IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

Criminal Writ Petition No.157 of 2015

* Ashok Metal Corporation,
Through its Proprietor
Shri. Kishorimal Bhabutmal Jain,
35, Krishna Bhavan, 1st Carpenter
Street, Mumbai - 400 004. .. **Petitioner.**

Versus

1) The Senior Inspector of Police
Lohmarg Police Station,
Bhusawal, Bhusawal,
District Jalgaon.

2) The Superintendent (Preventive)
Central Excise, Customs and
Service Tax, Jalgaon Division,
District Jalgaon, Maharashtra.

3) The Deputy Director of
Income Tax (Inv.)-I Nashik,
Maharashtra.

4) State of Maharashtra. .. **Respondents.**

Shri. Ravindra S. Shinde, Advocate, for petitioner.

Smt. R.K. Ladda, Additional Public Prosecutor, for respondent Nos.1 and 4.

Dr. (Smt.) Kalpalata Patil Bharaswadkar, Advocate for respondent No.2.

CORAM: T.V. NALAWADE &
Smt. I.K. JAIN, JJ.

DATE : 1st APRIL 2015

ORDER:

1) The proceeding is filed under section 482 of the Code of Criminal Procedure and Article 226 of the Constitution of India for claiming various reliefs. Relief of direction is claimed to hand over 8 gold bars weighing 8 kilograms seized by police in CR No.2/2015 registered for offence punishable under section 124 of the Maharashtra Police Act by Lohmarg Police Station Bhusawal. Indirectly relief is also claimed for quashing of the First Information Report of this crime. Compensation of Rs.15 lakh is claimed for so called illegal arrest of one Devang Shah in this crime. Relief is claimed for giving direction to the Customs Department not to make any further inquiry in respect of seizure of this gold. Learned counsel for the petitioner, learned counsel for the Customs Department and the learned Additional Public Prosecutor are heard.

2) The facts show that on 9-1-2015 at about 9.40 p.m. the police of aforesaid police station received

information that one person occupying berth No.39 of Coach No.B-1, III tire AC of train proceeding to Mumbai was carrying huge quantity of gold and arms. The train arrived at Bhusawal at 10.05 p.m. One Devang Shah was occupying this berth. After seeing police he attempted to run away but he was over powered and held by police. When search of his person and his belonging was taken, police noticed that he was wearing a jacket inside of the shirt and in the pockets of the jacket there were 8 gold bars of one kilogram each in concealed condition. These bars were seized under seizure panchanama in the presence of independent panch witnesses and Devang came to be arrested. Devang could not explain about source of the gold. There were marking showing that most of the bars were of foreign origin and on the bars there were no serial numbers which ordinarily refinery gives. The value of the bars was around Rs.2.8 crore. One A.P.I. who participated in this action gave FIR and the aforesaid crime came to be registered.

3) During the course of investigation of the aforesaid crime police collected certificate of purity of the

gold and it is 99.5%. Out of 8 bars on 4 bars there were marking as "MMTC-PAMP". However there were no serial number given by the refinery. On the two bars there was marking as "VALCANBI-SUISSE". One one bar there was marking as "KALOTI-Dubai". On the remaining bar there was as "PAMP-SUISSE".

4) The marking and the name of refinery on the bars indicate that these four bars were manufactured in refinery situated outside India, in the country such as Switzerland and Arab Emirates.

5) The petitioner Ashok Metal Corporation of which one Kishorimal Jain is the sole proprietor has contended that it had purchased 15 kilograms of gold on 5-1-2015 from Dealer "Edelweiss". This company is situated in Ahmadabad, Gujarat and it is purportedly having licence of import of gold. The petitioner has produced two vouchers of this company and they show that four gold bars were purchased by the petitioner from this company. Total weight of gold was around 15 kilograms. It is the case of the petitioner that it is

manufacturing jewelery. It is the case of the petitioner that it had sent Devang to Kolkata with this gold for preparation of ornaments, jewelery but the negotiations regarding charges of preparation failed and so the petitioner had asked Devang to return with gold to Mumbai. Devang was intercepted at Bhusawal and it is the case of the petitioner that this gold was purchased by the petitioner from Edelweiss company on 5-1-2015. It appears that application was also given under section 457 of the Code of Criminal Procedure by the petitioner in the Court of the Judicial Magistrate, First Class. This application was opposed by both the police and the Customs Department.

6) In the petition, the petitioner has not supplied particulars of serial number of the gold bars purchased from the aforesaid company. From one voucher it can be said that 5 gold bars of "Perth Mint" having serial numbers 2626401 to 2626405 were sold by the aforesaid company to the petitioner. On not a single bar seized in the present matter name of this refinery or its number is given.

