REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.164 OF 2018
(Arising out of S.L.P. (Crl.) No. 2190 of 2017)

MUNICIPAL CORPORATION OF GREATER MUMBAI ...Appellant(s)

Versus

PANKAJ ARORA (SECRETARY) AND OTHERS ...Respondent(s)

JUDGMENT

N.V. RAMANA, J.

1. Delay condoned.

2. Leave granted.

3. This appeal by special leave is directed against the judgment and order dated 16th September, 2015 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 3166 of 2012.

4. Briefly stated, the facts of the case are that the appellant-Corporation, in pursuance of a complaint filed by one Mrs. Veena Khanchandani a resident in the

respondent's society, carried out an inspection through its Junior Engineer on 31.01.2011 and noticed that various cracks had developed in the building endangering the inhabitants. In accordance with the procedure laid down under the provisions of Section 354 of the Mumbai Municipal Corporation Act, 1888 (*hereinafter referred as* '**MMC Act**'), a notice was issued on 02.02.2011 calling upon the respondents to carry out structural repairs of the building within a month time under the supervision of a registered structural engineer. On 08.03.2011, the appellant-Corporation again carried out an inspection and found that the respondents did not comply with the above-mentioned notice. Thereafter the appellant filed a complaint under the provisions of Section 354 read with Section 475A(1)(a) of the MMC Act. Metropolitan Magistrate, *vide* order dated 09.09.2011, refused to take cognizance of the complaint and *inter alia*, passed the following order:

> "The complaint is filed on the same building against different accused. There is delay of near about 2 months to file this complaint. There is no sufficient explanation for the delay, along with affidavit. It is only stated that delay was caused because of monsoon work and other works.
>
> Hence, this complaint is not tenable. I reject

> this application; and dismiss this complaint. All the accused No.1 to 3 are discharged for the offence punishable under Section 354 read with Section 475(A)(1)(a) of the MMC Act. The complaint is disposed of.
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> Proceedings closed."

5. Aggrieved by the aforesaid order of the Metropolitan Magistrate, the appellant invoked the criminal appellate jurisdiction of the High Court under Section 378 (4) of Code of Criminal Procedure [*hereinafter referred as* **'CrPC'**] by filing a Criminal Application No. 1330 of 2011. It was pointed out thereunder that if the repair works are not carried out, the building would collapse, and the crime complained was in nature of a continuing offence. However, the High Court by order dated 05.12.2011, dismissed the application but granted liberty for the applicants to file appropriate proceedings including an application under Section 482 of CrPC.

6. Accordingly, the appellant filed criminal writ petition, under Article 226 of the Constitution of India, before the High Court. By the impugned order dated 16.09.2015, the High Court dismissed the writ Petition.

7. Feeling aggrieved by the views taken by the High Court, the present appeal has been filed by the Municipal Corporation.

8. Heard learned counsel for the appellant as well as learned counsel for the respondent No.4 – State. No one appeared on behalf of private respondents, despite service of notice.

9. Learned senior counsel, Shri Dhruv Mehta, appearing for the appellant-Corporation vehemently contended that the writ petition was filed in furtherance of the liberty granted by the earlier order dated 05.12.2011 in Criminal Application No. 1330 of 2011 under Section 378 (4) of CrPC. Further he submitted that the High Court under the writ jurisdiction misconstrued the words 'liberty to file' to a mere phraseology which does not confer jurisdiction upon the Court to probe into the correctness or validity of the order under challenge and thereby wrongly dismissed the appellant's writ petition. According to the learned senior advocate once liberty has been granted by predecessor Bench to file the writ petition, the High Court should have dealt with it on merits and should not have dismissed the same citing lack of jurisdiction.

10. Having heard learned counsel for the appellant and going through the relevant material before us, we are of the opinion that the High Court through the impugned order has erred in dismissing the Criminal Writ Petition at threshold level without examining the merits of the case.

