IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 25 OF 2018

Imran Khan,
Son of latte Ahmed Khan,
Resident of
2730, Murida,
Fatorda, Margao, Goa. …... Petitioner

V e r s u s

1. STATE OF GOA
   through the Public Prosecutor

2. The Police Inspector,
   The Special Investigation Team,
   of the Crime Branch
   Dona Paula/Ribandar-Goa. …... Respondents

Shri Nitin Sardessai, Senior Advocate with Advocate K. Noorani for the Petitioner.

Shri S. R. Rivankar, Public Prosecutor for the Respondent/State.

CORAM: C. V. BHADANG, J.
Reserved on: 22nd February, 2018.
Pronounced on: 27th February, 2018

ORAL ORDER:

The challenge in this petition under Articles 226 and 227 of the Constitution of India r/w 482 of the Code of Criminal Procedure 1973 is to the order dated 22/1/2018 passed by the learned Sessions Judge in Criminal Misc. Application No.212/2017. By the impugned order, the application filed by the petitioner under section 457 r/w 451 of Cr.P.C for defreezing of the bank accounts has been partly allowed to the extent of permitting a withdrawal of Rs.25.00 lakhs only. The contention is that the accounts ought to have been defreezed as prayed.

2. The brief facts necessary for the disposal of the petition may be stated thus:

On 12/8/2013, an offence at Crime No.15/2013 has been registered under sections 120-B, 119, 166, 277, 278, 290, 379, 409, 418, 420, 430, 465, 468, 471 of Indian Penal Code (I.P.C, for short) and section 13 (1) (d) and 13(2) of the Prevention of Corruption Act, 1988 as also under section 4, 9, 9-A r/w section 21 of the Mines and Minerals (Development and Regulations) Act 1957 and the rules framed thereunder and the Mineral Concession Rules 1960 (Rules of 1960 for short). The Minerals Conservation & Development Rules 1988 (Rules of 1988 for short) and Rule 3 r/w Rule 7 of the Goa (Prevention of illegal mining transportation and storage of minerals) Rules 2004 (Rules of 2004 for short).

3. The said offence was registered on the basis of the complaint lodged by the Director of Mines and Geology, Panaji-Goa on the allegation that there was illegal mining and extraction of iron ore by different individuals, firms, lease holders, traders etc. during the period from 2007 to 2012 which has

resulted into wrongful loss to the State Exchequer and wrongful gain to the individuals and the entities engaged in such illegal extraction and sale of iron ore. During the investigation of the said crime various charge sheets have been filed and in so far the petitioner is concerned, the investigation is stated to be in progress which is presently being conducted by a Special Investigating Team (SIT) which was entrusted with the investigation on 12/5/2017.

4. Late Amalia Figueiredo was granted the mining concession under T.C. No.65/61 at Curpem of Sanguem Taluka over an area of 58.2700 Ha.. Subsequently the said concession has been abolished on being declared as a deemed lease.

5. According to the prosecution, the said mining concession was left by late Amalia Figueiredo to her son Mr. Caitano Figueiredo under a Will dated 13/6/1979. Caetano died interstate on 26/7/1985. It appears that Smt. Georgina Figueiredo one of the legal representatives of Mr. Caetano, filed first renewal application on 22/11/1988. Georgina died on 3.4.2008 before the renewal could be granted. The second renewal application was filed on 20/10/2006 by the petitioner Imran Khan under a Power of Attorney dated 23/2/2005 executed by Mr. Georgina Figueiredo and that application was

pending during the period from 2006-2012. In the year 2005, the petitioner and his brother Mohsin Khan availed of a Power of Attorney from late Georgina and yet another Power of Attorney in the year 2008 from Mrs. Maria Figueiredo “towards administrative act against title concession no.65/51”. According to the prosecution these Power of Attorneys were “criminally used by the petitioner and his brothers” in connivance with the Government/public servants and “highly influential politicians” who gave mute consent to the criminal act of theft of the natural resources. In short, according to the prosecution, the petitioner along with his brother through Imran Traders have extracted iron ore to the extent of 9,90644 metric tonnes amounting to more than Rs.3467254000/- during the relevant period. According to the prosecution, the documents evidencing the illegal extraction of the iron ore are available and have been referred to the Director of Mines and Geology in order to ascertain the exact quantity of the iron ore extracted year wise.

