

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 8TH DAY OF JUNE 2015/18TH JYAISHTA, 1937

Crl.MC.No. 379 of 2014 ()

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CRIME NO. 676/2013 OF POZHIYOOR POLICE STATION,
THIRUVANANTHAPURAM DISTRICT.**

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PETITIONER/1ST ACCUSED :

**SWAIN, S/O. PONNAYYAN, AGED 37 YEARS,
VIRALI P.S. NIVAS, KULATHOOR VILLAGE,
KULATHOOR DESOM, THIRUVANANTHAPURAM DISTRICT.**

BY ADV. SRI.LATHEESH SEBASTIAN.

RESPONDENTS/STATE & COMPLAINANT:

- 1. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031.**
- 2. SUB INSPECTOR OF POLICE,
POZHIYOOR POLICE STATION,
THIRUVANANTHAPURAM DISTRICT-695 001.**
- 3. THE VILLAGE OFFICER,
KULATHOOR VILLAGE, KULATHOOR P.O.,
NEYYATTINKARA TALUK,
THIRUVANANTHAPURAM DISTRICT-695 141.**

BY PUBLIC PROSECUTOR SMT.SAREENA GEORGE.

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 08-06-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:**

rs.

APPENDIX

PETITIONER'S ANNEXURES:-

- ANNEXURE A1 :** COPY OF THE FIR IN CRIME NO.676/2013 OF POZHIOOR POLICE STATION.
- ANNEXURE A2 :** COPY OF THE REPORT OF THE 2ND RESPONDENT.
- ANNEXURE A3 :** COPY OF THE REMAND APPLICATION OF THE 2ND RESPONDENT.
- ANNEXURE A4 :** COPY OF THE GO(MS)NO.917/97.
- ANNEXURE A5:** CERTIFIED COPY OF THE FINAL REPORT IN CRIME NO.676/2013 OF POZHIOOR POLICE STATION.

RESPONDENT'S ANNEXURES:- NIL.

//TRUE COPY//

P.S. TO JUDGE

rs.

ALEXANDER THOMAS, J.

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Dated this the 8th day of June, 2015.

ORDER

The petitioner is the 1st accused in the impugned Annexure-AI FIR in Crime No.676/2013 of Pozhiyoor Police Station registered for offences under Sec.379 IPC and Sec.4(1) r/w 21(1) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as 'the MMDR Act'). The gist of the prosecution case is that the 2nd respondent herein (Sub Inspector of Police, Pozhiyoor Police Station) had found the petitioner herein mixing M-Sand with Sea Sand illegally collected from beach without any valid pass for conducting of mining of sea sand on 4.12.2013 at about 8:00 p.m. and thereby committed offence under Sec.379 IPC and under Sec.379 IPC and Sec.4(1) r/w 21 (1) of the MMDR Act. The main contention raised by the petitioner is that various offence under the Special Enactment alleged to have been committed is incorporation of criminal offence involving general penal provisions of law like IPC is not in existence and that thus the very incorporation of the offence under Sec.379 IPC is illegal and ultravires.

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Yet another contention raised by the petitioner is that the crime is investigated by a person in charge of the Village Office and as per Annexure-4 notification of Government of Kerala in G.O(MS) No.917/1997 issued under the enabling powers under Sec. 22 of the MMDR Act, specifies the competent officer to prefer complaint under Sec.22 of the MMDR Act and therefore the action of the 3rd respondent Village Officer who is not a competent officer, in registering the crime is illegal. It is in the light of these aspects, the petitioner has filed the instant Crl.M.C seeking the invocation of the inherent powers conferred on this Court under Sec.482 Cr.P.C to call for the entire records leading to impugned Annexure-A1 FIR in Crime No.676/2013 of Pozhiyoor Police Station and to quash the same.

2. Heard Sri.Latheesh Sebastian learned counsel for the petitioner and the learned Public Prosecutor appearing for the respondents.

