

***HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**
+ CRIMINAL PETITION Nos.6764 and 6765 of 2013

% 22-12-2015

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CRIMINAL PETITION Nos.6764 and 6765 of 2013

Potluri Sri Bala Vamsi Krishna

....Petitioner

Vs.

\$ The State of A.P., rep. by its Public Prosecutor,
High Court of Andhra Pradesh, Hyderabad.

.... Respondent

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!Counsel for the Petitioner : Mr. Raja Sekhar Tulasi

^ Counsel for the Respondents: public prosecutor (AP)

<Gist :

>Head Note:

? Cases referred:

1. (1994) 3 SCC 440
2. 2015 (2) ALT (CrI) 263 AP

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO
CRIMINAL PETITION No.6764 and 6765 of 2013

COMMON ORDER :

These two Criminal Petitions are filed by the
petitioner/ accused in C.C. Nos.175 and 176 of 2012

dated 30.01.2013. The learned III Additional Judicial I Class Magistrate, Rajahmundry, East Godavari District has taken cognizance for the offences punishable under Sections 66 of the Information Technology Act and Section 379 IPC and after full dressed trial with reference to the evidence on record of PWs.1 to 8, Exs.P1 to P13 and M.Os 1 to 4 in C.C. No.175 of 2012 and PWs.1 to 6, Exs.P1 to P7, and MOs.1 and 2 in C.C. No.176 of 2012 convicted the accused for the said offences. The accused is sentenced to undergo simple imprisonment for a period of three years for each offence and both sentences shall run concurrently and by giving set off of the period undergone by the accused from 08.01.2012 to 13.01.2012 and 12.06.2012 to 30.01.2013 in C.C. No.175 of 2012 and from 07.07.2012 to 30.01.2013 in C.C. No.176 of 2012. Impugning the two conviction judgments respectively on 30.01.2013, the accused maintained two appeals before the District and Sessions Judge, Rajahmundry under Section 374 Cr.P.C. The office of Sessions Judge has taken objection on maintainability of two appeals particularly for the offence under Section 66 of I.T Act saying there is Cyber Appellate Tribunal (for short 'CAT') constituted having jurisdiction. It is impugning the same, these two applications are filed under Section 482 Cr.P.C.

2) Section 482 Cr.P.C reads as under:

Section 482 – Saving of inherent powers of High Court – Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

3) The grounds urged in the applications impugning said office objection of the Court of Sessions of the respective Sessions Division, are that the learned Sessions Judge erred in not entertaining the respective appeals under Section 374 (2) Cr.P.C and also application under Section 389 (1) Cr.P.C to suspend the sentence or order as the case may be by further saying the Tribunal's jurisdiction is no way to be invoked against the trial Court's conviction judgment particularly for the offence under Section 66 I.T Act for no such enabling provision to the Tribunal to entertain the appeal and hence to set aside said objection of the learned Sessions Judge and to give a direction to number the appeals if otherwise in order.

4) Heard learned counsel for petitioner and learned amicus curiae appointed by this Court by name Sri B.Nalin Kumar and also learned public prosecutor and perused the material on record.

5) Now the points that arise for consideration are:

i) Whether the learned Magistrate can try any offence under I.T Act, particularly covered by Chapter XI Sections 65 to 78 including the sub-sections in between Chapter XIII Sections 84 (B) and (C) and 85 of the I.T Act, amended by Act 10 of 2009 w.e.f., 27.10.2009 and if so, along with any other IPC offences or offence of any other special law and if so, in the event of conviction by the trial Court to which form the appeal lies to say whether it is to the Court of Sessions or CAT?

ii) to what result?

POINT No.1:

6) Section 57 of the Information Technology Act, 2009 reads as under:

Section 57 – Appeal to Cyber Appellate Tribunal - (1) Save as provided in sub-section (2), any person aggrieved by an order made by Controller or an adjudicating officer under this Act may prefer an appeal to a Cyber Appellate Tribunal (CAT) having jurisdiction in the matter.