7) The Customs Department has collected information from MMTC-PAMP India Pvt. Ltd. The information supplied by the refinery shows that the refinery has unique identity bearing serial number. A typical photo of the finished product is supplied by this company. Similar information is collected by Customs Department from the aforesaid two foreign refineries. In the present case there were no serial numbers appearing on 4 bars on which there was marking as MMTC-PAMP. On the remaining four bars there was name of refinery of foreign origin but the serial number was found erased. Thus, description of none of the 8 gold bars tallies with the description given in the vouchers produced by the petitioner. This gold was delivered to the petitioner in Mumbai as per the case of the petitioner.

8) Before police Devang gave information that as per instructions of Ashok Metals, the employer, he had gone to Kolkata on 8-1-2015 and there he collected 8 bars of gold from one person and he was returning with the bars to Mumbai to hand them over to the employer. Ticket from Howrah to Mumbai of railway was reserved

for Devang on 8-1-2015. This circumstance is not consistent with the case of the petitioner that when negotiations failed he asked Devang to return to Mumbai with the gold. Statement of Manager Bharat Jain of petitioner company is to the effect that he had sent Devang to Kolkata to take delivery of these 8 bars and it can be said that his statement is not consistent with the case of the company. The record does not show that delivery was given by the aforesaid company at Kolkata.

9) To the police and to the Customs Department the petitioner, the sole proprietor supplied different information than the information supplied to police by his employees. As per his case, he had sent Devang to Kolkata with 8 bars of gold and as the negotiation failed in respect of charges for preparation of ornaments / jewelery, he asked Devang to return with gold. The case does not show that it was certain as to when Devang was to return. It is already observed that railway ticket was already booked on 8-1-2015 for Mumbai in the name of Devang. It does not look probable that Devang had gone to Kolkata with huge quantity of gold for preparing ornaments / jewelery

and so the probability that he collected these 8 bars at Kolkata and he was returning to Mumbai with those gold bars and attempt is made to use false vouchers to explain the possession is more. There is sea shore at Kolkata and smuggling activities are there.

10) The Court cannot straightway give custody of such seized gold to the petitioner only because the petitioner is dealing in gold and gold ornaments and he has some record in respect of the gold purchase dated 5-1-2015. It is already observed that the description of the gold purchased does not tally. In view various duties and curbs imposed by the Central Government to curtail import of gold and save economy of the country, price of the gold in the country is still much higher than the price of the gold in international market. Due to this circumstance smuggling activities are still going on. Thus, there is clear possibility of obtaining possession of the gold in fraudulent way in the present case. The gold seized is in huge quantity and its value is more than Rs. 2 crore. In view of these circumstances it was necessary for the petitioner to show that it was legally acquired

gold. Relevant provisions of both the Maharashtra Police Act and the Customs Act are not in favour of the claim of the petitioner. Hereinafter this Court is discussing those provisions.

11) Section 102 of the Code of Criminal Procedure (hereinafter referred to as "the Code') deals with power of police officer to seize certain property and it runs as under :-

> "**102.(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.
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> **(2)** Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.
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> **(3)** 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, or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of

> the property in police custody may not be considered necessary for the purpose of investigation 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 if 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."

Thus, when there is suspicion that the property is stolen or found under circumstances which creates suspicion of the commission of any offence in respect of the property, the property can be seized by police. The report is required to be made to the Magistrate after making such seizure under this provision.

12) When there is seizure made by police under section 102 of the Code, person like present petitioner, if

wants custody of property, he can use provision of section 457 of the Code if case is not filed. Section 457 runs as under :-

> "**457. (1)** Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.
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> **(2)** If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

This provision shows that Magistrate is expected to make inquiry and then order of disposal or of custody of the property can be made by the Magistrate.

13) Provision of Section 458 of the Code reads as under :-

> **"458. (1)** If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, the Magistrate may by order direct that such property shall be at the disposal of the State Government and may be sold by that Government and the proceeds of such sale shall be dealt with in such manner as may be prescribed.
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> **(2)** An appeal shall lie against any such order to the Court to which appeals ordinarily lie from convictions by the Magistrate. "

This provision shows that if the person making claim of the property is unable to show that it was legally acquired, the Magistrate may by order direct that the property shall be at the disposal of the State Government. Thus the property can be treated as unclaimed property, not belonging to the person like the petitioner.

14) In the present case, charge-sheet is already filed for offence punishable under section 124 of the Maharashtra Police Act against Devang. Provision of Section 124 of Maharashtra Police Act reads as under :-

> "**124.** Whoever has in his possession or conveys in any manner, or offers for sale or pawn, anything which there is reason to believe is stolen property or property fraudulently obtained, shall, if he fails to account for such possession or to act to a term which may extend to one year but shall not, except for reasons to be recorded in writing, be less than one month and shall also be liable to fine which may extend to five thousand rupees."

