IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.387/2011

Appellants : Malik Muhammad Habib and another,

Respondent : The State.

CR. APPEAL NO.388/2011

Appellants : Mazhar Khan and two others,

Respondent : The State.

CR. REVISION APPLICATION NO.167/2011

Applicant : Abdul Basit,

Respondents : Malik Muhammad Habib and four others.

Mr. Irfan Ali advocate for appellants in Cr. Appeal No.387/2011.
Mr. Kazi Khalid Ali advocate for appellants in Cr. Appeal No.388/2011.
Mr. Faheem Hussain Panhwar, DPG.
None for applicant in Criminal Miscellaneous Application.

Date of hearing : 07.03.2019

Date of order : 07.03.2019

O R D E R

SALAHUDDIN PANHWAR, J. By instant appeals, appellants have challenged judgment dated 20.09.2011 passed in Special Case No.62/2006 (Re. The State vs. Sarfraz Matloob and others) arising out of FIR No.49/2006, u/s 420/423/468/471/218/161/34 PPC, r/w section 5(2) of the Prevention of Corruption Act 1947.

2. Complainant Abdul Basit lodged a complaint with Anti-Corruption Authorities which was numbered 55/2006; enquiry was conducted by SI Ameer Akbar Khan, ACE Karachi; thereafter on

approval of the competent authority on the enquiry, FIR was lodged, wherein it was reported that enquiry conducted revealed that Sarfraz Matloob ADO KMC Katchiabadis, CDG Karachi and Syed Babar Waseem, Land Surveyor, KMC Katchiabadis, CDG Karachi being public servants in collusion with Malik Muhammad Habib and Malik Gulzaib (private persons) and others have leased out created plots No.666-C and 666-D against all the existed record, ground realities and evidence. These plot Nos.666-C and 666-D were issued in the year 2005 (09.07.2005) to Malik Muhammad Habib and Malik Gulzaib on the basis of preparation of wrong record, misuse of official position and willful omission of the facts, record, ground realities and the evidence. These acts and willful omissions by the public servants are depiction of commission of the offences of the sections 420/423/468/471/161/34 PPC, R/w Section 5(2) Act-II 1947 hence there are reasons to believe that these offences have been committed after obtaining illegal gratification from the interested persons; that complainant Mr. Abdul Basit questionably dragged into loss of property, harassment, humiliation and mental torture through misuse of official position, manipulation, twisting of the facts and professionally tricks.

3. Charge was framed against accused persons on 10.0.2000 vide Ex:4 to which they pleaded not guilty and claimed their trial. During trial, prosecution examined PW-1 Abdul Basit at vide Ex:9, PW-2 Muhammad Saleem at Ex.11, PW-3 Muhammad Gohar at Ex:12, PW-4 Muhammad Iqbal at Ex:13, PW-5 Gul Hassan Shaikh at Ex:15, PW-6 Haifz Safdar at Ex:16, PW-7 Abdul Rahim Shoro at Ex:18, PW-8 Ameer Akbar Khan at Ex:19 and closed its side. Statement of accused persons was recorded under section 342 Cr.P.C at Exhibits 22 to 26 denying prosecution allegations.

4. Mr. Qazi Khalid Ali counsel for appellants in Appeal No.388/2011 has emphasized over last three pages of impugned judgment in view of the story as set up by prosecution. Having referred these pages, he insisted that learned trial Court judge was not legally justified in convicting the appellants *(officials)* merely for reason of not taking action for cancellation of lease because they (officials) did adopt the proper legal course in getting such lease cancelled. It is also a matter of record that lease of subject matter property was realized by KMC who have been arraigned in this case; they filed suit and got decree whereby such lease, obtained by concealment of facts, was cancelled. He stoutly argued that a *bona fide* and alternative *legal* act of appellants (officials) in getting an omission/wrong undone cannot be sufficient to hold them guilty; such approach is unwarranted under the law, particularly when the appellants *(officials)* themselves were not competent to reverse the lease/vested right created in favour of lessee. Thus, he prayed for setting aside of impugned judgment. Learned counsel for appellants in appeal No.387/2011 has adopted such arguments.

5. Learned DPG has not disputed the factual aspect that appellants filed suits and ultimately got decree whereby lease with regard to extra land in favour of lessee was cancelled.

6. Since, learned counsels for appellants have referred last three pages of impugned judgment hence it would be conducive to reproduce the same which reads as:-

> *<u>FINDINGS:</u>*
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> *1. From the facts it revealed that alleged so called Plots No 666-C and 666-d were carved out over the reserved Land which has already been mentioned as reservation for Nalla in survey report of Plot No 665 for lease during 1993."*
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> The facts above revealed are startling as it is quite

apparent that not only the land reserved for road alignment but also Nala Land was encroached and thereafter lease was obtained. Even the structure of the whole building constructed over Plot No 665, 666-C and 666-D from the start to the end is similar and identical. In the site Plan Ex 9/3 there is no mention of Plots 666-C & 666-D while in Ex 9/19 such plots have been added in hand writing.

