BEFORE JUDICIAL FIRST CLASS MAGISTRATE COURT, VARKALA WITH CONNECTED DOCUMENTS. ANNEXURE II TRUE COPY OF STOP MEMO DATED 3.7.2018 ISSUED BY THE 2ND RESPONDENT. ANNEXURE III TRUE COPY OF PROVISIONAL ORDER DATED 9.7.2018 UNDER SECTION 406(1) OF THE KERALA MUNICIPALITY ACT, 1994. ANNEXURE IV TRUE COPY OF NOTICE DATED 19.7.2018 ISSUED BY 2ND RESPONDENT. ANNEXURE V TRUE COPY OF ORDER DATED 27.7.2018 UNDER SECTION 406(3) OF THE ACT OF THE 2ND RESPONDENT. ANNEXURE VI TRUE COPY OF OBJECTION DATED 30.7.2018 SEEKING TIME

BEFORE 2ND RESPONDENT ON THE IMPUGNED ORDER. ANNEXURE VII TRUE COPY OF ORDER DATED 1.8.2018 IN I.A.NO.1099/2018 IN APPEAL NO.492/2018 BY THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS.

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