

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR.JUSTICE B.A.PATIL

CRIMINAL APPEAL NO.1988/2018

Dated:07-08-2019

Dinesh and Another vs. The State of Karnataka

J U D G M E N T

The present appeal is preferred by accused Nos.1 and 2, being aggrieved by the judgment and order of conviction and sentence passed by the learned II Additional Sessions and Special Judge at Mysuru in Special Case No.85/2018, dated 12/15.10.2018.

2. I have heard the learned counsel for appellant-accused Nos.1 and 2 and the learned HCGP for the respondent-State.

3. The gist of the complaint is that on the intervening night of 6.4.2016 and 7.4.2016, accused No.1 being the driver and accused No.2 being the owner of tipper Lorry bearing Regn.No.KA-45-8889, were illegally transporting the sand of 5.50 cubic meters from Lakshmana Thirtha river near Cholenahalli Village. When the said tipper lorry was intercepted, no explanation was given by the accused persons and the said lorry was seized by drawing a *mahazar* and a complaint has been

registered. After completion of investigation, the charge sheet was filed. Thereafter, the Special Court took cognizance and secured the presence of the accused. After hearing both the sides the charge was framed, accused pleaded not guilty and claimed to be tried. As such the case was fixed for trial.

4. In order to prove its case, the prosecution has got examined seven witnesses as PWs.1 to 7 and got marked 15 documents as per Exs.P1 to P15. Thereafter, the statement of accused was recorded under Section 313 of Cr.P.C. But accused have not chosen to lead any defence evidence. After hearing the arguments on both sides, the impugned judgment of conviction and order of sentence came to be passed. Challenging the legality and correctness of the same, the appellants-accused Nos.1 and 2 are before this Court.

5. It is the submission of the learned counsel for the appellants that the complaint is registered as per Ex.P8 by the PSI both for the offences punishable under Section 21 r/w Sections 4(1), 4(1A) of Mines and Mineral (Development and Regulation) Act (for short "MMDR Act") and Rules 42 and 44 of the Karnataka Minor Mineral Consistent Rules, 1994 ('Rules' for short) as well as

Section 379 of IPC.

6. It is the submission of the learned counsel for the appellants is that in order to take cognizance as per Section 22 of the MMDR Act, the authorized person has to file a complaint and without such complaint no Court can take cognizance of the offence punishable under the MMDR Act. Without considering the said aspect, the trial Court has wrongly convicted the accused-appellants under the provisions of MMDR Act. It is his further submission that PWs.1, 3 to 5 are the *panchas* to seizure *mahazar*, who have not supported the case of the prosecution and they have been treated as hostile. The only evidence which is available before the Court is that of PWs.6 and 7 who are official witnesses and they are interested witnesses to prove the fact that the sand is a stolen property. In the absence of the said material the accused cannot even be convicted for the offence punishable under Section 379 of IPC. It is his further submission that the trial Court without considering the law on the point and without proper appreciation of the material on record, , has come to a wrong conclusion and has wrongly convicted the accused. On these grounds, he prayed to allow the appeal by setting aside the impugned judgment and order and to acquit the accused.

7. *Per contra*, the learned HCGP vehemently argued and submitted that accused Nos.1 and 2 have

been caught red handed when they were transporting the sand in the tipper lorry. It is his further submission that the vehicle being laden is not in dispute and the said fact has also been supported by P.Ws.2, 6 and 7. Even the photographs produced at Exs.P2 to P5 corroborate the evidence of P.Ws.2 and 7. It is his further submission that when the prosecution has alleged the offence under Section 379 of IPC, then under such circumstances, police gets the jurisdiction to investigate and file the charge sheet. Accordingly, the charge sheet has been filed and the trial Court after taking into consideration the said aspect, has rightly convicted the accused. It is his further submission that as the accused have not raised the said issue at a preliminary stage, the said issue cannot be raised at this stage. It is his further submission that the license has not been produced to show that the accused were transporting the sand with valid permit. When that being so, it is going to be proved that the sand is a stolen property and as such the accused are liable to be convicted for the offence punishable under Section 379 of IPC. On these grounds he prayed to dismiss the appeal.

8. I have carefully and cautiously gone through the

submissions made by the learned counsel appearing for the parties and perused the records.

