

Surendra Kumar Golcha Vs. State of Raj. and Another

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Court : Rajasthan

Decided On : Dec-19-2011

Reported in : 2012CrLJ281(NOC)

Judge : Mahesh Chandra Sharma

Appeal No. : S.B. CR. MISC. PETITION NO. 691 OF 2009

Appellant : Surendra Kumar Golcha

Respondent : State of Raj. and Another

Judgement :

1. This misc. petition has been filed under section 482 Cr.P.C. by the petitioner Surendra Kumar Golcha, against the order dated 28.2.2009 passed by Additional Sessions Judge Dausa in Criminal Revision No. 12/2007 (old 58/2005) whereby the revision petition was dismissed and the order dated 5.4.2005 of Additional Chief Judicial Magistrate Dausa taking cognizance against owner of Golcha Group Surendra Kumar Golcha and Abimanyu Golcha for offence under section 203 of the Rajasthan Municipalities Act in complaint case No.912 of 2003 was maintained.

2. Brief facts of the case are that the petitioner is having a factory in Dausa which was established by him long back. This factory was established on the land comprising in old khasra No. 356 and new number of khasra is

768. The neighbouring khasra No. 769 is a Government land and entered as such in the name of the Government in revenue records. The petitioner has made encroachment on the land in Khasra No.

769. A notice under section 91 of the Rajasthan Land Revenue Act was issued to the Shop Stone Factory. The Tehsildar Dausa is said to have inspected the site and he found no encroachment on the land. Again in the year 2002 notice under section 91 of the Rajasthan Land Revenue Act came to be issued to the petitioner. Vide order dated 23.2.2002 the Tehsildar observed that earlier also order was passed on 31.1.1973 and there is no requirement of passing order again and again on the same issue and he therefore rejected the proceedings for removal of encroachment. A report was lodged by the Executive Officer of the Municipal Board at Police Station Dausa that Golcha Group has encroached upon an area of 33'x251' of Khasra No. 769 which is registered as Siwai Chak and Germumkin Rasta by raising 6' feet height boundary wall. It was stated that this encroachment is an offence under section 203 of the Rajasthan Municipalities Act, 1959.

3. The police on the basis of above information registered an FIR No. 353/2002 and after enquiry, it came to the conclusion that the petitioners have not made any encroachment. The police submitted a final report before the concerned Magistrate. A protest petition was filed before the Magistrate. The concerned Magistrate after hearing the parties took cognizance under section 203 of the Rajasthan Municipalities Act, by order dated 20.12.2002. The petitioner and Abhimanyu Golcha filed revision petition and the revisional court allowed the revision petition vide order dated 26.4.2003 and set aside the order dated 20.12.2002 of the trial court and remanded the case to the trial court with the direction to take proceedings under sections 200 and 202 Cr.P.C. In the meanwhile report was submitted by the Tehsildar to Dy. S.P. Dausa, wherein it was stated that the area surrounded by abadi, hence demarcation is impossible. After the remand statement of Laxmi Narain Meena was recorded. The Additional Chief Judicial Magistrate Dausa vide its order dated 5.4.2005 took cognizance against the petitioner and Abhimanyu Golcha under section 203 of the Rajasthan Municipalities Act. Against the order dated 5.4.2005 the petitioner and Abimanyu Golcha filed revision petition before the Additional Sessions Judge, Dausa, who

vide order dated 28.2.2009 after hearing the parties dismissed the revision petition. Against this order only the petitioner Surendra Kumar Golcha has filed the revision petition.

4. Mr. S.S.Hora, learned counsel appearing for the petitioner Surendra Kumar Golcha has contended that the order dated 5.4.2005 of the Additional Chief Judicial Magistrate taking cognizance against him under section 203 of the Rajasthan Municipalities Act and the order dated 28.2.2009 of the Additional Sessions Judge rejecting the revision petition filed against the order taking cognizance are absolutely illegal and contrary to law. He has further contended that the dispute related to long back. The factory was established in the year 1932 which is near about 79 year ago. He has drawn attention of this court on section 305 and section 468 Cr.P.c. According to him under section 305 Cr.P.C. the Magistrate cannot take cognizance against an individual while the company is there. He has further drawn attention of this court towards section 468 Cr.P.C. where there is bar for taking cognizance after lapse of the period of limitation. Mr. S.S. Hora in support of his arguments placed reliance on R. Kalyani vs. Janak C. Mehta and others (2009) 1 SSC 516. According to him a vicarious liability can be fastened only by reason of a provision of a statute and not otherwise and for the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled.