(2) No appeal shall lie to the Cyber Appellate Tribunal from an order made by an adjudicating officer with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Controller or the adjudicating officer is received by the person aggrieved and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Cyber appellate Tribunal

may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1), the Cyber Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Cyber Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Controller or adjudicating officer.

(6) The appeal filed before the Cyber Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

7) So far as Section 57 (1) concerned, the term Controller used therein is defined under Section 2 (m) of the Act which says the Controller of Certifying Authorities appointed under Section 17 (1) of the Act by Central Government by notification, may also by the same or subsequent notification appoint such number of Deputy Controllers, [Assistant Controllers, other officers and employees] as it deems fit. The Controller shall discharge his functions under this Act subject to the general control and directions of the Central Government. The Deputy Controllers and Assistant Controllers shall perform the

functions assigned to them by the Controller under the general superintendence and control of the Controller.

8) So far as the term adjudicating officer used under Section 57 (1) concerned, it is defined under Section 2 (c) of the Act to mean the adjudicating officer appointed under sub section (1) of Section 46.

9) Section 46 of the Act says, any person committed a contravention of any of the provisions of this Act or of any rule, regulation [direction or order made thereunder which renders him liable to pay penalty or compensation,] the Central Government shall, subject to the provisions of sub-section (3), appoint any officer not below the rank of a Director to the Government of India or an equivalent officer of a State Government to be an adjudicating officer for holding an inquiry in the manner prescribed by the Central Government.

10) As per Section 46 (5) of the Act, every adjudicating officer shall have the powers of a civil court that are conferred on the Cyber Appellate Tribunal under sub-section (2) of Section 58 of the Act, and all proceedings before it shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860) and shall be deemed to be a civil court for the purposes of Sections 345 and 346 Cr.P.C.

11) A reading of Section 46 read with Sections 43 to 45 of the Act, it is made clear that it is only in relation to a limited jurisdiction for penalty or compensation payable and otherwise it is not conferred any jurisdiction to adjudicating officer for any of the offences to be tried under Chapter 11 and 13 of the Act referred supra, particularly in relation to sections referred above.

12) Thus, such adjudicating officer even equated to CAT has no jurisdiction to decide and adjudicate the Chapter XI and part of Chapter XIII of the Act offences with or without any of the provisions of IPC or other laws as the case may be.

13) Coming to CAT, which is defined under Section 2 (n) of the Act to mean the CAT established under sub-section (1) of Section 48. Section 48 speaks of Establishment by notification, establish one or more appellate tribunals and it shall also specify, in the notification, the matters and places in relation to which the CATs may exercise jurisdiction. The procedure to be followed by CAT is specified under Section 58 of the Act, that it can adopt its own procedure and need not follow the procedure laid down by the C.P.C but shall be guided by the principles of natural justice and, subject to other provisions of this Act and of any rules; for the purposes of discharging its functions under this Act, the same powers are vested as a civil court under the C.P.C, while trying a

suit, in matters relating to summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of documents or other electronic records; receiving evidence on affidavits; issuing commissions for the examination of witnesses or documents; reviewing its decisions; dismissing an application for default or deciding it ex parte; any other matter which may be prescribed; and the proceedings shall be deemed to be the judicial proceedings under Sections 193 and 228 IPC read with 196 IPC and it shall be deemed to be a civil court for the purposes of Section 195 and Chapter XXVI of Cr.P.C.

14) It is specifically stated under Section 61 of the Act that, no Court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which an adjudicating officer appointed under this Act or the CAT constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any powers conferred by or under this Act.

15) There is no appeal from or against decision of CAT but for to the High Court. Thereby the CAT is only a civil court for adjudication and the appeal against it lies to the High Court and no Civil Court can entertain those matters, which are and can be decided by CAT. It is to

mean CATs jurisdiction is confined only to civil disputes or such disputes of civil nature covered by the provisions of the Act and for the time being with any other law in force and applicable as the case may be and the CAT has no jurisdiction in criminal matters to entertain and decide. Thereby, the office objection taken by the Court of Sessions for numbering the appeal saying the CAT is constituted and got jurisdiction from the above provisions is untenable.