9. In order to prove its case, the prosecution got examined seven witnesses. P.Ws.1 and 3 are the *panchas* to seizure *mahazar* at Ex.P1 whereunder the tipper lorry along with sand has been seized on 7.4.2016 at about 6.00 a.m. These two witnesses have not supported the case of the prosecution and they have been treated as hostile. Even during the course of cross-examination by the learned Public Prosecutor, nothing has been elicited so as to substantiate the case of the prosecution. P.Ws.4 and 5 are the attesting witnesses to the spot *mahazar* at Ex.P7. They have also not supported the case of the prosecution and have been treated as hostile. Even during the course of their cross-examination, nothing has been elicited to support the case of the prosecution. The only evidence which is available before the Court is that of P.Ws.2, 6 and 7. P.W.2 is the Assistant Executive Engineer, who has deposed that on requisition of the complainant on 3.5.2016, he proceeded to Bilikere Police Station and measured the sand in the tipper lorry bearing Regn.No.KA-45-8889 and the quantity of the sand was 5.50 cubic meters and he has given the report as per Ex.P6. During the course of cross-examination of PW.2, nothing has been elicited to discard his

evidence.

10. P.W.6 is the Head Constable who initiated the proceeding on the basis of the FIR given by P.W.7 registered the case in Crime.No.100/2016 and issued the FIR to the jurisdictional Court. He has further deposed that he has produced Exs.P9 and P1. In his cross-examination he has stated that the said complaint is registered at 1.00 a.m., i.e., in the midnight of 6.4.2016 and 7.4.2016 and there was no impediment for him to ask the neighbours to attest Ex.P1, the seizure *mahazar*. P.W.7 is the complainant, who has deposed that he was on patrolling duty during the intervening night of 6.4.2016 and 7.4.2016. On credible information, when he intercepted the tipper lorry in question, the driver of the said vehicle stopped and ran in the darkness. He deputed some of his staff to watch the said lorry and at about 12.00 a.m., he went back to the Police Station and got typed the complaint and registered the said complaint as per Ex.P8. He has further deposed that he has also investigated the case and after collecting the documents, he filed the charge sheet against the accused. During the course of cross-examination, nothing has been elicited so as to discard the evidence of P.W.7.

11. The main contention which has been raised by the learned counsel for the appellants is that there is a

bar under Section 22 of the MMDR Act to investigate and submit a report to the police under Section 173 Cr.P.C. For the purpose of brevity, I quote Section 22 of MMDR Act, which reads as under:-

*"22. Cognizance of offences.— 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. On close reading of the aforesaid Section, it clarifies that the complaint has to be filed by a person authorized by the Central Government or the State Government in respect of the offences punishable under the provisions of the MMDR Act or the Rules made thereunder. No doubt by Notification bearing No.CI 21MMN(2) 2014, Bengaluru, dated 21.1.2014, the Police Inspector and Sub-Inspector of Police are the authorized Officers by their designation. But on close reading of Section 22 of the MMDR Act, it states that except upon a complaint in writing made by a person authorized in this behalf, no Court shall take cognizance of any offence punishable under the provisions of the MMDR Act or any Rules made thereunder.

13. The word "complaint" has been defined in Section 2(d) of Cr.P.C., which reads as under:-

*2. Definitions.- In this Code, unless the context otherwise requires,-*

*(a) .....*

*(b) .....*

*(c) .....*

*(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."*

14. On close reading of the said Section, 'complaint' means, any allegation made orally or in writing to a Magistrate. Admittedly in the instant case, no such private complaint has been filed before the Magistrate making allegation to the effect that the accused persons have illegally transporting the sand in the said tipper lorry. The Co-ordinate Bench of this Court in the case of *Sri Vivek and Another Vs. The State of Karnataka, by Kunigal Police Station and Another*, reported in *ILR 2018 KAR 1497* has given certain guidelines to be borne in mind by the Magistrates and the Special Courts.



