

(2014) 12 GUJ CK 0031
In the Gujarat High Court

Case No : Criminal Misc. Application No. 12489 of 2014 in Special Criminal Application No. 980 of 2011

Suresh Fakirchand Parmar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 24-12-2014

Acts Referred:

Companies Act, 1956 — Section 617

Criminal Procedure Code, 1973 (CrPC) — Section 173, 190(1)(d), 378

Mines and Minerals (Development and Regulation) Act, 1957 — Section 18, 21, 22, 4, 4(1)

Penal Code, 1860 (IPC) — Section 378, 379, 405, 406, 415

Citation : (2014) 12 GUJ CK 0031

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : Satyam Y. Chhaya, Advocate for the Appellant; A.N. Shah, APP, Advocate for the Respondent

Judgement

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J.B. Pardiwala, J.—By this application the applicant-original accused prays for quashing of the proceedings of the Criminal Case No. 881 of 2013, pending in the Court of the learned Principal Senior Civil Judge and Chief Judicial Magistrate, Lunawada, District Panchmahal's, arising from a First Information Report registered with the Santrampur Police Station being C.R. No. I-10 of 2011 of the offence punishable under Sections 4, 4(1), 4(1)(A) and 22 of the Mines and Minerals (Development and Regulation) Act, 1957 and Sections 406 and 420 of the Indian Penal Code.

2. The case of the prosecution may be summarized as under:-

(a) It appears that the respondent No. 4, in his capacity as the Assistant Geologist, lodged a report at the Police Station stating that the applicant herein was granted lease of a parcel of land for the purpose of mining for a period of 20

years vide order dated 9th March, 1995 passed by the Industries and Mines Department. The portion of land allotted in favour of the applicant herein was a part of Survey No. 51 situated at village-Ora, Taluka Santrampur, District Panchmahal's admeasuring 4.20 hectares. An agreement in that regard was executed on 17th July, 1995. According to the first informant, the lease was ordered to be cancelled as the land was falling within the forest area. A team of flying squad of the Department carried out the necessary survey of the site at which the mining operations were being undertaken and it was found that over and above the area which was leased for the purpose of mining, the applicant had undertake mining operations in the land other than the one which was allotted. According to the first informant, 1,18,1198 M.T. of minerals was extracted from the place other than the one which was allotted.

(b) It is the case of the prosecution that at the rate of Rs. 154 per M.T. the accused is liable to deposit a sum of Rs. 2,79,03,106/- (Rupees Two Crore Seventy Nine Lac Three Thousand One Hundred and Six Only). On such allegations, it is alleged that the accused has committed an offence as noted above.

3. It appears that the Police carried out the investigation and filed a chargesheet in the Court of the learned Chief Judicial Magistrate, Lunawada of the offence punishable under Sections 4, 4(1), 4(1)(A) and 22 of the Mines and Minerals (Development and Regulation) Act, 1957 and Sections 406 and 420 of the Indian Penal Code.

4. Mr. Satyam Chhaya, the learned advocate appearing on behalf of the applicant, vehemently submitted that the trial Court committed a serious error in taking cognizance of the offence punishable under the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (for short, "the Act, 1957") on a Police report, in view of the specific bar under Section 22 of the Act, 1957.

5. Mr. Chhaya submits that the offence under the Act, 1957 is a cognizable offence, and being a cognizable offence, the Police definitely has the power to investigate. But at the end of the investigation when the charge-sheet is filed, the Court is precluded from taking cognizance upon such charge-sheet. The Court is empowered to take cognizance of the offence under the Act, 1957 only upon a complaint made by an authorized officer in that regard in the Court of the learned Magistrate.

6. Mr. Chhaya submits that even if the entire case of the prosecution is believed to be true, then none of the ingredients to constitute the offence under Sections 406 and 420 of the Indian Penal Code are spelt out.

7. In such circumstances referred to above, Mr. Chhaya prays that there being merit in the petition, the same be allowed and the proceedings be ordered to be quashed.

8. On the other hand, this petition has been opposed by Mr. A.N. Shah, the learned APP. According to Mr. Shah no error not to speak of any error of law, could be said to have been committed by the learned Magistrate in taking cognizance upon the charge-sheet filed by the Investigating Officer. Mr. Shah submits that the applicant had undertaken mining operations in the area which was actually not leased to him and thereby he could be said to have committed the offence as alleged. Mr. Shah prays that there being no merit in this application, the same deserves to be rejected.

9. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration in this petition is, whether the prosecution deserves to be quashed.

10. Section 4 of the Act, 1957 reads as under:-

"4. Prospecting or mining operations to be under license or lease. (1) [No person shall undertake any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting license or, as the case may be, of a mining lease, granted under this Act and the rules made thereunder.]

Provided that nothing in this sub-section shall affect any prospecting or mining operations undertaken in any area in accordance with the terms and conditions of a prospecting license or mining lease granted before the commencement of this Act which is in force at such commencement:

[Provided further that nothing in this subsection shall apply to any prospecting operations undertaken by the Geological Survey of India, the Indian Bureau of Mines, [the Atomic Minerals Directorate for Exploration and Research] of the Department of Atomic Energy of the Central Government, the Directorates of Mining and Geology of any State Government (by whatever name called), and the Mineral Exploration Corporation Limited, a Government company within the meaning of section 617 of the Companies Act, 1956:]

[Provided also that nothing in this subsection shall apply to any mining lease (whatever called mining lease, mining concession or by any other name) in force immediately before the commencement of this Act in the Union Territory of Goa, Daman and Diu.]

[(1A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.]

(2) [No reconnaissance permit, prospecting license or mining lease] shall be granted otherwise than in accordance with the provisions of this Act and the rules made thereunder.

[(3) Any State Government may, after prior consultation with the Central Government and in accordance with the rules made under section 18, [undertake

reconnaissance, prospecting or mining operations with respect to any mineral specified in the First Schedule in any area within that State which is not already held under any reconnaissance permit, prospecting license or mining lease].]"

11. Section 22 of the Act, 1957 reads thus:-

"Cognizance of offence-No court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government."

12. An identical question was considered by the learned Single Judge of this Court in a batch of matters being Criminal Misc. Application No. 5230/2010 and other allied matters decided on 3rd September 2010. The learned Single Judge formulated the following questions for his consideration.

"(1) Whether section 22 of the Act would debar even lodging an FIR before the police with respect to the offences punishable under the said Act and the Rules made thereunder?

(2) In case such FIRs are not debarred and the police are permitted to investigate, can the concerned Magistrate take cognizance of the offences on a police report?

(3) What would be the effect on the offences punishable under the Indian Penal Code in view of the provisions contained in the Act?

13. The aforesaid questions were answered by the Court as under:

"(1) The offence under the said Act being cognizable offence, the police could have registered an FIR.

(2) However, so far as taking cognizance of offence under the said Act was concerned, it could be taken by the Magistrate only on the basis of a complaint filed by an authorized officer, which might be filed along with the police report.

(3) Since the offence of mining of sand without permission is punishable under section 21 of the said Act, the question of the said offence being an offence under section 379 of IPC does not arise because the said Act makes illegal mining as an offence only when there is no permit/license for such extraction and a complaint in that regard is filed by an authorized officer."

14. The final conclusions arrived at by the learned Single Judge were as under:

"1. Section 22 of the Act does not prohibit registering an FIR by the police on information being given with respect to offences punishable under the said Act or the Rules made thereunder,

2. It is, however, not open for the Magistrate to take cognizance of the offence punishable under the Act or the Rules made thereunder on a mere chargesheet filed by the police. It would, however, be open for the officer authorized by the

State or the Central Government in this behalf to file a complaint in writing before the Magistrate relying upon the investigation carried out by the police and the compliant may also include the papers of police investigation.

3. With respect to offences punishable under the Indian Penal Code, no such bar as indicated in para (2) would apply.

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22. In so far as the petitions where only FIRs have been registered by the police and no chargesheet is filed, they must fail. In so far as the cases where police investigation has been concluded and chargesheets have been filed, it would not be open for the Magistrate concerned to take cognizance of offences only on such police reports."

15. It appears that the judgment of this Court referred to above was carried in appeal before the Supreme Court being Criminal Appeal No. 2105 of 2013. The Supreme Court took notice of the fact that such issue was decided by various other High Courts and the orders passed by various High Courts were challenged before the Supreme Court. In such circumstances, all the matters were ordered to be clubbed together and by a common judgment and order dated 4th September, 2014, disposed of all the appeals. The Supreme Court took the following view:

"57. Sub-section (1A) of Section 4 of the MMDR Act puts a restriction in transporting and storing any mineral otherwise than in accordance with the provisions of the Act and the rules made thereunder. In other words no person will do mining activity without a valid lease or license. Section 21 is a penal provision according to which if a person contravenes the provisions of Subsection (1A) of Section 4 shall be prosecuted and punished in the manner and procedure provided in the Act. Sub-section (6) has been inserted in Section 4 by amendment making the offence cognizable notwithstanding anything contained in the Code of Criminal Procedure 1973.