Now I would examine the role of the accused who are public servants. It is quite obvious that the lease in favour of the accused has been issued behind closed doors as in case there was any proper site inspection the said Government officials would have realized that there is no proper ingress or outgress of Plot 666-C & 666D and the same is only available thorough Plot No 665. Moreover it has also not come to the notice of the officials that when there was only 130.83 sq yards (Ex 9/2) then how the land became 180.58 Sq yards and how extra land became available. The simple answer is that the lease issued in favour of the accused was of reserved land for road alignment and Nala. *Nevertheless the 69.07 Sq Yards reserved for road alignment was actually in possession of Maroof Yasin as per record, then why his legal heirs were not given preference if the area was no longer required for road alignment.* This was never the case as the reserved land was never meant for allotment nor it is the stance taken that the Land was no longer required for road alignment. The officials also closed their eyes to the dispute between the parties and issued the lease in a highly perfunctory and cursory manner. On realizing that they would not be able to get away with their misdeeds another eccentric act was performed so as to save their skin. The accused Malik Habib and Malik Gul Rez were issued a show cause Notice (Ex 9/22). The show cause Notice reflects that the accused were completely naïve and came to know through the ACE about pendency of Suit No 668/2002 and Suit No 1738/2003 and that they were wrongly made to belief that access has been provided by the owner of house No 665 with will and wish and he has no reservation. This stance taken by the officials is totally absurd as it is being made to believe that on saying of one person the state functionaries believed that the other person would give ingress through his house. Even no written NOC was obtained what to talk about physical inspection and verification. The dilemma does not end here. The officials after issuance of the Notice did not take any action regarding cancellation of the lease if they were of the opinion that the same was wrongly issued. It is pertinent to mention here that in comments dated 12.8.2006 in Civil suit No 679/2006 (Ex 9/23) the official position taken is that the lease was obtained fraudulently and on mis-representation. Instead another out of the ordinary act of filing of Civil suits No 354/2008 & Suit No 355/2008 before the court of learned Vth Senior Civil Judge Karachi South for cancellation of the lease was performed. This act is rather unheard of as it is a mystery as to what led to filing of the Suits when the officials were quite competent to take lawful action on their own. The question whether there is involvement of illegal gratification is immaterial in view of the glaring

facts enumerated above.

In view of what has been discussed above I have reached to the conclusion that the accused are hand in glove with each other and reserved land has been leased without any justification. The prosecution has succeeded in bringing home the guilt of the accused and therefore, they are found guilty for having committed offences punishable u/s 420/423/468/471/218/161/34 PPC. R/w Section 5 (21 Act-II of 1947."

(underlining is for emphasis)

7. I would not hesitate in saying that neither a negligence nor *ignorance* of rule / law alone can hold a conviction for offence, within meaning of Section 5 of the Act-II of 1947. Such failure or negligence, however, may bring their own consequences against officials but in disciplinary proceedings. The learned trial court judge *did* refer to number of irregularities as well negligence in grant of lease but same alone, I would insist, would never be sufficient to prove ingredients of Section 5 of the Act-II as same has its own defined ingredients. Needless to add that every misuse of authority is not culpable. To establish the charge of misuse of authority, the prosecution has to establish the two essential ingredients of the alleged crime i.e 'mens rea" and "actus reus". If either of these is missing no offence is made out. Reference is made to the case of *Wahid Bakhsh Baloch v. State* 2014 SCMR 985 wherein observed as:-

12. In *M. Anwar Saifullah Khan v. State* (PLD 2002 Lahore 458), the Court while adverting to the initial burden on prosecution to prove the charge of misuse of authorities or powers held at page 477 as under:-

"20. Misuse of authority means the use of authority or power in a manner contrary to law or reflects an unreasonable departure from known precedents or custom. Every misuse of authority is not culpable. To establish the charge of misuse of authority, the prosecution has to establish the two essential ingredients of the alleged crime i.e 'mens rea" and "actus reus". If either of these is missing no offence is made out. Mens rea or guilty mind, in context of misuse of authority, would require that the accused had the

> *knowledge that he had no authority to act in the manner he acted or that it was against law or practice in vogue but despite that he issued the instruction or passed the order. In the instant case the documentary evidence led by the prosecution and its own witnesses admit that the appellant was told that he had the authority to relax the rules and the competent authority P.W.3 could make the appointments thereafter. The guilty intent or mens rea is missing. Even the actus reus is doubtful because he had not made the appointments. He merely approved the proposal and sent the matter to competent authority. At worst he could be accused of mistake of civil law. i.e. ignorance of rules. But a mistake of civil law negates mens rea."*
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> *(underlining is for emphasis)*

Such legal position seems to have been ignored by the learned trial Court Judge. Further, the learned trial court judge also failed in appreciating that grant of lease deed were claimed to be result of fraud and concealment of facts and even appellants *(officials)* did get the same cancelled by resorting to ***legal course*** and even prosecution brought nothing on record to substantiate that such irregularities / negligence were deliberate for personal gain or to benefit someone**.** Further, learned trial court judge was also not legally justified in drawing an *adverse* inference against the appellants (officials) for reason of not taking further action for cancellation of lease deed after issuance of *show-cause notice* because declaration of a document to be result of fraud or otherwise falls within domain of competent court and an authority is not legally justified in acting as judge of its own cause. In absence of any substance towards charge / allegation, the conviction legally cannot sustain on mere presumptions or surmises.

Accordingly, impugned judgment was set aside by short order, appellants were acquitted and Criminal Revision application was dismissed.

J U D G E

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