(2020) 08 GUJ CK 0309

In the Gujarat High Court

Case No : R/Special Civil Application No. 9203 Of 2020

Nathubhai Jinabhai Gamara APPELLANT

Vs

State Of Gujarat RESPONDENT

Date of Decision : 26-08-2020

Acts Referred:

Gujarat Mineral (Prevention Of Illegal Mining, Storage And Transportation) Rules 2017 — Rule 12, 12(b)(i), 21, 22, 22(ii)

Citation : (2020) 08 GUJ CK 0309

Hon'ble Judges : G.R.Udhwani, J

Bench : Single Bench

Advocate : Jasani, P B Khandheria, Asmita Patel

Final Decision : Allowed

Judgement

G.R.Udhwani, J

1. RULE. Opponents waive service.

2. The issue in the petition percolates around interpretation of Rules 12, 21 and 22 of the Gujarat Mineral (Prevention of Illegal Mining, Storage and Transportation) Rules 2017 (As Amended in 2019) (for short "the said Rules"). The short question concerns the authority of the investigating agency to detain the seized vehicle/article in its custody beyond the specified period, in absence of the complaint contemplated in Rule 12 of the said Rules.

3. The aforesaid being a short issue which is already deliberated in Zaverbhai Nanubhai Devani vs. State of Gujarat (Letters Patent Appeal No. 397 of 2018 in Special Civil Application No. 3862 of 2018 with Civil Application No. 1 of 2018 decided on 18.04.2018) and by myself in the interim order dated 14.07.2020 in Dipak Dhanjibhai Savaliya v. State of Gujarat and two others in SCA No. 7845 of 2020,the petition is taken up for final decision.

4. Brief facts relevant for the purpose of this determination are thus:

4.1 The petitioner is a registered owner of a JCB Loader bearing Registration No.GJ-10-X-6170 which is being provided by him on rental basis. It is the case of the petitioner that, while under the rental agreement, the respondent seized the machine without even issuing a seizure memo; on the charge of its illegal use i.e excavation of sand from the gauchar land. It is stated that the respondent No.3 advised the respondent No.2 - Geologist to take appropriate legal action; whereupon a show-cause-notice was issued on 22.04.2020 to the driver of the vehicle requiring him to pay the compounding charges as also the fine. It is stated that no notice came to be issued to the petitioner. It is averred that no FIR has been filed on the subject.

4.2 An affidavit-in-reply is filed wherein inter-alia a comparison of amended and unamended rules has been made with the contention that the outer limit of filing the complaint/concluding the investigation i.e. 45 days would not apply; that unlike unamended rules, the amended Rule 12 did not provide for 30 days for payment and invocation of the bank guarantee and the production of the vehicle with the court was contemplated in the unamended rules; that being the intent of unamended rules, that the amended rules permit encashment of the bank guarantee in absence of the payment of compounding amount/fine within a period of 30 days and that the amended rules has completely dispensed with an application for compounding, and in fact, the authority under the amended rules is required to consider two aspects being: (i) whether the compounding is not permissible under Rule 22 or (ii) that the offence is not compoundable within the specified period of 45 days. According to the submission of learned AGP, it is only in cases where compounding is impermissible that deadline of 45 days would be required to be complied with, but in cases where compounding is permissible, the eventuality of registration of a complaint with the court of sessions would not arise.

5. For convenience, the relevant rules as reproduced in the affidavit of the deponent are reproduced hereunder in juxtaposition:

Un-Amended Rule-12, as it stood prior to the amendment dated 21.06.2019

Amended Rule-12, as it stands post amendment dated 21.06.2019

12. Seizure of property liable to confiscation.-

(1) Whenever any person raises, transports or causes to be raised or transported, without any lawful authority, any mineral from any land, and, for that purpose, uses any tool, equipment, vehicle or any other thing, such mineral, tool, equipment, vehicle or other thing (hereinafter referred to as "property") shall be liable to be seized by the Government in the manner specified in subrule (2) of this rule.

(2) Every Authorised Officer seizing any property under these rules shall photograph the property and place on such property a mark in such manner as may be prescribed, indicating that the same has been so seized and shall:

(a) issue a notice in Form J informing the person from whom the property is seized of the property so seized;

(b) conduct:

(i) an investigation and if he is satisfied that a compoundable offence has been committed in respect of the property, he may, subject to receipt of a compounding application, order payment of such amount for compounding the offence as may be deemed appropriate; or (ii) a preliminary investigation and shall produce the property seized before a court empowered to determine commission of such offence, if compounding is not permissible under rule 22 or if no application for compounding is received pursuant to clause (a) above, upon the expiry of fifteen days from the date of seizure or upon completion of the investigation, whichever is earlier.