16) No doubt, the same is not the be all and end all but for to refer some of the other provisions also. The other special provisions covered by the Information Technology Act, 2000 amended in 2009 are with some non-abstante clause saying, the offences under the Act are punishable as per Section 77-A or as per 77-B of the Act. The offence punishable of three years and above are cognizable and as per the said provision, the offences up to three years are even bailable, notwithstanding anything contained in the Cr.P.C schedules particularly part-II. Further Section 78 of the Act with non-abstante clause says the offences under the Act, more particularly chapter XI and part of Chapter XIII referred supra are to be investigated, not withstanding anything contained in Cr.P.C, by the officer who is in the cadre of inspector of police. It clearly says jurisdiction of regular police only of the cadre of inspector to investigate and the same is substituted in 2009 for the cadre of Deputy

Superintendent under the original Act for more clarity.

17) Thus, the offences under the Act referred supra, can be investigated by regular police, no doubt, with cyber knowledge. So far as the offences in other respects for the registration of crime and investigation, the Cr.P.C provisions that are made applicable automatically and equally to say at all stages of investigation to submit the police final report or to arrest and interrogate any accused or to remand any accused to judicial custody or to submit the progress of investigation before the regular Magistrate having local jurisdiction as the case may be.

18) Section 85 of the Act speaks of the special procedure in relation to the offence committed by companies. It is akin to Section 141 of the N.I Act, for the officers responsibility to the day-to-day affairs of the company are being liable vicariously from the legal fiction. From the above, it is necessary to mention that, in the area where there is no procedure for investigation but for the cadre of officer and there is no procedure for taking of cognizance by the learned Magistrate concerned and remanding of accused, submission of the crime report or progress of investigation and issuing of summons and conducting of trial or maintaining of appeal as the case may be concerned, Cr.P.C provisions alone that can be applicable. It is on the fundamental principal that special law covers only to the extent it is specifically provided and

in the area and other than that is not provided, the general law of Cr.P.C that is applicable. In this regard, it is necessary to read Section 4 (2) read with Section 5 and Section 26 (b) read with Schedule part-I and Part-II Cr.P.C.

The Apex Court in ***Director of Enforcement vs Deepak Mahajan***^[1] at para Nos.121 to 125 held as follows:

121.Lastly, it falls for our consideration whether Section 4 (2) of the Code of Criminal Procedure can be availed of for investigating, inquiring or trying offences under any law other than the Indian Penal Code which expression includes FERA and Customs Act etc.

122. Section 4 (2) of the Code corresponds to Section 5 (2) of the old Code. Section 26 (b) of the Code corresponds to Section 29 of the old Code except for a slight change. Under the present Section 26 (b) any offence under any other law shall, when any court is mentioned in this behalf in such law, be tried by such court and when no court is mentioned in this behalf, may be tried by the High Court or other court by which such offence is shown in the First Schedule to be triable. The combined operation of Sections 4 (2) and 26(b) of the Code is that the offence complained of should be investigated or inquired into or tried according to the provisions of the Code where the enactment which creates the offence indicates no special procedure.

123. We shall now consider the applicability of provisions of Section 167 (2) of the Code in relation to Section 4 (2) to a person arrested under FERA or the Customs Act and produced

before a Magistrate. As we have indicated above, a reading of Section 4 (2) read with Section 26 (b) which governs every criminal proceeding as regards the course by which an offence is to be tried and as to the procedure to be followed, renders the provisions of the Code applicable in the field not covered by the provisions of the FERA or Customs Act.

124. We are not concerned with sub-section (1) of Section 4 in this matter which provides for the procedure to be followed in every investigation, inquiry or trial in relation to offences under the Indian Penal Code stating that all offences under the Indian Penal Code “shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.”

