IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.973 OF 2015
WITH
CRIMINAL APPLICATION NO.257 OF 2017
IN
WRIT PETITION NO.973 OF 2015

Ashish Rajinder Kapila,
Managing Director of
Kady Mercantile Pvt. Ltd. ... **Petitioner/Applicant**
V/s.
The State of Maharashtra & Anr. ... **Respondents**

WITH
CRIMINAL APPLICATION NO.499 OF 2016
IN
WRIT PETITION NO.973 OF 2015

Rahul Singhania ... **Applicant**

<u>In the matter in between</u> :
Ashish Rajinder Kapila … **Petitioner**
V/s.
The State of Maharashtra ... **Respondent**

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Mr.Subhash Jha with Ankita Pawar i/b. Law Global, Advocate for the Petitioner/Applicant.

Mr.Santosh S.Musale, Advocate for Respondent Nos.2 and 3.

Ms.P.N.Dabholkar, APP for the Respondent/State.

Mr.Charanjeet Chanderpal with Ms.Namita Shirke with Mr.Milnd Lad, Advocate for the Applicant in APPW/499/2016.

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CORAM : A.M.BADAR J.

DATED : 25th September 2017.

ORAL JUDGMENT :

1 Rule. Rule is made returnable forthwith. Heard finally by consent of parties.

2 By this petition, the petitioner is invoking provisions of Article 227 of the Constitution of India as well as that of Section 482 of the Code of Criminal Procedure (hereinafter referred to as "Code" for the sake of brevity) and is praying for quashing and setting aside order passed by Courts below rejecting his application for handing over seized cash in LAC No.56 of 2010. Revisional Order confirming the order of the learned Metropolitan Magistrate rejecting the application moved under Section 451 of the Code is also impugned in this petition. As, with passage of time, criminal proceedings initiated were ultimately stopped by the learned Magistrate in exercise of power under Section 258 of the Code, consequent order of confiscating the seized cash passed while stopping the proceedings is also impugned in the instant petition.

3 As it is seen that seizure of cash came to be reported by police to the Income-tax Department by letter dated 31/12/2010, and as Warrant of Authorization came to be issued, the application for intervention moved by the Income-tax Department is allowed.

4 Facts, in nutshell, leading to institution of petition are thus :

(a) On 28/12/2010 police personnel from Oshiwara Police Station, Mumbai intercepted a car and searched it. Cash amounting Rs.80,00,000/- was found in bogs kept in that car. Respondent No.2 Ashok Kothari and respondent No.3 Rohit Kothari were inmates of that car. They were arrested by the police as per provisions of Section 41(1)(d) of the Code and LAC No.56 of 2010 came to be registered for the offence punishable under Section 124 of the Maharashtra Police Act. Routine investigation followed.

(b) On conclusion of investigation, the charge-sheet came to be filed against respondent Nos.2 and 3 herein somewhere in October 2011. Accordingly, Criminal Case bearing No.3116/PS/2011 came to be registered and was pending on the file of the learned Metropolitan Magistrate, 65th Court, Andheri, Mumbai.

(c) It is seen from the record that during pendency of the criminal case instituted on the basis of report filed by police, by resorting to the provisions of Section 451 of the Code initially, an application for handing over the seized cash came to be filed by the petitioner in the year 2011. That application came to be rejected on 06/04/2011

(Exhibit 'D'). Subsequently, similar application is seen to have been filed in the year 2013 by the present petitioner with a prayer to hand over seized cash to him. After hearing the parties, by an impugned order dated 5th July 2013, the said application came to be rejected by the learned Metropolitan Magistrate, 65th Court, Andheri, Mumbai. The learned Metropolitan Magistrate while rejecting this application under Section 451 of the Code has observed that income-tax return of both companies of the petitioner does not show taxable income, annual turnover of the Companies are not over Rs.70 Laksh and net wealth is not more than Rs.2 Lakhs. The learned trial Court also considered wealth-tax return of the petitioner. The learned trial Court relied on Warrant of Authorization issued by the officer of the Income-tax Department under Section 132A of the Income Tax Act, 1961, authorizing its subordinate to take over seized assets. However, the question whether the seized cash belongs to the petitioner and his family members was not gone into nor say of accused in that criminal case was called for by the learned Magistrate.