11. The High Court, in Criminal Application No. 1330 of 2011, even after concluding that its jurisdiction was incorrectly invoked under Section 378 (4) of CrPC, still made adverse observations on the merit of the case [*emphasized infra.*] thereby exceeding its jurisdiction. It would not be out of context to point out that the order of the High Court, in Criminal Application No. 1330 of 2011, is ridden with internal contradictions, in the sense that the High Court first gives a finding on the merits of the case concerning the bar of taking cognizance for reason of delay in following manner-

> " 7. It is to be noted that under Section 468 of CrPC, there is a bar on taking cognizance of the offence by the court after lapse of the period of limitation mentioned in the said section. Section 473 gives discretion to the Court to condone the delay whereas under Section 514 of MMC Act, the limitation is provided for filing of complaint in the Court of Magistrate. It is clearly stated in Section 514 that no person shall be liable to punishment

> for any offence under the Act if the complaint is not filed within the period prescribed under Section 514. As such provisions of Section 514 has nothing to do with taking of cognizance by the Magistrate or otherwise. If the complaint is filed before the concerned Magistrate within the period prescribed by Section 514, the Magistrate may take cognizance. The powers of the Magistrate for taking cognizance are governed by the provisions of CrPC. **As such, the provisions of Sections 468 and 473 of CrPC have nothing to do with the provisions of Section 514 of MMC Act**. If the complaint is not made before the concerned Magistrate within the time prescribed by Section 514, the same is required to be returned to the complainant. It, therefore, follows that in such a case, the Magistrate will have no occasion to pass an order of discharge or acquittal. As such, in my view, the order passed by the learned Metropolitan Magistrate discharging the accused does not amount to acquittal. In fact, it amounts to return of the complaint to the complainant. As such no appeal can lie against such order.
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> 8. The application is, therefore, dismissed with liberty to the applicants to file appropriate proceeding including application under Section 482 of CrPC, if they are advised to do so."
>
> (**emphasis supplied**)

12. From the aforesaid order we may note that the High Court ultimately dismissed the case on the jurisdictional issue by observing that by no stretch of imagination, the dismissal of the criminal complaint for filing delay may be construed as acquittal so as to invoke the jurisdiction under Section 378 of CrPC, and ultimately held that it did not have jurisdiction

to entertain such matter. It can be observed that the High Court at this juncture, recognised the incorrect invocation of the criminal appellate jurisdiction under the aforesaid provision and granted further liberty to move appropriate court if so advised.

13. When the matter came up before the High Court, in furtherance of the liberty granted earlier, for the second time in the Criminal Writ Petition under Article 226 of the Constitution of India. The High Court *vide* impugned order dismissed and, *inter alia*, observed as under-

> " 12. It is true that Hon'ble Justice Tahaliyani had granted liberty to file the Writ Petition. However, "liberty to file" is a phraseology without a valid sanction of any statute or any specific precedent. It is the liberty granted to the petitioner to probe the possibility of seeking the relief by an alternative remedy. **The said liberty does not give right to a litigant fresh/anew to agitate the same issue/order which has attained finality**. The liberty may confer a right to the petitioner to file a petition, but it does not confer jurisdiction upon the Court to probe into the correctness or the validity of the order under challenge. Review of a judgment cannot be had on this liberty. Hence, this Court is of the opinion that only because liberty is granted does not mean that the subsequent proceeding is maintainable in the eye of law or that it calls upon the successor Court to hold subsequent petition maintainable or pass an

> order setting aside the order passed by the Court granting liberty. The successor Court is not bound to hold the proceedings maintainable."
>
> (**emphasis supplied**)

14. Having observed two orders by the High Court, the only question we need to ascertain is whether the High Court was right in dismissing the writ petition by treating the findings in the earlier order as binding?

15. At the outset we must observe that the High Court notes that the earlier decision has attained finality. Although not much guidance is provided in the impugned judgment as to how and why the earlier order attained finality, we can only second guess that High Court had the broad principle of *res judicata* in mind while coming to such conclusion.

16. There is no dispute that the rule of *res judicata* in common law, from ***Ferrer v. Arden***, (1598) 77 Eng. Rep. 263, to recent precedents of this Court, has been accepted as a universal rule of law emanating from the public policy[1] to limit excessive and unnecessary litigation. It may not be an overstatement to state that the principle of *res judicata* is as old as the law itself. The extent of application of *res judicata* in a country, on a comparative analysis of foreign

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1 *interest reipublicae ut sit finis litium.*

jurisprudence, depends on various considerations such as efficiency, fairness, and substantive policies, but across the board a minimal core seems to be well preserved.

17. We may note that 'issue estoppel or collateral estoppel', which is a part of principle of *res judicata,* has often been agitated resulting in bevy of decisions across Indian, English and American jurisprudence and has created large voluminous records of academic literature. It may not be beneficial herein to restate the entire law on this aspect, rather we restrict ourselves within the narrow scope in which this case falls.