58. Section 22 of the Act puts a restriction on the court to take cognizance of any offence punishable under the Act or any rule made thereunder except upon a complaint made by a person authorized in this behalf.

59. It is very important to note that Section 21 does not begin with a non-obstante clause. Instead of the words "notwithstanding anything contained in any law for the time being in force no court shall take cognizance.....", the Section begins with the words "no court shall take cognizance of any offence."

60. It is well known that a non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.

61. In *Liverpool Borough vs. Turner* Lord Campbell (1861), 30 L.J. Ch. 379, C.J. at page 380 said:-

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

62. In *Thakur Pratap Singh Vs. Shri Krishna Gupta and Others*, , the Supreme Court while interpreting the mandatory and directory provisions of statute observed as under:-

"We do not think that is right and we deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter; they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the legislature does not itself state which Judges must determine the matter and exercising a nice discrimination, sort out one class from the other along broad based, commonsense lines."

63. The question is whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.

64. In *Maxell on the Interpretation of Statutes* 10th Edn. At page 381, it is stated thus:-

"On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them."

65. In the case of *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, , while interpreting a particular statute as mandatory or directory this Court observed:-

"When a statute uses the word "shall", "prima facie", it is mandatory, but the court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the

legislature the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the noncompliance with the provisions, the fact that the noncompliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

66. Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the river bed.

67. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the eco-system of the rivers and safety of bridges. It also weakens river beds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the ground water levels.

68. There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorized under the Act shall exercise all the powers including making a complaint before the jurisdictional magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorized officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitute an offence under Indian Penal Code.

69. However, there may be situation where a person without any lease or licence or any authority enters into river and extracts sands, gravels and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections 378 and 379 of the Indian Penal Code.

70. From a close reading of the provisions of MMDR Act and the offence defined under Section 378, IPC, it is manifest that the ingredients constituting the

offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravels and other minerals from the river, which is the property of the State, out of State's possession without the consent, constitute an offence of theft.

71. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such person. In other words, in a case where there is a theft of sand and gravels from the Government land, the police can register a case, investigate the same and submit a final report under Section 173, Cr.P.C. before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.

72. After giving our thoughtful consideration in the matter, in the light of relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Indian Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the river beds without consent, which is the property of the State, is a distinct offence under the IPC. Hence, for the commission of offence under Section 378 Cr.P.C., on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorized officer for taking cognizance in respect of violation of various provisions of the MMRD Act. Consequently the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the concerned Magistrates to proceed accordingly."

16. Thus having regard to the position of law as explained by the Supreme Court as aforementioned, the learned Chief Judicial Magistrate, Lunawada, could not have taken cognizance of the offence under Section 4 of the Act, 1957, in view of the specific bar under Section 22 of the Act, 1957. The Police, no doubt, has completed the investigation and has filed the charge-sheet. At best, relying on the papers of the investigation carried out by the Police, it is for the person authorized to file a private complaint in the Court of the learned Magistrate so far as the offence under Section 4 of the Act, 1957 is concerned. Upon such complaint only, the Magistrate is empowered to take cognizance. Therefore, I have no hesitation in coming to the conclusion that the learned Chief Judicial Magistrate has committed an error in taking cognizance of the offence under Section 4 of the Act, 1957.

17. The above takes me to deal with the second question, whether any case of the offence under Section 406 and Section 420 of the Indian Penal Code could be

said to have been made out.

18. The offences of criminal breach of trust (Section 406 IPC) and cheating (Section 420 IPC) have specific ingredients. In order to constitute a criminal breach of trust (Section 406 IPC);

1) There must be entrustment with person for property or dominion over the property, and

2) The person entrusted:

a) dishonestly misappropriated or converted property to his own use, or

b) dishonestly used or disposed of the property or willfully suffers any other person so to do in violation

i) any direction of law prescribing the method in which the trust is discharged and

ii) of legal contract touching the discharge of trust (see: S.W. Palanitkar and others Vs. State of Bihar and another, .