This provision shows that term "reason to believe" is used and if there is possibility that property is stolen or is fraudulently obtained, such case can be filed. In such a case, the accused is expected to give explanation to the satisfaction of the Magistrate that the property does not fall under the two categories mentioned in the section. When a case is filed, provisions of sections 451 and 452 of the Code come into play. These provisions run as under :-

> "**451**. When any property is produced before any Criminal Court during any inquiry or trial the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.**--** For the purposes of this section, "property" includes--

(a) property of any kind or document which is produced before the Court or which is in its custody;

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence."

"**452.(1)** When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

> **(3)** A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in sections 457, 458 and 459.
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> **(4)** Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.
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> **(5)** In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

15) For getting interim custody of such property under section 451 of the Code, the petitioner or Devang will have to satisfy the Magistrate as per section 124 of the Maharashtra Police Act as already observed.

Provision of section 452 of the Code shows that there is power with the Magistrate to make order of disposal of such property at the conclusion of the trial and the Magistrate is expected to ascertain whether the property is liable to confiscation.

16) In view of the aforesaid provisions, when the case is filed under section 124 of the Maharashtra Police Act and the record shows that property is notified goods of foreign origin, was covered under the provisions of the Customs Act, the Magistrate is expected to ascertain as to whether the property needs to be dealt with under the provisions of the Customs Act. There is separate machinery provided under the Customs Act 1962 for confiscation of such property. In section 151 of this Act it is specifically provided that police is empowered to assist the Customs Department when such a case is detected. Thus, in ordinary course such property is required to be handed over to Customs Department.

17) In view of the aforesaid provisions of law and the power given to the Customs Department of making

investigation, it is not possible to give interim custody to the petitioner. The aforesaid material shows that trial of the case for offence punishable under section 124 of the Maharashtra Police Act needs to be concluded.

18) The learned counsel for the petitioner made submissions that notice as provided under the Customs Act needs to be given within six months from the date of seizure and after such period the petitioner will be entitled to get the custody in ordinary course if the notice is not given. Relevant material is already quoted by this Court and it shows that the seizure from the employee of present petitioner is made by police under the provision of the Code and seizure is not made under the provisions of the Customs Act. There is power given to Customs Officer to make investigation of such case irrespective of the registration of the crime and filing of the case for offence punishable under section 124 of the Maharashtra Police Act and that has nothing to do with the limitation of six months to issue notice for confiscation. Even if it is presumed that the presumption provided under section 123 of the Customs Act cannot be used, the other

provisions are there empowering the Customs Officer to make investigation and file the case. Further the provisions of Cr.P.C. and the Customs Act can be used for confiscation of such gold.

19) The term "reason to believe" is used in section 124 of the Maharashtra Police Act and also in section 110 of the Customs Act. At present there is material of aforesaid nature against the petitioner and the explanation given by the petitioner is not at all plausible. In view of these circumstances this Court holds that at this stage it is not possible to give custody of the gold to the petitioner. Further it cannot be said that the arrest of Devang was illegal and the Customs Officers need to be prevented from making investigation or taking steps for confiscation. In the case reported as **AIR 1975 SC 160 (Champaklal Ganeshmal v. State of Maharashtra)** provision of Section 124 of the Bombay Police Act, now Maharashtra Police Act, is discussed. Following observations are made by the Hon'ble Apex Court in para 7 of the report:-

"**7.** . . . It can hardly be disputed that when anything is imported into the country clandestinely in violation of import or customs regulations it is fraudulently obtained, that is obtained by committing a fraud on the regulations. Smuggled goods are clearly goods fraudulently obtained. .... The plain language of the section stops short at describing the property as "stolen property or property fraudulently obtained" and does not go on to add the words "by him". . . . if the property were stolen or fraudulently obtained by the accused, that would be a distinct and independent offence under the Indian Penal Code or the Customs Act, . . . and it would not be necessary to make it an offence over again under Section 124 of the Bombay Police Act. . . . If the property is capable of being described as "stolen property" or "property fraudulently obtained" by whomsoever it might have been stolen or fraudulently obtained that would be sufficient to comply with the requirements of the section. . . . it is the possession by the accused of property which bears the attribute or characteristic of 'stolen property' or 'property fraudulently obtained', that is made penal. . . . the explanation given by the appellant for his possession of the wrist watched was unsatisfactory and the High Court was right in taking the view that the appellant had failed to account for the possession of wrist watches to the satisfaction of the Court. "

20) Case is already filed under section 124 of the Act against Devang and so this Court holds that the observations made by the Apex Court can be used against Devang if he fails to explain the things.

21) In the result, the petition stands dismissed.

Sd/-	Sd/-
(Smt. I.K. JAIN, J.)	**(T.V. NALAWADE, J.)**

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