5. Mr. Hora has further drawn attention of this court towards the case of Pepsi Foods Ltd. and another vs. Special Judicial Magistrate and others (1998) 5 SCC 749. According to him the order taking cognizance dated 5.4.2005 by the Addl. Chief Judicial Magistrate and the order rejecting the revision petition dated 28.2.2009 by the Addl. Sessions Judge Dausa, be set aside.

6. Mr. Peeyush Kumar, Public Prosecutor for the State and Mr. Rajesh Chaturvedi, learned counsel appearing for the Municipal Board have argued that before the Additional Sessions Judge Dausa, Surendra Kumar son of Harish Chandra Golcha and Abhimanyu Golcha son of Surendra Kumar Golcha, challenged the order of

the Additional Chief Judicial Magistrate Dausa taking cognizance in FIR No. 353 of 2002 for offence under section 203 of the Rajasthan Municipalities Act in complaint case No. 912 of 2003 State vs. Surendra Kumar. The revisional court dismissed the revision petition vide order dated 28.2.2009. S.B.Criminal Misc. Petition No. 691 of 2009 was filed only by Surendra Kumar Golcha. Thus it is clear that after rejection of revision petition filed by Surendra Kumar Golcha and Abimanyu Golcha, the order of taking cognizance by the Additional Chief Judicial Magistrate against Abimanyu Golcha attained finality as no revision petition was filed by him against that order. This Hon'ble Court on 11.5.2009 while issuing notice to the respondents stayed the further proceedings in Criminal Case No. 912 of 2003 State vs. Surendra Kumar and others pending before the Court of Additional Chief Judicial Magistrate, Dausa. Mr. Peeyush Kumar, Public Prosecutor appearing for the State and Mr. Rajesh Chaturvedi, Advocate appearing for the Municipal Board, Dausa have contended that Abhimanyu Golcha has not challenged the order passed by the Additional Sessions Judge Dausa of revision petition before this Court in the misc. petition. The interim order passed by this court against Abimanyu Golcha is not operative from the date of passing of the interim order and the order taking cognizance by the Addl. Chief Judicial Magistrate is operative against him. They have argued that the offence under section 203 of the Rajasthan Municipalities Act is a continuing offence and the prosecution in respect of it cannot be challenged. Mr. Peeyush Kumar, PP for the State placed reliance on Municipal Council Ganganagar vs. Rawat Ram (AIR 1965 Raj. 180). Mr. Peeyush Kumar, PP for the State and Mr. Rajesh Chaturvedi, learned counsel appearing for the Municipal Board has drawn my attention towards the findings of the revisional court.

7. Mr. Peeyush Kumar, PP for the State has also placed reliance on Municipal Board Saharanpur vs. Kripa Ram and another (AIR 1965 Allahabad 160) arguing that an offence of encroachment under the Municipal Act is a continuing offence and if a person is prosecuted for having committed an offence during a particular period, there is no bar for prosecuting him again for committing a similar offence on some other date, and the bar under Article 20(2) of the Constitution and under Section 403(1) Criminal Procedure cannot be attracted. His offence is a continuing day to day.

8. I have gone through the order of the revisional court and the order of the Addl. Chief Judicial Magistrate taking cognizance against the petitioner and his son.

9. Before proceeding further it would be necessary to have a look at the provisions of section 203 (1) and proviso to section 265 of the Raj. Municipalities Act.

Section 203 (1) of the Rajasthan Municipalities Act reads as under :

“203. Encroachment or obstruction upon public land - (1) whoever makes any encroachment in any land or space not being private property, whether such land or space belongs to or vests in the Board or not except steps over drain in any public street shall on conviction be punished with simple imprisonment which shall not be less than one month but which may extend to three years and with fine which may extend to twenty thousand rupees.

Provided that the court may for any adequate or special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term of less than one month.”

Proviso to Section 265 of the Act reads as under :

“265 - Proviso

Provided that no prosecution for an offence under this Act or rule or bye-law framed thereunder shall be instituted except within six months next after the commission of such offence.

10. Provisions of Section 305 and 468 are also necessary to be looked into.

Section 305 Cr.P.C. reads as under :

305. Procedure when corporation or registered society is an accused.-(1) In this section, “corporation” means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

Section 468 Cr.P.C. reads as under :

468. Bar to taking cognizance after lapse of the period of limitation.- (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

1[(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]

11. The important judgments of the Apex Court and this Court, Allahabad High Court and Patna High Court, which are directly on the point raised in this misc. petition are necessary to be looked into.

12. In R. Kalyani's case he has drawn attention towards para 32 of the judgment, which reads as under :

32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created.

