

Bombay High Court

Shaikh Yunus vs State Of Maharashtra on 13 December, 2013

Bench: A.M. Thipsay

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Cri.Appln.5348.12

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 5348 OF 2012

1. Shaikh Yunus S/o Shaikh Chand
Age : 30 years, Occ : Business,
2. Ayesha W/o Yunus Shaikh

Age : 31 years, Occ : Household,

Both R/o Patelnagar, Aurangabad
Tq. Aurangabad, Dist. Aurangabad.

..APPLICANTS

-VERSUS-

State of Maharashtra

..RESPONDENT

...
Advocate for Applicants : Mr. Shaikh Mazhar A. Jahagirdar
APP for Respondent : Mr. V.P. Kadam
...

CORAM : ABHAY M. THIPSAY, J.

Dated: December 13, 2013 JUDGMENT :-

The applicants are being prosecuted vide R.C.C. No. 360 of 2010 pending before the learned Judicial Magistrate, First Class, Paithan, on the basis of a police report alleging that they have committed an offence punishable under section 379 of the Indian Penal Code (IPC) read with section 34 of IPC, as also the offences 2 Cri.Appln.5348.12.odt punishable under section 21 of the Mines and Minerals (Development and Regulation) Act, 1957.

By the present application, the applicants pray that by exercising the inherent powers of this Court, the proceedings of the said case be quashed.

2. The prosecution case is in brief as follows :-

That, on 26.07.2009 at about 5 p.m., near Shri Saraswati Bhuwan Vidyalaya, Bidkin, one Keshav Venkatesh Netake, Tahsildar, noticed that a motor truck bearing registration No. MH-20 AT-3167 was transporting around three brass of sand. The driver of the said vehicle had no 'royalty receipt' (transport permit) to transport sand. On questioning the driver, it was revealed that the truck was owned by the applicants, and that, the sand found in the truck had been excavated illegally from the river bed of Godavari and was being transported illegally. As per the oral directions given by Shri Keshav Venkatesh Netake, the Tahsildar, the vehicle was detained at the police station, Bidkin. Thereafter, as per the directions of the Sub-Divisional Officer, Aurangabad, to register a 3 Cri.Appln.5348.12.odt crime against the owners and driver of the said motor truck, one Bhimashankar Gopalrao Tope, Circle Officer lodged report with Bidkin Police Station, on 21.07.2010 alleging commission of the offences punishable under section 21(1),(2), (3) and (4) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as "the said Act") and section 379 of IPC.

After investigation, a charge-sheet came to be filed against the applicants.

3. Though a number of contentions including that there is no prima facie case of the alleged offences against the applicants have been raised, the main contention raised on behalf of the applicants is that their prosecution is not maintainable in view of the provisions of section 22 of the said Act. It is submitted that the cognizance of the offences under the said Act could be taken only on a complaint made by a person duly authorized in that behalf by the Central Government or the State Government. It is submitted that since the applicants are not being prosecuted on the basis of any complaint lodged by any such authorized person, the cognizance of the alleged offences under the said Act could not have been taken.

It is also submitted that the accusation of the applicants having 4 Cri.Appln.5348.12.odt committed an offence punishable under section 379 of IPC is unsustainable. It is submitted that there is no material to support the allegations of theft but, what is emphatically submitted is that in any case, when the alleged acts are covered by a special provision i.e. the provisions of the said Act, the question of application of general provisions under IPC, was ruled out.

4. Initially, one Rajiv Shinde, Tahsildar, Paithan filed an affidavit - in - reply, opposing the present application. However, in the course of hearing, since there was an emphasis on the prosecution being not maintainable in view of the provisions of section 22 of the said Act and since the learned Additional Public Prosecutor was not able to throw any light on who was the person 'authorized in that behalf', the District Collector was summoned; who after appearing before the Court, sought time and expressed his desire to file an additional affidavit in the matter. Such permission was granted and consequently, the District Collector has filed an additional affidavit in reply to the application.

5. Section 22 of the said Act reads as under :-

"22. Cognizance of offences .- No court 5 Cri.Appln.5348.12.odt shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorized in this behalf by the Central Government or the State Government."

6. A bare reading of the provision leaves no manner of doubt that it is a mandatory provision. A bar has been imposed on the power of the Court to take cognizance of any offence punishable under the said Act or the Rules made thereunder, except upon a complaint in writing made by a person authorized in that behalf by the Central Government or the State Government. Thus, it is clear that before a Court takes cognizance of an offence punishable under the said Act, the following requirements must be met :-

- (i) There should be a complaint;
- (ii) Such complaint must be in writing;
- (iii) it should have been made by a person

authorized in that behalf - i.e. authorized to lodge a complaint - by the Central Government or the State Government.