(3) Where any property seized under sub- rule (1) is produced before a court under sub clause (ii) of clause (b) of sub-rule (2) and the court is satisfied that offence has been committed in respect thereof, the court may order confiscation of the property under sub-section (4A) of Section 21 of the Act.

(4) No order for confiscating any property shall be made under sub-rule (3) unless the person from whom the property is seized is given:

(a) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds for confiscation; and

(b) a reasonable opportunity of being heard in the matter. (5) Upon expiry of fifteen days from the date of seizure of the property under subrule

(2) and prior to:

(a) payment for compounding the offence under sub-clause (i) of clause (b) of subPage 7 of 10 rule (2); or

(b) completion of the investigation by the Authorised Officer under subclause (i) of clause (b) of sub-rule (2); or (c) a determination under subrule (3), the Authorised Officer may release the property on the furnishing of a noninterest bearing security deposit or a bank guarantee.

(6) The bank guarantee issued under subrule (5) shall be valid for an initial period of one year and shall be renewed from time to time until payment for compounding the offence under sub-clause (i) of clause (b) of sub-rule (2) or a determination under subrule(3), as applicable, is made. The non-interest bearing security deposit or bank guarantee shall be for an amount equivalent to ten times of the market value of the mineral seized or for such other amount as may be specified by the Government through a notification, subject to a minimum of rupees two lakh:

Provided that, if upon a determination under sub-rule

(3), a penalty for an amount exceeding the amount of non-interest bearing security deposit or bank guarantee is levied and the penalty amount is not paid, then the penalty amount may be recovered in the same manner as if it were an arrear of land revenue.

(7) The property seized under this rule shall be kept in the custody of the Authorised Officer, any other third party, nearest police station or Government premises until: (a) payment for compounding the offence is maid; or (b) a bank guarantee is provided pursuant to sub-rule (5); or (c) an order of the court directing its disposal is received by the Authorised Officer.

12. Seizure of property liable to confiscation.-

1) Whenever any person raises, transports or causes to be raised or transported, without any lawful authority, any mineral from any land, and for that purpose, uses any tool, equipment, vehicle or any other thing, such mineral, tool, equipment, vehicle or other thing (hereinafter referred to as "property") shall be liable to be seized by the Government in the manner specified in sub-rule (2) of this rule.

(2) [Every Authorised Officer seizing any property under these rules shall photograph the property and place on such property a mark in such manner as may be determined, indicating that the same has been so seized and shall:

(a) issue a notice in Form J informing the person from whom the property is seized of the property so seized, and release the property so seized upon receipt of a bank guarantee for an amount equal to-

(i) the penalty payable under rule 21, in case of transportation of, or causing to transport, mineral without lawful authority; or

(ii) the written down value of the property, in case of illegal mining or illegal storage of mineral: Provided that, release under clause (a) of sub-rule (2) shall be without prejudice to and shall not in any manner affect the conduct of investigations and other actions contemplated under clause (b) of sub-rule (2).

Explanation: Under these rules property is seized as

a security against the amount of penalty due to the Government and to ensure the presence of the alleged offender before the Government if the case is at notice stage.]

(b) [conduct,

(i) an investigation and if he is satisfied that a compoundable offence has been committed in respect of the property, he may, subject to receipt of a compounding application, order payment of such amount for compounding the offence as may be deemed appropriate, which amount, if not paid within thirty days, may be recovered by invocation of the bank guarantee furnished under clause (a) of sub-rule (2); or

(ii) a preliminary investigation, and if compounding is not permissible under rule 22 or if he is satisfied that the offence committed in respect of the property is not compoundable, upon the expiry of forty-five days from the date of seizure or upon completion of the investigation, whichever is earlier, shall approach by way of making a written complaint, before the Court of Sessions.

Explanation: Any offence under these rules shall be tried by the Court of Sessions in accordance with the Procedure laid down under the Code of Criminal Procedure, 1973;]

(3) [Where the court is satisfied that an offence has been committed and is punishable under these rules, the court may order for,- (a) penalty in accordance with rule 21,

(b) confiscation of the property under sub-section (4A) of section 21 of the Act, where the property seized under sub-rule (1) above is produced before a court under sub-clause (ii) of clause (b) of sub-rule (2).]

(4) No order for confiscating any property shall be made under sub-rule

(3) unless the person from whom the property seized is given:

(a) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds for confiscation; and;

(b) a reasonable opportunity of being heard in the matter. (5) [***]

(6) [The bank guarantee issued under clause (a) of sub-rule (2) shall be valid for an initial period of one year and shall be renewed from time to time until payment for compounding the offence under sub-clause (i) of clause (b) of sub-rule (2) or until payment of the penalty determined under sub-rule (3), as applicable, is made:

Provided that, if upon a determination under sub-rule (3), a penalty for an amount exceeding the amount of the bank guarantee is levied and the penalty amount is not paid, then the excess penalty amount may be recovered in the same manner as if it were an arrear of land revenue.]

