



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**R/CRIMINAL MISC. APPLICATION NO. 3975 of 2020
(FOR QUASHING & SET ASIDE FIR/ORDER)**

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE DIVYESH A. JOSHI : Sd/-

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Approved for Reporting	Yes	No
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RAMABHAI JIVABHAI KESHWALA
Versus
STATE OF GUJARAT & ANR.

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Appearance:

MR DARSHIL KAMDAR for MR ASHISH M DAGLI(2203) for the
Applicant(s) No. 1

MR MANAN MEHTA APP for the Respondent(s) No. 1

RULE SERVED for the Respondent(s) No. 2

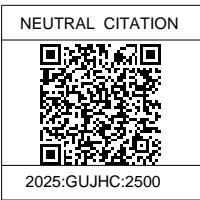
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CORAM:HONOURABLE MR. JUSTICE DIVYESH A. JOSHI

Date : 10/01/2025

ORAL JUDGMENT

1. Draft amendment is allowed. To be carried out forthwith.
2. By way of present application under Section 482 of the Criminal Procedure Code, 1973 ("the Code" for short), the applicant has invoked inherent jurisdiction of this Court for quashing and setting aside FIR being C.R. No.I-48/2016 registered with Bhayavadar Police Station for the offences under Sections 379 and 114 of the Indian Penal Code ("IPC" for short), under Rules 3, 5, 6, 8 and 13 of the Gujarat Minerals (Prevention of



Illegal Mining, Transportation and Storage Rules, 2005 ("Rules, 2005" for short) and under Sections 4(1) and 4(1A) of the Mines and Minerals (Development and Regulation) Act, 1957 ("Act, 1957" for short).

3. When the matter is taken up for hearing, learned advocate for the applicant has submitted that the present matter is squarely covered by the order dated 03.07.2024 passed by this Court in Criminal Misc. Application No.11029/2017, wherein similar issue has been decided by this Court and quashed and set aside FIR qua the offences under the IPC reserving liberty to take appropriate action under the provision of Act, 1957. He further submitted that the chargesheet has already been filed, which may also be quashed and set aside. It is, therefore, urged that this application may be allowed.
4. On the other hand, learned APP is not in a position to dispute about the order passed by this Court relied upon by learned advocate for the applicant and submitted that appropriate order may be passed reserving liberty to the concerned officer to initiate proceedings under the provision of the Act, 1957.
5. I have heard learned advocates appearing for the parties as also considered the order dated 03.07.2024 passed by this Court in Criminal Misc. Application No.11029/2027. Relevant observations made by this Court reads as under,



- "7. 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 as to whether the prosecution deserves to be quashed or not in view of the specific bar as provided under Section 22 of the Act, 1957.
8. Before the submissions made on behalf of the parties are considered, I would like to refer to the provision of the Act, 1957.
9. 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 sub section 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 sub section 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].]"

10. 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."

11. At this stage, it is pertinent to note that an identical question was considered by the Coordinate Bench of this Court in a batch of matters being Criminal Misc. Application No.5230/2010 and allied matters by an order dated 03.09.2010, wherein the Coordinate Bench of this Court has formulated the following questions for his consideration,
12. The aforesaid questions were answered by the Coordinate Bench of this 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."
13. The final conclusions arrived at by the Coordinate Bench of this Court 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 complaint 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."
14. However, the decision taken by the Coordinate Bench of this Court in the aforesaid matter was challenged before the Hon'ble Supreme Court by filing Criminal Appeal No.2105 of 2013 and while deciding the said appeal, the Hon'ble Supreme Court has taken notice of the fact that such issue came up for consideration before various High Courts and the orders passed therein were challenged before the Hon'ble Supreme Court. Thus the Hon'ble Supreme Court clubbed all those matters together and by a common judgment and order dated 04.09.2014, disposed of all the appeals. The observations made by the Hon'ble Supreme Court while passing said order read as under,
- "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 Pratap Singh vs. Shri Krishna Gupta, AIR 1956 SC 140 at page 141, 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 State of U.P. vs. Babu Ram Upadhy, AIR 1961 SC 751, 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 ecosystem 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-a-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."

15. In view of the above observations, now I would like to consider the facts of the case on hand. Here in this case on hand, as stated above, on the fateful day, the Assistant Geologist had carried out surprise visit at the place of occurrence, where along with the Hitachi Machine of the applicant, other four vehicles were also found and, hence, FIR has been lodged by the complainant, who is Royalty Inspector, not authorized officer as contemplated under Section 22 of the Act, 1957 and after registration of the FIR, chargesheet came to be filed before the court concerned on conclusion of the investigation, where it has been registered as Criminal Case No.178/2016 and as on date, pending for adjudication but because of the stay



granted by the Coordinate Bench of this Court by an order dated 05.05.2017, the proceedings are stayed and there is no progress in the trial. It is, therefore, required to be noted that there is no bar upon the Magistrate concerned to take cognizance of the offence but as per the provision of Section 22 of the Act, 1957, it is not open for the Magistrate concerned to take cognizance of the offence punishable under the Act, 1957 after filing of the chargesheet and instead thereof, it will 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 and as and when such complaint in writing is filed, in that event, it is open for the Magistrate to take cognizance upon the said written complaint, which in the facts of the present case is missing.

16. Now the contention raised by learned advocate for the applicant with regard to the provision of Section 22 of the Act, 1957 is required to be considered. On careful consideration of the provision of Section 22 of the Act, 1956, it clearly goes on to show that it 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 but at the same time, it clarifies that it is 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 also provides that it would 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. Admittedly herein in this case on hand, FIR has been lodged by the Police Inspector, who filed chargesheet before the court concerned on conclusion of the investigation and, thereafter, the court concerned took cognizance, which is against the provision of the statute as stated above and vitiates the proceeding.

17. In view of the foregoing reasons, this application succeeds and is hereby allowed. The impugned proceeding being Criminal Case No.178/2016 pending before the Court of learned Judicial Magistrate First Class, Mansa, District : Gandhinagar arising out of the First Information Report being C.R. No.I-73/2015 registered with Mansa Police Station, Gandhinagar is hereby quashed and set aside qua the applicant. All consequential proceedings pursuant thereto also stand terminated. However, it is clarified that it shall be open for the authority concerned to file a private complaint in the Court of the learned Magistrate concerned, 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 concerned shall proceed to consider the same in accordance with law.
6. In view of the above, it is clear that the present case is covered by the aforesaid order, therefore, deserves to be allowed.
7. Accordingly, the present application is hereby allowed. The impugned FIR being C.R. No.I-48/2016 registered with Bhayavadar Police Station is hereby quashed and set aside qua the applicant. All consequential proceedings pursuant thereto



also stand terminated. However, it is clarified that it shall be open for the authority concerned to file a private complaint in the Court of the learned Magistrate concerned, of the offence punishable under Section 4 of the Act, 1957, through an authorized officer in that behalf putting relying upon the material and evidence collected so far in connection with the impugned FIR, and if such private complaint is filed, the Magistrate concerned shall proceed to consider the same in accordance with law.

8. Rule is made absolute to the aforesaid extent. Direct service is permitted.

Sd/-
(DIVYESH A. JOSHI, J.)

Gautam