At paragraph-37 of the said decision, it has been observed as under:-

*"37. Before concluding even at the cost of repetition, I, feel it just and necessary to summarize the guidelines to be born in mind by the police, Magistrates and the special Courts, and the same are briefly enumerated hereunder.*

**GUIDELINES:**

*(1) The Special Court constituted under the MMDR Act, has no jurisdiction to directly take cognizance of the offences under the MMDR Act and KMMC Rules, even along with any other penal offences unless the case is committed by the jurisdictional Magistrate. It is made clear that the Special Court has no jurisdiction to receive a final report from the Police under Section 173 of Cr.PC or to receive any private complaint under the MMDR Act, directly from the authorized officer and take cognizance of the offences either under the MMDR Act or any other penal laws. If any such complaint is erroneously received and pending, the Special Court has to follow the procedure as contemplated under Section 201 of Cr.PC. and return the complaint for presentation to the proper Court with an endorsement to that effect. Like wise if any police report is received the same has to be transferred to the jurisdictional Magistrate invoking the provisions*

*under Section 228 (1) (a) of Cr.PC for appropriate action.*

*(2) The Police cannot file a final report under Section 173 of Cr.PC for the offences under the MMDR Act & KMMC Rules either to the jurisdictional JMFC Court or to the Special Court. However, they can file the report for the offences under the IPC or any other penal law for the time being in force before the jurisdictional Magistrate.*

*(3) The jurisdictional Magistrate has no jurisdiction or power to take cognizance for the offence punishable under the MMDR Act & KMMC Rules on the basis of any Police report under Section 173 of Cr.PC. However, if any penal provisions under the IPC or any other penal laws are available in the final report of the police, if there is no other legal bar; the Magistrate can take cognizance of such offences under the IPC or other penal laws for which he is empowered, except the offences under MMDR Act & KMMC Rules.*

*(4) A private complaint is only contemplated under the MMDR Act & KMMC Rules and thus it has to be filed under Section 22 of the Act by the competent authorized officer under the MMDR Act & KMMC Rules. Even if other offences under any other penal laws, are also included along with offences under MMDR Act*

*and Rules, the jurisdictional Magistrate, has to take cognizance of the offences under MMDR Act & KMMC Rules only on the basis of the private complaint even though other penal laws are also invoked by the authorized officer and after compliance of relevant provisions of Cr.PC, the Magistrate has to commit the entire case to the Special Court for trial.*

*(5) The Special Court gets jurisdiction to try the offences under the MMDR Act & KMMC Rules thereunder including any other offences under any other penal laws for the time being in force only after the case is committed to it for trial by the jurisdictional Magistrate.*

*(6) If the authorized officer under Section 22 of the MMDR Act, has filed a private complaint, and the Magistrate has taken cognizance of the same, and during the course of inquiry or trial of private complaint, it is made to appear to the Magistrate that an investigation by the police in the same case is pending in relation to the offence which is the subject matter of inquiry or trial held by him then the Magistrate has to stay the proceedings of such inquiry or trial and call for the report on the matter from the police, and there after commit both the cases to the Special Court, for trial.*

*(7) If the police have already filed the report under section 173 of Cr.P.C. for the offences*

*under the MMDR Act and also under Other penal laws, like I.P.C. Motor vehicles Act or under any other penal law for the time being in force where the Magistrate has taken cognizance of the offences under other Penal laws, during inquiry or trial of such case, if any Private complaint is filed as per Section 22 of the said Act, by the authorized officer for the offences under MMDR Act and Rules arising out of same incident, the Magistrate shall stay all further proceedings, and commit both the cases to the Special Court for trial of both the cases, as per Section 323 of Criminal Procedure Code, after following the procedure as contemplated under section 202 (2) of Cr.PC.*

*(8) The Special Court on receipt of the cases as noted at guidelines 6 and 7, relating to the same incident, as the case may be has to try both the cases together, in accordance with law, adopting the procedure of a sessions trial, in view of the powers vested as per section 30 C of MMDR Act.*

*(9) The provisions and powers of the Magistrate with regard to the bail and also with regard to the interim custody of the seized properties can be exercised by the Magistrate during the inquiry till the committal of the case to the Special Court.*

*(10) After committal of the case, the Special Court being the trial Court shall have all the*

*powers of the Sessions Court regarding bail and disposal of the properties involved in the case, as provided under the provisions of the Code of Criminal Procedure.”*