13. In Pepsi Foods Ltd. v. Special Judicial Magistrate, (1998) 5 SCC 749, the Apex Court in para 28 held as under :

28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused

must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

14. In *Municipal Council Ganganagar vs. Rawat Ram* (supra), while discussing section 205 and proviso to section 265 of the Raj. Municipalities Act, and placing reliance on *State vs. Kunja Behari Chandra* (AIR 1954 Pat 371 (FB)) and *State of Vs. Bhiwandiwalla* (AIR 1955 Bom 161) held that the encroachment made is a continuing offence and that it is an offence in "de die in diem" and that prosecution for an offence arising out of encroachment cannot be barred under the proviso of section 265 of the Act. This Hon'ble Court in para 12 of the judgment in this case held that it will be open to the Municipal Council to prosecute persons in encroachment even after the expiry of very long periods. Paras 11, 12 and 13 of the judgment reads as under :

"11. In the light of the principles laid down in the case referred to above and on the language of section 203 of the Act, I have no hesitation in coming to the conclusion that encroachment has been made a continuing offence and that it is an offence in 'de die in diem' and that prosecution for an offence arising out of encroachment cannot be barred under the proviso of section 265 of the Act.

12. The learned counsel for the respondent raised the argument that if this view is held it will be open to the Municipal Council to prosecute persons in encroachment even after the expiry of very long periods. The answer to this argument is that if under any law relating to prescription the person encroaching upon the land acquires rights in the property and the rights in favour of the Municipal Council are extinguished at that stage encroachment will cease to be an encroachment and

there should be no prosecution. On this view of the matter, there can be no anomaly in adopting the contention canvassed on behalf of the appellant.

13. In the light of the above discussions, I hold that the proviso to section 265 of the Act, does not bar prosecution in respect of continuing offence and that encroachment is a continuing offence under the provisions of the Rajasthan Municipalities Act. In this view of the law, the respondent, in my opinion, is guilty of an offence under section 203 of the Act. The trial Magistrate was right in convicting him. The Sessions Judge Ganganagar went wrong in setting aside the conviction and acquitting him. The appeal is, therefore, allowed, acquittal of the respondent is set aside and his conviction by the trial court under section 203 of the Act is restored.”

15. In *State vs. Kunja Behari Chandra* (AIR 1954 Pat 371 (FB) it was held as under :

“if an act or omission on the part of an accused constitutes an offence, and if that act or omission continues from day to day, then a fresh offence is committed on every day on which the act or omission continues.”

16. The observations of the Patna High Court with regard to continuing offences are of a general nature and can apply with equal force to contraventions of offences under the Municipal Act.

17. The Division Bench of the Bombay High Court in *State vs. Bhiwandiwalla* (AIR 1955 Bombay, 161) observed as under :

“Even so, this expression has acquired a well recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then from day to day a fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course an offence is committed only once. But we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences.”

18. In Municipal Board Saharanpur vs. Kripa Ram and another (AIR 1965 Allahabad 160), it was observed as under :

“An offence under Bye-law No.2 of the Municipal Board of Saharanpur read with Section 299 of the UP Municipalities Act is a continuing offence and if a person is prosecuted for having committed an offence during a particular period, there is no bar for prosecuting him again for committing a similar offence on some other date, and the bar under Art. 20(2) of the Constitution and under Section 403 (1) Cr.P.C. cannot be attracted.”

19. In the instant matter as per the arguments of the counsel for the petitioner himself that earlier the petitioner's factory was given notice under section 91 of the Raj.Land Revenue Act was dropped in 1973. The petitioner's encroachment in my opinion is a continuing offence as it is committed not once but committed from day to day and it is still continuing.

20. The portion of the findings given by the revisional court reads as under :

“ Other Language”

21. The order passed by the revisional court and the Addl. Chief Judicial Magistrate are correct in the eye of law and there is no illegality in the order passed by the courts below as the offence committed by the petitioner is a continuous offence from day to day and still continuing. The argument in relation to provisions of section 305 Cr.P.C. cannot be considered in this misc. petition at this stage particularly when Abhimanyu Golecha, who is also co-accused in this matter has not approached this court and the matter in relation to him has attained finality. It is a fact that the persons who are physically as well as economically strong they are encroaching upon the Government land and their offence is a continuing offence day to day, therefore such types of situation is also seen in this matter. Not only this the people are encroaching upon Air and Sky and such types of the act of the person should not be permitted by the court below.

22. In view of the above this misc. petition is rejected being devoid of merit. The interim order dated 11.5.2009 passed by this court is vacated.

