

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CRMC 271/2018 IA(1/2018)

BASHIR AHMAD MIR

...Petitioner(s)

Through: Mr. Tasaduq H. Khawaja, Advocate with
Mr. Naseer ul Akbar, Advocate.
Mr. Imaan Abdul Muizz, Advocate.

Vs.

STATE THROUGH POLICE STATION SAFAKADAL

...Respondent(s)

Through: Mr. Hakim Aman Ali, Dy.AG.

CORAM:

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
12.02.2025

(ORAL)

1. The petitioner herein has invoked the inherent power of this court, contained under Section 561-A, CrPC, for quashing FIR No. 210/2017 registered with Police Station Safa Kadal, Srinagar, along with Challan arising there from titled as "*State v. Aijaz Ahmad Handoo and anr.*", pending trial before the court of Special Mobile Magistrate, Passenger Tax and Electricity, Srinagar (for short the trial court).

Facts: -

2. The brother of the petitioner, namely Nazir Ahmed Mir S/o Ghulam Mohammad Mir R/o Channa Mohalla, Chattabal Srinagar, is claimed to have constructed a guest house at Bemina Crossing Chattabal, Srinagar, in the year 2017, and in the year 2017-18, in furtherance thereof, started constructing a parking portion along with ramp thereof in order to ensure smooth ingress and egress of the guest house building, which construction of ramp, however, was objected to by the Municipal Authorities of the area, compelling the brother of the petitioner to approach this Court through the medium of OWP No. 1175/2017, wherein an interim order came to be passed initially on 10th August 2018 and modified subsequently on 2nd March 2018,

permitting the petitioner therein, being the above named brother of the petitioner herein, to raise the ceiling leading to the parking space while prohibiting the Municipal Authorities from causing any interference in the said process.

3. On 4th December 2017, the officials of the Municipality of the area are stated to have come on spot and attempted to demolish the construction of ramp in question which was resisted by the petitioner herein as the petitioner had been entrusted by his brother to guard the property in question however, despite the resistance by the petitioner, a portion of the construction in question came to be demolished and against the said action of the officials of the Municipality the locals of the area are stated to have gathered and raised slogans.
4. After a few days, the petitioner herein is stated to have been summoned by the Police Station, Safa Kadal Srinagar, where he presented himself and came to be informed that the FIR in question has been registered against him at the instance of Municipal Authority qua the incident of demolition undertaken by them, being the FIR impugned in the instant petition.
5. Upon completion of the investigation in the FIR, challan/charge sheet also impugned in the instant petition came to be laid by the respondents wherein the trial court proceeded to try the petitioner herein and other accused persons.
6. The petitioner herein while challenging the impugned FIR including the challan, has maintained the instant petition on the following grounds: -

a) Because the registration of FIR is fraudulent, perverse and amounts to abuse of authority and process of law besides being misconceived both in law and facts. The registration of FIR and consequent challan filed before Judicial Magistrate amounts to miscarriage of justice and unnecessarily expose the petitioner herein, to unwarranted processes and interferes with the liberty of the petitioner. The same are, therefore, liable to be quashed.

b) Because registration of FIR and consequent challan are futile exercise besides wastage of resources and judicial time. It is submitted that judicial process initiated on the basis of challan is destined to ultimately fail and thus is nothing but a brazen attempt to waste the cherished judicial time of the Hon'ble Court.

c) Because the perusal of FIR does not disclose the commission of offence alleged to have been committed and challenges the conventional wisdom of a man of a reasonable standing. In fact, rather than petitioner being charged with offence, it is in reality other way round wherein the petitioner has defended himself from the excesses of officials of Municipality accompanied by Police who were steadfast in their stance to commit an illegal and criminal act of not only consciously violating the status-quo order of the Hon'ble High Court but also destroying the personal property of a citizen without the authority of law and without following the procedure as their corrupt and abhorrent wishes were not fulfilled and therefore, disgruntled, they not only defied the order of the Hon'ble Court but also falsely implicated petitioner so as to subject him to the abuse of process of law and unnecessarily vex him for denying their patently illegal demands.

d) Because the registration of FIR and consequential challan are nothing but coercive steps taken by unscrupulous officials, who on failure of their attempt to solicit corruption are punishing the petitioner by falsely implicating him on concocted fiction for standing up to their mala-fide might. The FIR and proceedings of the Ld. Trial Court are, therefore, liable to be set aside.

e) Because having regards to evidence that is proposed to be produced, the petitioner is sure to be acquitted. There are no chances of conviction on the basis of said evidence. That conducting of the trial would be sheer abuse of process of law and wastage of judicial time. The challan, therefore, deserves to be quashed at the thresh hold to prevent miscarriage of justice.

f) Because this court in exercise of inherent and extra-ordinary constitutional powers vested in it by section 103 of the Constitution of Jammu and Kashmir as also Section 561 A of Code of Criminal Procedure ought to interpose in the matter and prevent miscarriage of justice as petitioners have no other alternate efficacious remedy to protect his liberty but to approach this Court in its extra ordinary jurisdiction and have not filed any other proceedings except present petition.

7. A status-report has been filed by respondents in compliance to order dated 21st September 2021 passed by this court wherein the petition is being opposed and the registration of impugned FIR as also filing of the impugned challan/charge sheet is being justified and defended on the premise that the petitioner committed the offence covered under FIR/challan.

Heard counsel for the parties and perused the record.