6. Indisputably the petitioner was not originally named as an accused in the FIR. However, his name was included as one of the accused somewhere around 12/8/2017 when the petitioner came to be arrested and since has been released on bail. The prosecution filed an application for cancellation of bail before this Court being Criminal Misc. Application (Main) No.280 of 2017

No.280/2017 which was dismissed on 21/12/2017 inter alia on the ground that prima facie there is no material to show involvement of the petitioner in the alleged crime.

7. Coming to the material dispute, the concerned Police Inspector wrote to the banks where M/s. Imran Traders and other relatives of the petitioner were having their accounts and as a result of which several bank accounts in the name of the petitioner and his relatives have been freezed. According to the petitioner, the amount lying in all these accounts which have been freezed is in excess of Rs.69 corers. The accounts came to be freezed on the ground that the amounts lying in these accounts are the proceeds of the sale of the iron ore which has been illegally extracted and sold over the relevant period.

8. The petitioner filed an application before the learned Sessions Judge for defreezing of the accounts. It was contended that the investigating agency has been unable to collect any evidence to show the involvement of the petitioner in the alleged illegal extraction of the ore. It was contended that this Court while rejecting the application for cancellation of bail had come to the conclusion that prima facie the involvement of the petitioner in the alleged crime is not shown. It was also contended that the petitioner has been singled out as the bank account of none of the other accused have been

freezed, which would indicate absence of bona fides on the part of the prosecution. It was contended that on account of the freezing of the account the petitioner is even unable to comply with the statutory liabilities, such as income tax and others and also to incur the day to day expenses.

9. The application was opposed on behalf of the prosecution on the ground that the investigation is still in progress and there is evidence to show that large amount of iron ore has been extracted illegally during the period from the year 2007 to 2012 and in breach of the provisions of the MMDR Act and the Rules framed thereunder and there is clear case of theft of the iron ore made out.

10. The learned Sessions Judge found that no case for defreezing of the accounts is made out. However, at the same time, allowed a partial withdrawal of the amount to the tune of Rs.25.00 lakhs, so that “the petitioner can sustain themselves and incur their day to day expenses”. Thus, except the amount of Rs.25.00 lakhs the learned Sessions Judge has refused to defreeze the accounts. Feeling aggrieved the petitioner is before this Court.

11. I have heard Shri Sardessai, the learned Senior Counsel for the petitioner and Shri Rivankar the learned Public Prosecutor for the

Respondent/State. With the assistance of the learned counsel for the parties, I have gone through the record. I have also gone through the case diary produced by the investigating officer.

12. Shri Sardessai, the learned Senior Counsel for the petitioner has raised the following contentions:

(i) That although a bank account has been held to constitute "property within the meaning of section 102 of Cr.P.C., an attachment of the amount lying in such a bank account, can be made under section 102 of Cr.P.C only if the amount lying in the account is "used in the commission of the offence" and not where the amount is alleged to be "proceeds of the crime". In other words, a distinction is tried to be made between the amount "used in commission of the crime" and the amount being "proceeds of the crime". Reliance in this regard is placed on the decision of the Supreme Court in the case of **State of Maharashtra Vs. Tapas D. Neogy (1999) 7 SCC 685.** It is submitted that a bank account can be attached and the amount can be freezed only when it is shown that there is “a direct link” with the commission of the offence by the accused. It is thus submitted that the prosecution is required to establish a direct link between the accused, the commission of the offence and the amount sought to be freezed which is not forthcoming in this case.

(ii) It is submitted that there is non compliance with the provisions of sub sections (2) and (3) of section 102 of Cr.P.C., inasmuch as it is not shown that the seizure was reported to the officer in-charge of the police station and the magistrate. Reliance in this regard is placed on the judgment of this Court in the case of **Dr. Shashikant D. Karnik Vs. State of Maharashtra through Anti Corruption Bureau Bombay** in Criminal Writ Petition no.2509/2006 decided on 17/4/2007 reported in 2007 (2) Bom. C.R.(Cri.) 871.

It is pointed out that although there is a specific averment in the petition about non compliance with sub section (2) and (3) of section 102 of section 102 of Cr.P.C. the same has not been refuted by filing any reply or affidavit.

(iii) Under section 8A of the MMDR Act there is a deemed extension till 31/3/2020 and the same is apparent from the order dated 4/4/2017 from the Director of Mines and Geology. Thus the lease stood extended till 31/3/2020.