3. The point in issue raised in this case is no longer res-integra and is fully covered by the decision of the Apex Court in the case State of N.C.T of Delhi v. Sanjay reported in 2014 (3) KLT 1033 (SC)

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wherein the Apex Court has specifically held that prohibition contained in Sec.22 of the MMDR 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 Sec.4 of the MMDR Act and not for any act or omission which constitute an offence under Indian Penal Code. It was held that there cannot be any dispute with regard to restriction 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 Sec.4 and other sections of the Act, the officer empowered and authorised under the Act shall exercise all the powers including making a complaint before the jurisdictional Magistrate and the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorised officer and that in case of breach and violation of Sec.4 and other provisions of the Act, the police officer cannot insist the Magistrate for taking cognizance under the Act on the basis of the report submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Sec.22 of the Act against

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prosecution of a person except on a complaint made by the officer is attracted only when such persons sought to be prosecuted for contravention of Sec.4 of the Act and not for any act or omission which constitute an offence under Indian Penal Code. In paragraph 66 of the above said Sanjay's case (supra) it was held that considering the principles of interpretation and the wordings used in Sec.22, the said 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. In paragraph 70 thereof, the Supreme Court has held that from a close reading of the provisions of the MMDR Act and the offence defined under Sec.378, it is manifest that the ingredients constituting the offences are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Sec.4 of the Act is an offence punishable under Sec. 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 as envisaged under Sec.378 IPC. Further in paragraphs 71 & 72 of the

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above case, the Supreme Court has held that 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 by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. So, in a case where there is theft of sand and gravels from the Government land/property, the police can register a case, investigate the same and submit a final report under Sec.173 of the Cr.P.C before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Sec.190(1)(d) of the Cr.P.C. Thus, the Supreme Court has held in no uncertain terms 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 Sec.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

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complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. It was held that consequently the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled.

4. In the instant case, the police has registered the impugned Crime not only for the offence under the MMDR Act, but also for the one under Sec.379 IPC (relating to punishment for offence of theft). Sec.22 of the MMDR Act dealing with cognizance of the offence under that Act reads as follows:

“22. Cognizable 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.”

5. It is indisputable that neither the 2nd respondent (SI of Police) nor the 3rd respondent (Village Officer) is a notified authorised officer as mandated in Sec.22 of the MMDR Act. Moreover, cognizance for the offence punishable under the MMDR Act can be taken only on a complaint in writing by a competent officer on that regard by the State

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Government. Therefore, the Magistrate Court concerned cannot take cognizance of the alleged offences under the MMDR Act on the basis of police report/final report/charge sheet as envisaged under Sec.173, pursuant to an investigation by the police in view of the expressed embargo and prohibition mandated under Sec.22 of the MMDR Act and therefore, inclusion of the offence under the MMDR Act in the impugned Annexure-A1 FIR in Crime No.676/2013 of Pozhiyoor Police Station is ultravires and without jurisdiction. However, the inclusion of offence under the IPC as per Sec.379 IPC is certainly within the jurisdiction and vires of the police investigating agency as held in no uncertain terms by the Apex Court in the aforestated reported decision (supra). Accordingly, the impugned criminal proceedings at Annexure-1 FIR in Crime No.676/2013 of Pozhiyoor Police Station and all further proceedings arising therefrom pending against the petitioner to the extent it includes the offences under the MMDR Act is quashed. It is made clear that the impugned criminal proceedings at Annexure-A1 Crime can proceed in accordance with law as far as offence under Sec.379 IPC is concerned. It is made clear that the appropriate

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authority concerned will be at liberty to initiate appropriate criminal proceedings in respect of the aforestated offences under the MMDR Act against the petitioner in accordance with that Act, but the same shall be necessarily be in strict conformity with all other prescriptions of law.

With these observations and directions, the Crl.M.C stands finally disposed of.

ALEXANDER THOMAS,
Judge.

bkn/-