7. Since the term 'complaint', as used in this section, has not been defined under the said Act, one may refer to the definition 6 Cri.Appln.5348.12.odt of the term 'complaint' given in section 2(d) of the Code of Criminal Procedure. It is only an allegation made to a Magistrate that can be termed as a 'complaint' and from this category, a police report is specifically excluded. The present prosecution is on the basis of a police report and not a complaint. However, even if a wider interpretation is given to the term 'complaint', as appearing in section 22, (reproduced above) - just for the sake of arguments - and it is interpreted in a manner so as to include a report made to the police, still, there is no escape from the fact that such report would be required to be lodged by 'a person duly authorized in that behalf by the Central Government or the State Government.' Thus the least that was expected, was that the first information report was lodged by a person duly authorized in that behalf in accordance with section

22. However, it is nobody's case that a Circle Officer - or even the Tahsildar for that matter - is a person authorized under the said provision.

8. Interestingly, as to the query specifically putforth by this Court, viz :- 'who is the person authorized in that behalf,' as contemplated under section 22 of the said Act, there is no reply at all from the State. Even the affidavit of the District Collector is 7 Cri.Appln.5348.12.odt totally silent on this aspect, though it was made clear that the affidavit was required to be filed basically for explaining this aspect of the matter. A Notification bearing No. G.S.R. 1201 dated 15th May, 1969 issued by the Central Government has been brought to my notice but, no such notification issued by the State Government has been brought to my notice. Though no categorical statement that no such notification has been issued at all has been made before me, it was indicated to me that the Additional Public Prosecutor or the District Collector 'could not find out' any Government Resolution/Notification and/or Order authorizing any person to file a complaint in respect of an offence punishable under the said Act.

9. The Notification issued by the Central Government reads as under:-

"G.S.R. 1201- In pursuance of the powers conferred by section 22 of the Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957) and in supersession of the notification of the Government of India in the late Ministry of Mines and Fuel No. MII-185(4)/62 dated 18th September, 1962, the Central Government hereby authorises -

(a) the Controller, Indian Bureau of Mines;

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(b) the Controller of Mines, Indian Bureau of Mines;

(c) the Regional Controller of Mines, Indian Bureau of Mines and

(d) the Mineral Economist, Indian Bureau of Mines to prefer complaints in writing in respect of any offence punishable under the said Act or any rules made thereunder."

10. If no Notification authorizing any person has been issued so far by the State Government, it is high time that the concerned authorities of the State shall look into the matter at least now and do the needful. Otherwise, there is a danger that all prosecutions instituted in such matters would fail on that count itself and the offenders would go unpunished.

11. The fact, however, remains that since the prosecution of the applicants with respect to the offences punishable under the said Act is in breach of the mandatory provisions of section 22 of the said Act, the same cannot be permitted to be continued.

12. So far as the allegation of an offence punishable under section 379 of IPC is concerned, apart from the fact that there is no material in the entire charge-sheet to justify the accusation of theft, 9 Cri.Appln.5348.12.odt there is substance in the contention advanced by the learned counsel for the applicants that when special provisions have been enacted to deal with the acts in questions, the provisions of general law cannot be invoked for dealing the offenders under the general provisions.

Here, the allegation against the applicants is that they had illegally excavated the sand and were transporting the same. These acts are squarely covered by the offences made punishable under the said Act. A special machinery for detection, investigation and prosecution of the offenders committing the said offences and a special procedure for prosecuting them has been created by the said Act.

Following the said special procedure cannot be avoided by applying the general law to the same acts. When a special Act dealing with certain types of the offences has been made, it would not be permissible to invoke the provisions of the general law just to circumvent the provisions of the Special Statute. Thus the prosecution of the applicants under the provisions of section 379 of IPC read with section 34 of IPC is also bad-in-law.

13. There is also an interesting aspect of the matter. To support the accusation of theft one has to accept the theory that the 'sand excavated was in possession of the State which is certainly 10 Cri.Appln.5348.12.odt doubtful. It would mean that all things, which are not in the possession of anyone are deemed to be in possession of the State, and that, for taking them away, the consent or permission of the State is necessary. I find it difficult to accept this theory, but since discussion on this is not necessary for a proper decision, I leave it at that.

14. The prosecution of the applicants is, clearly, contrary to law. The inherent powers of this Court must be exercised to quash such a prosecution.

15. The application is allowed in terms of prayer clause `B'.

Sd/-

(ABHAY M. THIPSAY, J.) *** sga/-