(iv) It is submitted that the investigating officer had first seized the accounts and then made an attempt to collect the material which is not permissible. In this regard it is pointed out that time was sought on behalf of the prosecution before the learned Sessions Judge to verify the accounts. However, the order sheet dated 8/1/2018 shows that inspite of opportunity, the prosecution had not furnished the details on verification of the accounts.

(v) It is submitted that the petitioner has been singled out as the bank account of none of the other accused have been seized and this shows that the action by the investigating officer is not bona fide.

(vi) It is submitted that this Court vide order dated 21/1/2017 in Criminal Misc. Application (Main) no.280/2017 has prima facie come to the conclusion that no offence as alleged is made out against the petitioner of violation of the provisions of the MMDR Act or Mineral concession rules. It is submitted that the learned Sessions Judge was in error in brushing aside the said aspect on the ground that they were made in an application for cancellation of bail.

13. On the contrary it is submitted by Mr. Rivankar, the learned Public Prosecutor that the investigation carried out so far has brought out material to prima facie show that the petitioner and his brother through M/s Imran Traders has illegally extracted iron ore worth more than 9.00lakhs metric tonnes during the period from 2007-2012 which is in breach of the provisions of the MMDR Act and Mineral Concession Rules and the amount lying in the accounts are the proceeds of the sale of such iron ore which can be attached under section 102 of Cr.P.C. . It is submitted that the petitioner has carried out extraction and sale of iron ore on the basis of a Power of Attorney dated 2005 which is clearly in breach of Rule 37 of the mineral Concession Rules 1960. It is submitted that the observations of this Court in Criminal Misc. application (Main) no. 280/2017 are in the context of a prayer for

cancellation of bail and different considerations would arise while examining a challenge to the order attaching the various bank accounts. It is submitted that the profit and loss account of “Imran Traders”, clearly show payment of royalty by Imran Traders which would indicate that it is the petitioner who has carried out the the mining activity and the sale of the iron ore.

14. It is submitted that there is compliance with the provisions of sub section (2) and (3) of section 102 of the Code, inasmuch as, the seizure has been communicated to the officer incharge of the police station and the learned magistrate.

The learned Public Prosecutor has placed reliance on the decision in the case of **Teesta Atul Setalvad Vs The State of Gujarat Criminal Appeal No.1099 of 2017 and and other petitions.** Reliance is also placed on the decision in the case **Goa Foundation Vs. M/s. Sesa Sterlite Ltd. & Others Special Leave to Appeal (Civil) No.32138 of 2015** dated 7/2/2018 in order to submit that the second renewal granted by the Directorate of Mines and Geogology has been held to be illegal. It is submitted that the offence involves extraction of iron ore on a very large scale. It is submitted that the investigation is at final stages and the matter has been referred to the department of Mines and Geology to ascertain the exact amount of the iron ore extracted per month and the charge sheet is likely to be filed in the near future. However, the learned Public Prosecutor submitted that the respondent would not have any objection if the petitioner wants release of a partial amount to satisfy his statutory liability, such as income tax etc.

15. In reply it is submitted by Shri Sardessai, the learned Senior Counsel for the petitioner that the judgment of the Supreme Court in the case of **Goa Foundation (supra)** does not apply to the mining lease which is subject matter in the present petition.

16. I have carefully considered the rival circumstances and the submissions made.

Section 102 of the Code under which the impugned action has been taken by the investigating officer reads thus:

> 102. **Power of police officer to seize certain property.**
> (1) Any police officer, may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.
> (2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.
> (3) [1] Every police officer acting under sub- section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.]

> Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and of the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale."

It can thus been seen that under section 102 of Cr.P.C any police officer may seize any property (1) which may be alleged or suspected to have been stolen or (2) which may be found under the circumstances which creates "suspicion of commission of any offence". The Supreme Court in the case of **Tapas Neogy (supra)** has held that the property as used in section 102 of the Code would include a seizure of the bank account, prohibiting the account holder from if circumstances exist creating "suspicion" of any offence in relation to the bank account. That was a case where **Tapas D. Neogy** who was an architect and a Town Planner working in the department of Town Planning in the Union Territory of Daman and Diu was alleged to have forged a map of Daman thereby increasing the industrial zone in conspiracy with the co accused. As a result of this the land prices shot up from Rs.100/-Rs.110 per sq.mtr. to Rs.800/-Rs.1600 per sq.metre and in the process **Tapas D. Neogy** and the other co accused got pecuniary advantage from the land owners which was deposited in the accounts. The Supreme Court after taking a survey of various judgments held that a bank account of the accused or any of his relations is "property" within the meaning of section 102 of the Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have "direct link" with the commission of the offence for which the police officer is investigating into. The present case has to be examined in the context of the aforesaid legal position.