Similarly, in respect of an offence under Section 420 IPC, the essential ingredients are:

1) deception of any person, either by making a false or misleading representation or by other action or by omission;

2) fraudulently or dishonestly inducing any person to deliver any property, or

3) the consent that any persons shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit (see: Harmanpreet Singh Ahluwalia and Others Vs. State of Punjab and Others,

19. Further, in both sections, mens rea i.e. intention to defraud or the dishonest intention must be present from the very beginning or inception, without which, either of these sections cannot be invoked.

20. In my view, the plain reading of the First Information Report fails to spell out any of the aforesaid ingredients noted above. I may only say, with a view to clear a serious misconception of law in the mind of the police as well as the courts below, that if it is a case of the complainant that offence of criminal breach of trust as defined under Section 405 of IPC, punishable under Section 406 of IPC, is committed by the accused, then in the same breath it could not be said that the accused has also committed the offence of cheating as defined and explained in Section 415 of the IPC, punishable under Section 420 of the IPC.

21. Every act of breach of trust may not be resulted in a penal offence of criminal breach of trust unless there is evidence of manipulating act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person may seek his remedy for damages in civil courts but, any breach of trust with a mens rea, gives rise to a criminal prosecution as well. It

has been held in Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others, as under:

We have heard Mr. Maheshwarit on behalf of the appellant and are of the opinion that no case has been made out against the respondents under Section 420 Indian Penal Code. For the purpose of the present appeal, we would assume that the various allegations of fact which have been made in the complaint by the appellant are correct. Even after making that allowance, we find that the complaint does not disclose the commission of any offence on the part of the respondents under Section 420 Indian Penal Code. There is nothing in the complaint to show that the respondents had dishonest or fraudulent intention at the time the appellant parted with Rs. 35,000/- There is also nothing to indicate that the respondents induced the appellant to pay them Rs. 35,000/- by deceiving him. It is further not the case of the appellant that a representation was made, the respondents knew the same to be false. The fact that the respondents subsequently did not abide by their commitment that they would show the appellant to be the proprietor of Drang Transport Corporation and would also render accounts to him in the month of December might create civil liability on the respondents for the offence of cheating.

22. To put it in other words, the case of cheating and dishonest intention starts with the very inception of the transaction. But in the case of criminal breach of trust, a person who comes into possession of the movable property and receives it legally, but illegally retains it or converts it to his own use against the terms of the contract, then the question is, in a case like this, whether the retention is with dishonest intention or not, whether the retention involves criminal breach of trust or only a civil liability would depend upon the facts of each case.

23. The distinction between mere breach of contract and the offence of criminal breach of trust and cheating are fine one. In case of cheating, it depends upon the intention of the accused at the time of inducement, which may be judged by a subsequent conduct, but for this, the subsequent conduct is not the sole test but mere breach of contract which cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction i.e. the time when the offence is said to have been committed. Therefore, it is this intention, which is the gist of the offence. Whereas, for the criminal breach of trust, the property must have been entrusted to the accused or he must have dominion over it. The property in respect of which the offence of breach of trust has been committed must be either the property of some person other than the accused or the beneficial interest in or ownership of it must be of some other person. The accused must hold that property on trust of such other person. But the offence, i.e. the offence of breach of trust and cheating involve dishonest intention but they are mutually exclusive and different in basic concept. There is a distinction between criminal breach of trust and cheating. For cheating, criminal intention is necessary at the time of entrustment. In criminal breach of trust, mere proof of entrustment is sufficient.

Thus, in case of criminal breach of trust, the offender is lawfully entrusted with the property and he dishonestly misappropriated the same. Whereas, in case of cheating, the offender practices fraudulent or dishonest to induce with another person to deliver the property. In such situation, both the offences cannot co-exist simultaneously.

24. In the aforesaid view of the matter, no case could be said to have been made out so as to charge the applicant of the offence of criminal breach of trust and cheating. At best, the prosecution could have been of the offence of theft under Section 379 of the Indian Penal Code.

25. In the result, this application is allowed. The further proceedings of the Criminal Case No. 881/2013, pending in the Court of the learned Chief Judicial Magistrate, Lunawada, are hereby ordered to be quashed. All consequential proceedings pursuant thereto also stand terminated. Rule is made absolute.

26. However, it is clarified that it shall be open for the Department to file a private complaint in the Court of the learned Magistrate, of the offence punishable under Section 4 of the Act, 1957, through an authorized officer in that behalf, and if such private complaint is filed, the Magistrate shall proceed to consider the same in accordance with law.