(7) [The property seized under this rule shall be kept in the custody of the Authorised Officer, any other third party, nearest police station or Government premises until:

(a) a bank guarantee is provided pursuant to clause (a) of sub-rule (2);

(b) payment of the amount as determined under sub-clause (i) of clause (b) of sub-rule (2) for compounding the offence is made; or, (c) payment of penalty as determined under sub-rule (3) is made; or (d) an order of the court directing its disposal is received by the Authorised Officer.]

6. Salient features of the Rules can be summarized thus:

(1) Seizure of the offending property as a security against the amount of penalty

if any as may be determined as also to ensure the presence of the alleged offender before the government at notice stage in the event of person found to be indulging into objectionable activities by the use of the said property.

(2) Issuance of notice in Form J; release of the seized property upon receipt of the bank guarantee equal to penalty payable under Rule 21 or written down value of the property in case of illegal mining or illegal storage of minerals subject to right of the investigator to conduct investigation and other actions.

(3) Investigating and compounding of the offence if compoundable; upon receipt of the application for compounding, and recovery of the compounded amount by invocation of bank guarantee if the amount remains unpaid after the specified period. (4) Preliminary investigation and registration of a complaint before the court of sessions upon expiry of 45 days from the date of seizure or completion of the investigation whichever event occurs earlier, if compounding is not permissible or offence is not compoundable or not compounded.

(5) Trial by the court of sessions and imposition of penalty or confiscation of the property after appropriate opportunity of making a representation in writing as also the opportunity of being heard to the alleged offender found to have committed the offence.

(6) Validity of the bank guarantee and its renewal until occurrence of certain eventualities.

(7) Custody of the property seized until the occurrence of certain events.

7. Pertinently the competent authority under Rule 12 is only authorized to seize the property investigate the offence and compound it; the penalty can be imposed and confiscation of the property can be done only by order of the court. Imposition of penalties and other punishments under Rule 21 is thus the domain of the court and not the competent authority. Needless to say therefore that for the purpose of confiscation of the property it will have to be produced with the sessions court and the custody would remain as indicated in sub-rule 7 of Rule

12. Thus where the offence is not compounded or not compoundable it would be obligatory for the investigator to approach the court of sessions with a written complaint and produce the seized properties with the court on expiry of the specified period. In absence of this exercise, the purpose of seizure and the bank guarantee would stand frustrated; resultantly the property will have to be released in favour of the person from whom it was seized, without insisting for the bank guarantee.

8. Although Rule 12, while referring to Rule 22 speaks about compoundability of offence and impermissibility of the compounding, the class of offences not qualifying for compounding are not indicated therein and on the contrary it speaks about compoundability of 'any' offence punishable under the Rules. Thus all the offences would be compoundable in absence of contrary provision; at any time before the order of confiscation by the court.

9. On perusal of the affidavit by respondent No.2, it appears that an attempt has been made to read amended and unamended rules in a distorted manner by picking up few contemplations of the rules in a selective manner. That, in the opinion of this court, is not a proper reading of the rules. Although the compounding of the offence under Rule 22 would be permissible even after institution of the prosecution; should there be an application for the purpose.

10. The bank guarantee is contemplated to be furnished in three eventualities: (i) for the release of the seized property and (ii) for compounding of the offence and recovery of compounded amount, if it remains unpaid on expiry of the specified period of 30 days; (iii) for recovery of unpaid penalty. Merely because that is so, it cannot be said that the investigator would be absolved from its duty of instituting the case on failure of compounding of the offence. Infact offence can be compounded at two stages being (1) at a notice stage, within 45 days of the seizure of the vehicle; (2) during the prosecution but before the order of confiscation. Needless to say that for compounding the offence during the prosecution, prosecution must be lodged and it is only then that on the application for compounding, the bank guarantee could be insisted upon. In absence of prosecution, the question of bank guarantee would not arise; nor would the question of compounding of offence.

11. The deponent of the affidavit appears to have turned a blind eye on Rule 12 when he contends that application for compounding has been dispensed with by the amended rules inasmuch as; even the amended Rule 12(b)(i) clearly uses the word "subject to receipt of compounding application". Thus the said contention deserve no merits. Thus, in absence of the complaint, the competent authority will have no option but to release the seized vehicle without insisting for bank guarantee. There is thus a huge misconception on the part of the authority to assert that even in absence of the complaint it would have a dominance over the seized property and that it can insist for a bank guarantee for its.

12. In view of the above discussions, the petition is required to be allowed. Relief in terms of para 8(A) is granted and the show-cause-notice dated 22.04.2020 issued by respondent No.2 is quashed and set aside. Rule is made absolute.