(d) Feeling aggrieved by the Order dated 5th July 2013, the petitioner invoked revisional jurisdiction of the learned Session Judge, Greater Bombay, Mumbai, by filing Revision Petition bearing No.832 of 2014 which ultimately came to be rejected by an order dated 4th April 2014 which is also impugned in the instant petition. The learned revisional Court concluded that the learned trial Magistrate has exercised is discretion in sound manner warranting no interference. That is how the present petition came to be filed.

(e) At the time of hearing of the instant petition, under Orders of this court a copy of charge-sheet came to be tendered by the learned Additional Public Prosecutor along with Order dated 9th November 2016 passed by the learned Metropolitan Magistrate, 65th Court, Andheri, Mumbai. By this Order, by resorting to the provisions of Section 258 of the Code, as Criminal Case No.3116/PS/2011 was a summons case, the learned Metropolitan Magistrate had ordered for stopping proceedings thereof without pronouncing Judgment and released respondent Nos.2 and 3, who were accused, by disposing of the said criminal case. In the very same Order dated 09/11/2016, it appears that a hand written sentence came to be added subsequently. It reads thus :

> "unclaimed cash amount forfeited to State after appeal period is over."

As this event took place after filing of the petition, the petitioner has incorporated challenge to this Order by effecting necessary amendment.

(f) During pendency of the petition, respondent Nos.2 and 3/original accused placed on record their affidavits stating that both of them have no claim whatsoever over seized cash amounting to Rs.80,00,000/-. Similarly, today the learned Advocate for the petitioner has placed on record affidavits of his daughter Roshni Kapila and his wife Binafer Kapila stating that both of them have no objection, if seized cash is handed over to the petitioner. Those affidavits are also taken on record.

5 Heard the learned Senior Counsel appearing for the petitioner. He vehemently argued that in fact two applications were moved by the petitioner before the learned Metropolitan Magistrate for claiming the seized cash by resorting to the provisions of Section 451 of the Code and as such, the learned trial Magistrate was very much aware about the claim of the petitioner over the seized cash. He drew my attention to the statement of the petitioner recorded under Section 161 of the Code finding its place in the charge-sheet, wherein the petitioner has laid his claim over the seized cash. With this, the learned Senior Counsel argued that the petitioner is rightfully entitled for the seized cash and, therefore, the learned trial Magistrate had erred in passing the impugned Order on 05/07/2013 rejecting his application for return of property and the consequent Order dated 09/11/2016 directing forfeiture of the seized property also suffers from non-

application of mind. According to the learned Senior Counsel, both these Orders along with revisional Order needs to be set aside by exercising powers of this Court under Section 482 of the Code instead of relegating the petitioner to the revisional Court in terms of Section 452 of the Code.

6 The learned Senior Counsel further argued that what is impugned in the present petition is action of police and the petition is directed against the action of the Income-tax Department. He drew my attention to the letter dated 31/12/2010 issued by the Senior Police Inspector of Oshiwara Police Station to the Deputy Director of Income-tax and contended that the affidavit of Rahul Singhania in support of application for intervention is *per se* incorrect in the light of the Order passed by the learned Commissioner of Income-tax (Appeals) annexed to that affidavit. The seized cash is duly account asset belonging to the petitioner and his family members.

7 I have also heard the learned Additional Public Prosecutor for the Respondent/State. She drew my attention to the Order passed by the learned Metropolitan Magistrate and submitted that the cash seized cannot be an accounted cash. She drew my attention to the observations of the learned Metropolitan Magistrate regarding financial position as well as position of wealth-tax return reflected in that Order.

8 The learned Advocate appearing for intervenor/ Income-tax Department submitted that in respect of the seized cash, the income-tax has taken up the proceedings. The assessment is reopened and the action is being taken. The learned Advocate for the Income-tax Department drew my attention to the Warrant of Authorization issued under Section 132A of the Income-tax Act, 1961 and has also drawn my attention to the provisions of said Section as well as Section 132 of the Income-tax Act, 1961. It is submitted that as Warrant of Authorization is issued, seized assets should go to the Income-tax Department.

9 I have carefully considered the submissions so advanced and also perused the documents placed on record including impugned Orders passed by the Courts below.

