

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 11th May, 2017
Decided on: 31st May, 2017

+ **CRL.M.C. 1777/2011 and Crl. M.A. No. 6391/2011 (Stay)**

PRAMOD KUMAR JAIN AND ANR. Petitioners
Represented by: Mr. Lalit Kumar Jha, Advocate.

versus

STATE OF NCT OF DELHI AND ANR. Respondent
Represented by: Mr. Ravi Nayak, APP for the
State with SI Bharat, PS Civil
Lines.
Mr. S.P. Jha, Advocate for
respondent No.2.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. A complaint case was filed by respondent No.2 as proprietor of M/s. Tridev Construction & Consultants against the two petitioners and one S.K. Agarwal alleging that on 8th May, 2006 the University had floated a tender vide a newspaper advertisement for the purpose of renovation of toilets of SES Jawahar Lal Nehru University. The complainant had participated in the tender and thereafter an agreement was entered into between the parties. However later he was informed by a corrigendum dated 28th February, 2007 that the rebate quoted in tender document dated 24th May, 2006 was inadvertently taken as 1.25% instead of 21.25% and the said mistake was due to an error. Complainant protested in respect of the corrigendum and alleged that the documents have been forged and fabricated by the petitioners

and S.K. Aggarwal. He filed a complaint with the SHO PS Vasant Kunj on 30th April, 2007 on which no action was taken. Hence he filed a criminal complaint before the learned Metropolitan Magistrate seeking directions to the SHO to lodge the FIR. The said complaint was listed on 3rd May, 2010 before the learned Metropolitan Magistrate when none appeared for the complainant/respondent No.2 and was adjourned to 11th May, 2010. Even on 11th May, 2010 despite the matter having been passed over twice and taken up at 3.35 PM on the third call, none appeared on behalf of the respondent No.2/complainant. Hence the complaint was dismissed in default.

2. On an application filed by the respondent No.2 seeking restoration of the complaint, learned Metropolitan Magistrate vide order dated 17th May, 2010 restored the complaint and vide order dated 4th May, 2011 directing SHO PS Vasant Kunj (North) to register FIR against the petitioners pursuant where to FIR No.115/2011 under Sections 420/468/471/120B IPC was registered on 11th May, 2011. Immediately thereafter the petitioners filed the present petition wherein this Court vide order dated 26th May, 2011 directed stay of the proceedings in the complaint case and FIR No.115/2011 under Sections 420/468/471/120B IPC registered at PS Vasant Kunj (North).

3. In the present petition, the petitioners challenge the two orders dated 17th May, 2010 restoring the complaint to its original position and the consequential order dated 4th May, 2011 directing registration of FIR. Challenging the order dated 17th May, 2010 learned counsel for the petitioners submits that the Magistrate had no power to review its order and restore the complaint. Thus the order dated 17th May, 2010 was beyond the jurisdiction of the learned Metropolitan Magistrate. Reliance is placed on

the decision of the Supreme Court reported as (2004) 7 SCC 338 Adalat Prasad Vs. Rooplal Jindal & Ors. and of this Court reported as 44 (1991) DLT 508 United Decoratives (P) Ltd. Vs. Naipal Singh & State. It is further contended that while reviewing its order dated 11th May, 2010 the learned Metropolitan Magistrate did not even issue any notice to the petitioners and passed the impugned orders dated 17th May, 2010 and 4th May, 2011, thus violating the principles of natural justice. Since by the order dated 11th May, 2010 dismissing the complaint, a right had accrued to the petitioners, the same could not have been taken away without notice to the petitioners.

4. Learned counsel for the respondent No.2 on the other hand contends that there is a difference between review of the order and recall of the order. Since no order was passed on merits, the learned Metropolitan Magistrate did not review its earlier order and only recalled the order dismissing the complaint for technical reasons. It is contended that the power of the Magistrate under Section 156(3) Cr.P.C. are wide enough and it can pass all ancillary orders to effectively implement the said provision. Relying upon the decision of the Supreme Court in (2002) 7 SCC 726 Mohd. Azeem Vs. A. Venkatesh & Anr. it is contended that the Magistrate was unjustified in dismissing the complaint and there was a valid ground for restoration of the same.

5. The short issue in the present petition is whether the learned Metropolitan Magistrate could have restored the complaint to its original position vide order dated 17th May, 2010. In Mohd. Azeem (supra) relied upon by learned counsel for the respondent No.2, a criminal complaint was filed by the petitioner therein under Section 138 of the Negotiable Instruments Act which he was diligently attending on all dates except one

i.e. 22nd June, 2001 due to the error in noting the date of hearing and the complaint was dismissed on the said date and the accused was acquitted. Aggrieved by the order of the Magistrate, the petitioner therein preferred an appeal under Section 378(4) Cr.P.C. before the High Court which was dismissed, hence the special leave to appeal before the Supreme Court. Faced with this fact situation, the Hon'ble Supreme Court held that the Magistrate and the High Court adopted a strict and unjust attitude resulting in failure of justice as for absence of the complainant on only one date the complaint was dismissed and not restored, even though sufficient cause for absence was shown. Hon'ble Supreme Court in the said decision did not adjudicate the power of the Metropolitan Magistrate to review or recall its order and restore the complaint to its original position. As noted above, pursuant to the dismissal of the complaint, appeal was filed before the High Court which was dismissed. Thus the decision relied upon by learned counsel for the respondent No.2 has no application to the facts of the present case.

6. In Adalat Prasad (supra) a three Judge Bench of the Supreme Court overruling its earlier decision reported as (1992) 1 SCC 217 in K.M. Mathew Vs. State of Kerala held that in the absence of any power to review or any inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Criminal Procedure Code. It was held that the view expressed by the Supreme Court in Mathew's case that no specific provision was required for recalling an erroneous order amounting to one without jurisdiction does not lay down the correct law.

7. Supreme Court in the decision reported as 1986 CrL.L.J. 1074 Maj. Genl. A.S. Gauraya & Anr. Vs. S.N. Thakur & Anr. has held that a

Magistrate has neither the power to review/ recall its order nor any inherent power to do so. Learned counsel for respondent No.2 strenuously contends that there is a difference between review and recall and since in the present case the complaint was dismissed without taking cognizance, the impugned order dated 17th May, 2010 passed by the learned Metropolitan Magistrate restoring the complaint amounted to recalling its earlier order dated 11th May, 2010 and not reviewing the said order. Supreme Court in the decision reported as (2011) 14 SCC 813 Vishnu Agarwal Vs. State of UP following its earlier decision reported as (2009) 2 SCC 703 Asit Kumar Kar Vs. State of West Bengal noted that there was a distinction between review petition and a petition to recall the order and where the Court has not gone into the merit but simply recalls an order which was passed without giving an opportunity of hearing to the affected party would amount to recall and not review. The two decisions of the Supreme Court have no application to the facts of the present case for the reason in Asit Kumar Kar Supreme Court was dealing with its jurisdiction under Article 32 of the Constitution of India and not of a Magistrate who has neither the power to review nor recall nor any inherent power to do so as held by the Supreme Court in Maj. Genl. A.S. Gauraya (supra). Hence the order dated 17th May, 2010 passed by the learned Metropolitan Magistrate reviewing/ recalling its earlier order and restoring the complaint to its original position is without jurisdiction and liable to be set aside.

8. In view of the discussion aforesaid, the order dated 17th May, 2010 and the consequential order dated 4th May, 2011 are set aside. FIR No.115/2011 under Sections 420/468/471/120B IPC is quashed.

9. Petition and application are disposed of.

(MUKTA GUPTA)
JUDGE

MAY 31, 2017
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