125. In this context, Section 5 of the Code which is for all practical purposes identical with the relevant portion of the corresponding Section 1 (2) of the old Code, also may be referred to which states,

“Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

The expression ‘special law’ or ‘local law’ is defined under Sections 41 and 42 of the Indian Penal Code.”

It is ultimately held at para No.128 as follows:

“128. To sum up, Section 4 is comprehensive and that Section 5 is not in derogation of Section 4 (2) and it only relates to

the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4 (2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the Special Act or any special provision excluding the jurisdiction or applicability of the Code. In fact, the second limb of Section 4 (2) itself limits the application of the provisions of the Code reading "... but subject to any enactment of the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

19) This Court in ***Gaddameedi Nagamani vs State of Telangana***^[2] held as follows:

10. Now coming to Section 4 and 5 of Cr.P.C., Section 4 (1) deals with offences under Indian Penal Code whereas Section 4 (2) deals with other offences. Section 4 (2) reads that all offences under any other law shall be investigated, enquired into, tried and otherwise dealt with according to the same provisions (of the Code), but subject to any enactment for the time being in force regulating the matter or place of investigating, inquiring into, trying or otherwise dealing with such offence. Section 5 speaks 'Saving' clause that nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. It is to say from the combined reading of Section 4 (ii) r/w Section 5 of Cr.P.C.

20) Regular Criminal Courts of Magistrate got jurisdiction to try the offences as per Cr.P.C that is applicable regarding registration of crime, arrest of accused, investigation and submitting accused to judicial custody and grant of bail and the like and also taking cognizance and conducting of trial as per the procedure from nature of offence as to summary or summons or warrant (either on police report or on private complaint as per procedure). Particularly for the offences specified under Section 70 (B) (8) of the Act as per amended Act 2009, no court shall take cognizance of any offence under this Section, except on a complaint made by an officer authorized in this behalf by the agency referred to in sub section (1).

21) This Court also earlier considered the scope of Section 4 (2) and Section 5 of Cr.P.C in Crl.P. No.5846 of 2014 dated 06.08.2014 in ***Superintendent of Customs vs Kannur Abdul Kader Mohammed Haneefa***.

22) Having regard to the above, from the Information Technology Act, the jurisdiction of CAT is only a civil jurisdiction as a substitute to the Civil Court with bar of civil suit and not for criminal proceedings. The jurisdiction of the adjudicating officer even designed under Section 57 along with appellate Tribunal is not for taking cognizance and to try any of the offences under Chapter XI and part of XIII of the Act, but for to impose penalties or

compensation and there is no other authority provided by virtue of specific provisions of the Act to try the penal offences or to entertain an appeal against such accused tried and convicted or acquitted among the penal provisions covered by Chapter XI and part of Chapter XIII of the Act and there is no any special procedure laid down but for to the limited area referred supra. Thus, the Cr.P.C provisions alone that apply in the area not specifically covered and as per the Cr.P.C provisions, the Magistrate Court concerned alone are as the judicial Magistrate or Metropolitan Magistrate or the Assistant Sessions Judge or Sessions Judge concerned, as per Cr.P.C to entertain and take cognizance of the offence and to entertain and take cognizance of the appeals against conviction or acquittal as the case may be and as per the procedure laid down in Cr.P.C. Thus, the appeal lies before the Sessions division covered and not before CAT and the office objection of the Court of Sessions for numbering the appeals, is untenable.

23) Accordingly and in the result, the Criminal Petitions are allowed and the objection taken by the learned Sessions Judge since untenable the same are set aside and the learned Sessions Judge is required to number the appeals if otherwise in order and to proceed with the matters.

24) Miscellaneous petitions, pending if any in

these Criminal Petitions shall stand closed.

Dr. B. SIVA SANKARA RAO, J

22.12.2015
LR Copy to be marked - Yes
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HON’BLE Dr. JUSTICE B. SIVA SANKARA RAO

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Crl.P.Nos.6764 and 6765 of 2013

Date:22.12.2015

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[\[1\]](#) (1994) 3 SCC 440

[\[2\]](#) 2015 (2) ALT (Cri) 263 AP