8. Before proceeding to advert to the rival submissions of the appearing counsel for the parties, it would be pertinent and significant to refer

hereunder the offenses covered under the impugned FIR/charge sheet which are alleged to have been committed by the petitioner herein.

Section 353. Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person to the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

A plain reading of the provisions of Section 353 RPC supra would reveal that the ingredients of Section 353 are that the accused must have assaulted or used criminal force against the public servant and the public servant at the time of committing of offence was acting in discharge of his duty imposed on him by law as such a public servant or that the offence was committed with an intent to prevent or deter the public servant from discharging the duty imposed on him by law as such or that it was committed in consequence of something done or attempted to be done by the public servant in the lawful discharge of a duty imposed on him by law, as such,

What emanates from above is that while tracing out the essentials of offence under section 353 RPC, the test is whether the public servant at the time of assault was lawfully discharging a duty imposed on him as such, thus, suggesting that if a public servant is not acting lawfully or if the act of public servant is not strictly justifiable or he is not discharging a duty imposed on him by law or else he is not doing, what is his duty to do as a public servant, the offence would not fall under section 353 RPC supra.

Section 323. Whoever except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

As is manifest above, the essential ingredients of the offence of Section 323 RPC are that the hurt must have been caused to a public servant while such public servant was acting in discharge of his duty as such, or in order to prevent or deter him for discharging his duty as a public servant, or in consequence of having done or attempted to do anything in the lawful discharge of his duty as such a public servant.

What emanates from above is that for constituting an offence under Section 323 RPC, there must be a nexus between the causing hurt and discharge of duty by a public servant and the intent to prevent or discharge a public servant from discharging a duty as such public servant is an essential ingredient for constituting an offence under Section 323 RPC thus, suggesting that where there is total absence of authority with a public servant and the public servant is not discharging the duty in any capacity whatsoever, an offence under Section 323 RPC cannot be said to have been committed or caused.



Section 427:- Mischief causing damage to the amount of fifty rupees. Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Perusal of the aforesaid definition of Section supra reveals that for constituting an offence under Section 427 IPC, that accused must have committed mischief and that he thereby caused loss or damage to the amount of Rs.50 or more.

It is significant to mention here that the offence of mischief is contained and is defined under section 425 RPC and is made punishable under section 426 RPC. Thus, in order to constitute an offence under Section 427 RPC, it is necessary that there should have been an intention to cause wrongful loss or damage to the public or to any person and the value of damage being Rs.50 or more.

It is pertinent to mention here that “wrongful loss” stands defined under Section 23 RPC and means loss by unlawful

means of property to which the person gaining is not legally entitled.

Thus, what emanates from above is that Section 427 RPC is not attracted wherein an accused is not alleged to have committed any act with intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or to any person.

9. Keeping in mind the aforesaid position of law qua the offences covered under FIR/challan alleged to have been committed by the petitioner herein and reverting back to the case in hand, perusal of the FIR/charge sheet would manifestly tend to show that no evidence, much less credible, cogent, or legal has been collected or placed on record by the investigating agency, to show that the Municipal Authority on the day of occurrence were acting lawfully in furtherance of a duty imposed upon them by law and had been entrusted with undertaking the process of demolition of the construction in question by competent authority in furtherance of law governing the field, in that, law in this regard is settled and is no more as res-integra that an act of a public servant which is very contrary of the duties of such public servant cannot be said to have been done by a public servants while acting or purporting to act in discharge of an official duty and even an act done in good faith under the colour of the office of a public servant cannot said to be by any sense of imagination, an act by a public servant in discharge of his duty.

Since nothing is forthcoming from the record of the case set up by the prosecution against the petitioner herein that the officials of Municipal Authority on the day of occurrence were acting in discharge of a public duty imposed by law upon them, it can safely be said and held that the offences under Sections 353 and 323 are not made out for lack of requisite essential ingredients. No order of the competent authority of Municipality is part of the charge sheet available on the file so much so, no medical record pertaining to the alleged offence under Section 323 RPC is as well on record. Besides no material or evidence worth the name is available with the charge

sheet which suggests even remotely that the offence under Section 427 RPC is made out and committed by the petitioner herein.

10. Having regard to above analysis, the next question for consideration of this court is as to whether the exercise of inherent power sought in the petition by the petitioner herein is warranted.

Law in this regard is settled by the Apex court passed in case titled as “**State of Haryana and Ors., v Bhajan Lal and Ors**” reported in **1992 Supp (1) SCC 335** wherein at para 102 following has been laid down: -

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

- 1) *Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
- 2) *Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.*
- 3) *Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
- 4) *Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.*
- 5) *Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
- 6) *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and*

continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

- 7) *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

11. In a view of the aforementioned principles of law laid down by the Apex Code in the Judgment supra, the instant case indisputably falls within clause (3) of the Judgment supra, which reads as under: -

“Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of offenses and make out a case against the accused.”

12. Viewed thus for what has been observed, considered, and analyzed herein above the instant petition succeeds as a consequence whereof the impugned FIR including challan titled “*State v. Aijaz Ahmad Handoo and anr.*”, pending trial before the court of Special Mobile Magistrate, Passenger Tax and Electricity, Srinagar is quashed insofar as it relates to the petitioner herein.

13. Disposed of.

(JAVED IQBAL WANI)
JUDGE

SRINAGAR

12.02.2025

Ishaq

Whether the order is speaking? Yes
Whether approved for reporting ? Yes