

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CRIMINAL APPLICATION NO. 3712 of 2021**

KANTARIYA KHALID AHMED

Versus

STATE OF GUJARAT

Appearance:

MS. KRUTI M SHAH(2428) for the Applicant(s) No. 1

MR L B DABHI, APP for the Respondent(s) No. 1

CORAM:HONOURABLE MR. JUSTICE A.S. SUPEHIA

Date : 04/04/2022

ORAL ORDER

1. Rule. Learned Public Prosecutor waives service of notice of rule on behalf of respondent-State.

2. By way of this petition, the petitioner has prayed to quash and set aside the order dated 12.10.2020 passed by the 3rd Additional Chief Judicial Magistrate, Godhra, Panchmahals below Muddamal Application, as also to quash and set aside the order dated 01.12.2020 passed by the learned 4th Additional Sessions Judge, Panchmahals at Godhra, in Criminal Revision Application No.49 of 2020 and to order release of the muddamal vehicles in favour of the petitioner.

3. Learned advocate for the petitioner submits that the FIR against the petitioner is registered under Sections 379, 114 and 120B of the Indian Penal Code and under Rule 3, 21 and 22(a) of the Gujarat Mineral (Prevention of Illegal Mining, Transport and Storage) Rules, 2017 and under Sections 4(1)A, 21(1), 21(4) and 21(4A) of the

Mines and Mineral (Regulation and Development) Act, 1957. Learned advocate for the petitioner submits that the competent authority is authorized to compound the offence under the Mines and Mineral (Regulation and Development) Act, 1957.

3.1 Learned advocate for the petitioner has submitted that the vehicles were seized on 10.01.2020. She submitted that the petitioner and the other co-accused have preferred quashing petition by filing Special Criminal Application Nos.6890 of 2020, 6955 of 2020, 6887 of 2020, 6935 of 2020, 6997 of 2020, 6927 of 2020 and 6956 of 2020. Learned advocate for the petitioner has submitted that the petitioner has not committed any breach of condition under the provisions of the Gujarat Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017. It is further submitted that the vehicles in question is the only source of livelihood of the petitioner and that if the vehicles are kept in continuous seizure, then its condition shall deteriorate as the trial shall take its own time to conclude. It is, therefore, prayed that the Court below has seriously erred in not releasing the vehicles in question in favour of the petitioner.

4. Learned APP, drew attention of the Court to the reasons assigned by the Court below in the impugned judgment and order. It is submitted that

the Court below is completely justified in rejecting the application filed by the petitioner since the vehicles in question were used in the commission of the illegal mining. It is, accordingly, prayed that the present petition deserves to be rejected.

5. Heard learned advocates of the respective parties and perused the documents on record.

5.1 Considering the facts of the case, a reference to the provisions of Section 451 Code of Criminal Procedure, 1973 (for short "the Cr.P.C.") would be apposite:

"451. Order for custody and disposal of property pending trial in certain cases:

When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation—For the purposes of this section,

"property" includes—

(a) property of any kind or document which is produced before the Court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence."

6. Section 451 of the Cr.P.C. mandates that when any property is produced before any criminal Court during trial, the Court may make order for the proper custody of such property pending the

conclusion of the trial. The object of Section 451 of the Cr.P.C. is well defined by the Supreme Court in the case of Sunderbhai Ambalal Desai vs. State of Gujarat, 2003(1) G.L.H. 307, wherein the Supreme Court have extracted Para – 4 of the judgment delivered in the case of Smt. Basava Kom Dyamangouda Patil vs. State of Mysore and Another, (1977) 4 SCC 358, which reads thus :

"4. The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject matter of an offence is seized by the police, it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place, it may be returned during any inquire or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the Court or should be in its custody. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance. The court further observed that where the property is stolen, lost or destroyed and there is no prima facie defence made out that the state or its officers had

taken due care and caution to protect the property, the magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property. To avoid such a situation, in our view, powers under Section 451 Cr.P.C. should be exercised promptly and at the earliest."