15. Before going to discuss the case on hand, I am conscious of the fact that the object of restriction put by the MMRD Act in the illegal mining, transportation and storage of the minerals including sand affects the ecological system and it will be having a larger impact on the ecology. It is the duty of every citizen and the Court to protect the environment. If the Court is not going to protect the environment, then nobody can help. Keeping in view the ratio laid down in the above decision, in the case on hand, PW.7 has filed the complaint to the Sub- Inspector of Police and on the basis of the said complaint the case has been investigated and the charge sheet has been filed as against the accused. The procedure adopted by the Investigating Officer is not in contemplation with Section 22 of the MMDR Act. The MMDR Act puts restriction on the Court to take cognizance of any offence punishable under the MMDR Act and Rules made thereunder except upon a complaint in writing made by a person authorized in this behalf. Mere initiation of the proceedings for commission of the offence under the MMDR Act on the basis of the complaint is illegal and taking cognizance is also not correct. When the said procedure has not been followed, then under such circumstances, the entire proceedings vitiate and

the conviction passed by the learned Special Court, for the offences punishable under Sections 4(1) 4(1A) of the MMDR Act is not correct and it is illegal. In that light the judgment of the trial Court requires interference.

16. It is the contention of the learned HCGP that under Section 173 of Cr.P.C. the Police Inspector is having right to take cognizance for the offence punishable under Indian Penal Code and accordingly he has investigated the case and filed the charge sheet. The distinction between the offences punishable under the MMDR Act and the Indian Penal Code has been elaborately dealt with by the Hon'ble Apex Court in the case of *State of NCT of Delhi Vs. Sanjay reported in AIR 2015 SC 75* At paragraphs-71 and 72 of the said decision, it has been observed as under:-

*"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.”*

17. On close reading of the aforesaid paragraphs, it is clear that taking cognizance by the Magistrate on the basis of the complaint filed by the police for the commission of theft of sand and mineral is not justifiable. However, if a case is registered for theft of the sand and other minerals and after investigation if final report is filed under Section 173 of Cr.P.C. before a Magistrate having jurisdiction for the purpose of taking cognizance as per Section 190(1)(b) of Cr.P.C. that is justifiable. But the Magistrate is not having any jurisdiction to take cognizance for the said offence, that too, when the offence is clubbed with the MMDR Act. The Magistrate can take the 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 MMDR Act, but that is not done in this case. In that light, the contention taken up by the learned HCGP that as the accused is also charged for the offence punishable under Section 379 of IPC and the Investigating Officer is having authority to investigate, cannot be acceptable. If there is any minor distinction in this behalf, he can only investigate and give the report under Section 173 of Cr.P.C. in respect of the offence punishable under Section 379 of IPC and not beyond that.



18. Be that as it may, even I have carefully and cautiously gone through the evidence produced before the trial Court. PWs.1, 3 to 5, who are the witnesses for the seizure *mahazar* have not supported the case of the prosecution and they have been treated as hostile. Even the prosecution has not produced any material to show as to from where the sand has been stolen by the accused and whether it belongs to the State or any other person and how it was intended to be transported. As could be seen from the records, accused No.1 is said to have been driving the tipper lorry bearing Regn.No.KA-45-8889. When the said vehicle was intercepted, he ran away in the darkness and accused No.2 was also not present. No explanation is made in this behalf. Under such circumstances any of the ingredients for having committed theft of sand are not forthcoming. In the absence of any such material, the accused are not entitled to be convicted for the said offence. Looking from any angle, the trial Court has not considered the said proposition of law that it is the authorized officer who has to file a private complaint before the competent Magistrate under Section 200 of Cr.P.C. and then the procedure has to be followed by the learned Magistrate and thereafter investigation

has to be completed and charge sheet has to be filed. The said procedure has not been followed and as such the investigation done in this behalf itself is without there being any jurisdiction. Taking into consideration the aforesaid facts and circumstances, the appellants have made out a case to set aside the impugned order. Accordingly, the following order is made:-

The impugned judgment and order of conviction and sentence passed by the II Additional Sessions and Special Judge at Mysuru, in Special Case No.85/2018, dated 12/15.10.2018 is set aside and the accused-appellants 1 and 2 are acquitted of the charges levelled against them.

The bail bonds and surety bonds executed by the appellants herein stand cancelled. Tipper lorry bearing Regn.No.KA-45-8889, seized and confiscated to the State in the case on hand is hereby ordered to be released in favour of Sri Cheluvamurthy-appellant No.2 herein on proper identification and acknowledgement, with a condition that if the State prefers any appeal, till the disposal of the said appeal, he shall not either alienate or change the nature of the vehicle by executing an indemnity bond to that effect.

Appeal is *allowed* accordingly.

Consequently, I.A.No.1/2019 is disposed of.