18. In our opinion the High Court misconstrued the earlier order as it failed to note that the observations made thereunder were not binding since they were made without jurisdiction. It is useful to quote *Corpus Juris Secundum*[2], which recognizes the difficulty faced by the High Court in application of *res judicata* in following words-

> 'it is sometimes difficult to determine when a particular issue determined is of sufficient dignity to be covered by the rule of estoppel.

Mulla[3] has aptly cautioned against such mis-application of *res judicata* in the following manner-

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2 Vol. 50, ¶ 725

3 Mulla, CPC 15th Ed., p.104

> 'It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision.

19. It is apparent from the perusal of the impugned order that the High Court stretched the ambit of 'finality' for some observations to the saying (relating to collateral aspects) that every such observation was final unless reversed in appeal, which had an effect of throttling the substantive justice out of life. We cannot approve such reasoning of the High Court that the issue had attained finality, since the observations were made by a court which went against its own findings that the court did not have any authority/jurisdiction to do so. Once the court concludes that a case is not maintainable under Section 378 of CrPC, it did not have any jurisdiction to make further observations on merits as has been done in this case.

20. Moreover, it was not necessary for the High Court in the earlier order to travel beyond the issue of ascertaining

whether a dismissal of complaint on the ground of delay amounted to acquittal in order to invoke the jurisdiction under Section 378 of CrPC. The observations of the High Court on the interplay of CrPC and MMC Act and its implication on the facts were not foundational or necessary for the jurisdictional issue. Despite a specific jurisdictional issue present, the court gave a finding on merits and such finding cannot be treated as *res judicata* as it was purely auxiliary or non-foundational to the main issue in the earlier order.[4]

21. Hence, such observation can neither be said to have a preclusive effect nor can it be said to have attained finality. It would not be out of context to clarify that the only aspect which attained finality with respect to the first order pertains to the jurisdictional issue concerning invocation of Section 378 of CrPC and nothing beyond that.

22. In light of the aforesaid discussion, we consider that the High Court was not correct in dismissing the case on the threshold without holding a full-fledged enquiry into the issues raised thereunder. Accordingly, we set aside the impugned order passed by the High Court and restore the

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4 Sri Ramnik Vallabhdas Madhvani and Ors. V. Taraben Pravinlal Madhvani, (2004) 1 SCC 497 (*as per* S. B. Sinha J. (concurring)).

Criminal Writ Petition No. 3166 of 2012 on the file of the High Court. Further we request the High Court to afford an opportunity of hearing to the parties and dispose of the same on its own merits, expeditiously.

23. Before parting with the case, we make it clear that we have not expressed any opinion on the merits of the case. The appeal is, accordingly, disposed of.

.....J.
(N.V. RAMANA)

.....J.
(S. ABDUL NAZEER)

New Delhi,
January 23, 2018

ITEM NO.11 COURT NO.9 SECTION II-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

(Criminal Appeal NO. 164 of 2018 arising out of Petition(s) for Special Leave to Appeal (Crl.) No(s). 2190/2017

(Arising out of impugned final judgment and order dated 16-09-2015 in CRLWP No. 3166/2012 passed by the High Court Of Judicature At Bombay)

MUNICIPAL CORPORATION OF GR. MUMBAI Petitioner(s)

VERSUS

PANKAJ ARORA (SECRETARY) & ORS. Respondent(s)
(FOR CONDONATION OF DELAY IN FILING ON IA 3876/2017)

Date : 23-01-2018 This matter was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE N.V. RAMANA
HON'BLE MR. JUSTICE S. ABDUL NAZEER

For Petitioner(s)
Mr. Dhruv Mehta, Sr.Adv.
Mr. Ashish Wad, Adv.
Ms. Jayashree Wad, Adv.
Ms. Paromita Majumdar, Adv.
Ms. Sukriti Jaggi, Adv.
For M/S. J S Wad And Co, AOR

For Respondent(s)
Ms. Surabhi Sanchita, Adv.
For Mr. Nishant Ramakantrao Katneshwarkar, AOR

UPON hearing the counsel the Court made the following
O R D E R

Delay condoned.

Leave granted.

This appeal is disposed of in terms of the signed reportable judgment.

(SUKHBIR PAUL KAUR) (RENUKA SADANA)
AR CUM PS ASST.REGISTRAR

(Signed reportable judgment is placed on the file)