7. Considering the facts and circumstances of the case and in view of the principle laid down by the Supreme Court in the case of **Sunderbhai Ambalal Desai** (supra) and also considering the observations made by the Supreme Court in the case of Jayant Etc. v. The State of Madhya Pradesh decided in Criminal Appeal Nos.824-825 of 2020 (Arising from SLP (Criminal) Nos.2640-2641/2020), wherein the Supreme Court has laid down in para - 13 as under:

"13. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the MMDR Act and the Rules made thereunder vis-a-vis the Code of Criminal Procedure and the Penal Code, and the law laid down by this Court in the cases referred to hereinabove and for the reasons stated hereinabove, our conclusions are as under:

i) that the learned Magistrate can in exercise of powers under Section 156(3) of the Code order/direct the concerned Incharge/SHO of the police station to lodge/register crime case/FIR even for the offences under the MMDR Act and the Rules made thereunder and at this stage the bar under Section 22 of the MMDR Act shall not be attracted;

ii) the bar under Section 22 of the MMDR Act shall be attracted only when the learned Magistrate takes cognizance of the offences under the MMDR Act and Rules made thereunder and orders issuance of process/summons for the offences under the MMDR Act and Rules made thereunder;

iii) for commission of the offence under the IPC, 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 authorised officer for taking cognizance

in respect of violation of various provisions of the MMDR Act and Rules made thereunder; and

iv) that in respect of violation of various provisions of the MMDR Act and the Rules made thereunder, when a Magistrate passes an order under Section 156(3) of the Code and directs the concerned In-charge/SHO of the police station to register/lodge the crime case/FIR in respect of the violation of various provisions of the Act and Rules made thereunder and thereafter after investigation the concerned In-charge of the police station/investigating officer submits a report, the same can be sent to the concerned Magistrate as well as to the concerned authorised officer as mentioned in Section 22 of the MMDR Act and thereafter the concerned authorised officer may file the complaint before the learned Magistrate along with the report submitted by the concerned investigating officer and thereafter it will be open for the learned Magistrate to take cognizance after following due procedure, issue process/summons in respect of the violations of the various provisions of the MMDR Act and Rules made thereunder and at that stage it can be said that cognizance has been taken by the learned Magistrate.

v) in a case where the violator is permitted to compound the offences on payment of penalty as per sub-section 1 of Section 23A, considering sub-section 2 of Section 23A of the MMDR Act, there shall not be any proceedings or further proceedings against the offender in respect of the offences punishable under the MMDR Act or any rule made thereunder so compounded. However, the bar under sub-section 2 of Section 23A shall not affect any proceedings for the offences under the IPC, such as, Sections 379 and 414 IPC and the same shall be proceeded with further."

8. Taking into consideration the observations and the conclusion derived in the above-referred judgment of **Jayant Etc.** (supra), the offences under Mines and Mineral (Regulation and Development) Act are compoundable and under the cognizance of the court the FIR under the IPC could be registered. In view of the discussions made hereinabove, this Court is of the opinion

that that the courts below have seriously erred in not releasing the vehicles in question in favour of the petitioner.

9. In the result, the petition is allowed. The impugned order dated 12.10.2020 passed by the learned 3rd Additional Chief Judicial Magistrate, Godhra, Panchmahals below Muddamal Application and also the order dated 01.12.2020 passed by the learned 4th Additional Sessions Judge, Panchmahals at Godhra in Criminal Revision Application No.49 of 2020 are quashed and set aside and the respondent authority is directed to release the muddamal i.e. vehicles bearing Registration No.GJ-05-CE-8233 excavator SY-2210C-9 Serial No.19SEY 021867861 excavator machine in favour of the petitioner.

10. The petitioner shall furnish solvent surety of Rs.5,00,000/- within a period of 15 days from the date of receipt of writ of the order of this Court. The petitioner shall not sell, transfer or alienate the vehicles in question in any manner pending the trial and shall produce the vehicles in question as and when called for.

11. The petition stands disposed of accordingly. Rule is made absolute to the above extent. Direct service is permitted.

Sd/-
(A. S. SUPEHIA, J)

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