17. However, before that it is necessary to deal with the objection about there being non compliance with the provisions of sub section (2) and (3) of section 102 of Cr.P.C. It s true that the respondents have not filed any reply to the petition. However, merely on account of that it cannot be accepted that, there is non compliance. The non filing of the reply cannot preclude the Court from examining the case dairy in order to find out whether there is compliance with the sub section (2) and (3) of section 102 of Cr.P.C.. In this regard I have perused the case diary and I do find that the matter was reported to the incharge of the SIT as also the magistrate and thus the contention about non compliance with the provisions of sub sections 2 and 3 of section 102 of the Code cannot be accepted.

18. In the case of **Shashikant Karnik, (supra)** before the Division bench of this Court on facts it was found that there is non compliance.

19. This takes me to the merits of the matter. Admittedly, the mining concession bearing TC No.65/51 was granted to now deceased Georgina and the petitioner claims to be operating the same under the Power of Attorney dated 23/2/2005. It would now be necessary to note the provisions of Rule 37 of the Mineral Concession Rules 1960 which reads thus:

37 Transfer of lease. —

(1) The lessee shall not, without the previous consent in writing of the State Government [133] [and in the case of mining lease in respect of any mineral specified in [134] [Part A and Part B of] the First Schedule to the Act, without the previous approval of the Central Government]

(a) assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein, or

(b) enter into or make any bona fide arrangement, contract or understanding whereby the lessee will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operations or undertakings will or may be substantially controlled by, any person or body of persons other than the lessee: [Provided further that where the mortgagee is an institution or a Bank or a Corporation specified in Schedule V, it shall not be necessary for the lessee to obtain any such consent of the State Government.]

It can thus be seen that under Rule 37 of the Minerals Concession Rules 1960 no person can assign, sublet, mortgage, or in any other manner, transfer the mining lease or any right, tittle or interest therein. Rule 37 (1)(b) of the rules prohibits the lessee from entering into or making any bonafide arrangement, contract or understanding whereby the lessee will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operations or undertakings will or may substantially controlled by, any relevant person or body of persons other than the lessee.

19. The contents and the recitals of the Power of Attorney dated 23/2/2005 may now be examined. Paragraphs 1, 2 and 3 of the Power of Attorney read thus:

> (1) To work, manage and develop the said mines and to raise, extract and sell ores or any other permitted minerals, on our behalf, in such manner as our said Attorney or Attorneys may think fit.
> (2) To carry or manage, conduct and supervise the mining operations on our behalf in the said Mines.
> (3) To appoint, dismiss, suspend Engineers, Managers or any employee or labourers or workmen in the said Mines or otherwise accept the services of Engineers, Managers, Employees, Labourers or other persons for

> the purpose of working the said mines on such remuneration as pay salary, commission or otherwise and on such terms and conditions as our said Attorney or Attorneys may deem fit.

Prima facie it can be seen that under Clause 1 the petitioner has been authorized to work, manage and develop the said mine and to raise, extract and sale or the ore or any other permitted minerals on behalf of the consignor in such manner as the petitioner thinks fit. Clause 2 authorizes the petitioner to carry on manage, conduct and supervise mining operations on behalf of the consignor. Clause 3 delegates power in respect of the supervision and the disciplinary control over the employees working in the mine. Thus prima facie it appears that the operation under the Power of attorney would be in violation of Rule 27 of the Minerals Concession rules.

20. Shri Sardessai, the learned Senior Counsel for the petitioner has placed strong reliance on the observation of this Court in order dated Criminal Misc. Application (Main) No.280/2017, in order to submit that this Court has already found that there is no case made out by the prosecution against the petitioner.

21. In order to appreciate the contention it would be necessary to find out the nature, effect and the relevance of the observations of this Court in

deciding the present petition.

22. At the outset, it is necessary to note that Criminal Misc. Application (Main) No.280/2017 was an application seeking cancellation of bail granted to the petitioner on the ground that the bail has been wrongly granted by the learned Sessions Judge. A prayer for cancellation of bail can arise under various circumstances, namely, (i) bail having been erroneously granted for reasons and grounds which are not acceptable, (ii) on the ground that some new material has been collected during the course of the investigation which has relevance on the aspect of grant of bail and (iii) on account of breach of any of the conditions of bail. The cancellation of the bail in Criminal Misc. Application (Main) No.280/2017 was sought on the first ground, namely, that the bail has been irregularly granted. This Court after taking note of several decisions found that the Court while considering an application for cancellation should avoid re-appreciation of the evidence (See case of **Narendra K. Amin Vs. State of Gujarat and anr. (2008) 13 SCC 584**). This Court also noted that while considering an application for cancellation of bail, this Court is not sitting in appeal over the order passed by the learned Special Judge and quite to the contrary it is tasked with a duty to consider whether the ground urged warrant cancellation of bail in which the parameters are distinct and different than those involved in grant of bail. This

Court also noted that it was not the case of the State that the respondent had violated the terms of the bail or in any manner hindered the course of the investigation or had made an attempt to influence the witnesses. The State had also not claimed that the petitioner had not cooperated with the investigation. In para 30 of the order this Court has found that the petitioner was never called for interrogation at any time after the grant of bail on 15/9/2017 and/or its modification vide order dated 6/10/2017. It was also noted that thre was no explanation on behalf of the State for a lapse of 55 days in seeking the cancellation of bail granted to the petitioner. A perusal of the order dated 21/12/2017 passed by this Court shows that broadly these were the considerations which weighed with this Court while refusing to cancel the bail granted to the petitioner. It is true that in paras 27 and 28 this Court has adverted to Rule 37 and the Power of Attorney dated 23/2/2005 and the profit and loss account of Imran Traders and has ultimately found in para 29 that there was no illegal transfer of the lease in contravention of the Act and Rules nor there was any theft of the iron ore. The considerations which weigh with the Court while granting bail are distinct while considering a challenge to the order of the present nature where the accounts have been attached. Apart from the question of existence of a prima facie case the question which assumes significance while granting bail and/or refusing to cancel it are the necessity of the custody of the applicant for the purposes of investigation and the possibility of misuse of the bail. In any event whatever observations are made by this Court in Criminal Misc. Application (Main) No.280/2017 are of a prima facie nature and that too in the context of a prayer for cancellation of bail and with respect the same would not be decisive while considering a challenge to the order of attachment of the bank accounts. Thus the ground based on the observations of this Court while deciding CRMA (Main) No.280/2017 in my considered view cannot be accepted.

23. It is not necessary to go into the question of the deemed extension of the lease till 31/3/2020 particularly when prima facie on the basis of the contents of the Power of attorney it has been found that there is non compliance with Rule 37 of the Mineral Concessions Rules which is punishable under section 4 r/w section 21 of the Act. Once it is prima facie found that there is non compliance with the provisions of Rule 37 of the Mineral Concession rules, the proceeds of the sale which are said to be lying in the various bank accounts can be said to be found under circumstances "which creates suspicion of commission of any offence" within the meaning of section 102 of Cr.P.C and there would be a direct link between the commission of such offence and the proceeds. The distinction tried to be made out on behalf of the petitioners between "amount used in commission

of the crime" and the "amounts being proceeds of the crime" although attractive at the first blush cannot stand deeper scrutiny. Section 102 of Cr.P.C as noticed earlier takes into its ambit any property which may be alleged or suspected to have been stolen or which may be found under circumstances which creates suspicion of the commission of any offence. I have already found that prima facie there is material to show that the amount is found under circumstances which creates suspicion of any such offence. Even in the case of **Tapas Neogy (supra)** the amount lying in the accounts which was sought to be seized were proceeds of the crime which the Supreme Court on principle held that the same could be attached under section 102 of CR.P.C. In the facts and circumstances of that case, as the impugned order of the Court releasing the bank account was already given effect to and the accused were operating the account, the Hon'ble Supreme Court declined to interfere. In the present case the investigation is still in progress and is said to be in final stages. The matter has been referred to the department of Geology for verification and as such, I do not find that the accounts can be defreezed at this stage. The petition is accordingly dismissed. Needless to mention that it will be open to the petitioners to apply for release/defreezing of the bank accounts under section 451 of Cr.P.C after filing of the charge sheet. It is further made clear that the observations made herein are for the limited purpose of deciding the application for release of the bank accounts and shall not be used for seeking cancellation of bail, which order has attained finality a this stage.

C. V. BHADANG, J.

Ap/