10 Now let is examine whether the petitioner is entitled for seized cash.

11 During the course of investigation, police had recorded statement of the petitioner on 07/01/2011 under Section 161 of the Code. In that statement, the petitioner has averred that he had to finalize a deal with one Hasmukh Sawla in respect of purchase of a plot of land and, therefore, he collected an amount of Rs.80,00,000/- and proceeded to meet said Hasmukh Sawla along with his friend Surendra Barmecha. The petitioner further

averred that on the way they came to know that Hasmukh Sawla has left for some marriage ceremony and now the deal may be finalized subsequently. Hence, the petitioner changed his plan and decided to proceed towards Thane. Therefore, for safe custody, the amount of Rs.80,00,000/- came to be entrusted to respondent No.2 Ashok Kothari. The petitioner in his statement under Section 161 of the Code has clarified that amount of Rs.22.50 Lakhs from the seized cash belongs to his Company M/s.Kady Mercantile Pvt. Ltd., amount of Rs.60,000/- belong to M/s.Kenley Mercantile Pvt. Ltd., Rs.62.50 Lakhs belongs to his daughter Kum.Roshni Kapila, Rs.4.90 Lakhs belongs to himself whereas Rs.3.50 Lakhs belongs to his wife Mrs.Binafer Kapila. Along with the instant petition, the petitioner has placed on record Certificate of Singhvi & Sancheti, Chartered Accountants at Exhibit 'A' reflecting the same position. Chartered Accountants have clarified in their Certificate dated 28/12/2010 that as per books of account, statements of accounts and as per available information, it is confirmed that Kapila Group of Companies was having the said cash in hand as of 24/12/2010. The seized cash certified by the Chartered Accountants as 'cash in hand' vide Certificate (Exhibit A) is perfectly in tune with statement of the petitioner recorded under Section 161 of the Code during the course of investigation. As such, *prima facie,* it cannot be termed as 'an unaccounted asset'.

12 It is seen that on 21/02/2011, the petitioner has sent a communication to the Deputy Director of the Income-tax Department requesting him to furnish 'No Objection Certificate' for obtaining cash seized by police. This letter dated 21/02/2011 (Exhibit B) reflects that Certificate of the Chartered Accountants as well as copies of relevant books of account were enclosed and forwarded to the Income-tax Department. This indicates that the seized amount, without inquiry by the appropriate authority, cannot be termed as 'unaccounted asset'.

13 Perusal of reply affidavit of the Parmeshwar Ganame Police Inspector shows that during investigation, it was transpired to the Investigator that accused persons/respondent Nos.2 and 3 were carrying the cash on behalf of the present petitioner, who is Managing Director of M/s.Kady Mercantile Pvt. Ltd and M/s.Kenley Mercantile Pvt. Ltd. This averment is found in paragraph 5 of the affidavit of Parmeshwar Ganame on behalf of the State filed on 06/10/2016. This makes it clear that even it is the case of the respondent/State that the petitioner is the rightful owner of the seized cash. The reply of the State makes it clear that the seized cash cannot be a stolen property or property obtained fraudulently.

14 Once it is the stand of the State that seized cash belongs to the petitioner, then the petitioner becomes the rightful

claimant for the cash seized from accused persons i.e. respondent Nos.2 and 3. They are also not having any objection for releasing the seized cash in favour of the petitioner. Criminal proceedings initiated against them has ultimately been stopped by the learned Magistrate, as it is not the case of the State that they are contemplating any further action in the matter.

15 With passage of time, the criminal case lodged as a result of seizure of cash is also disposed of by an Order dated 09/11/2016 by the learned Metropolitan Magistrate. Proceedings of that criminal case are stopped under Section 258 of the Code. The learned Metropolitan Magistrate had observed in the said Order passed below Exhibit 1 in Criminal Case No.3116/PS/2011 that the cash seized is unclaimed and, therefore, forfeited to the State. This is obviously done without keeping in mind that the petitioner had claimed it as owner in his statement under Section 161 of the Code annexed to the charge-sheet and by two applications moved during pendency of the trial of that case, the petitioner had claimed that seized cash. Therefore, the Order directing forfeiture of the seized cash is totally perverse and illegal. The petitioner right from beginning was claiming that cash, which even according to the case of the State belongs to him. As the trial could not be held, there is no question of arriving at the finding that the cash seized is a stolen property or it was the property which was fraudulently obtained by the petitioner. Even

otherwise, it was for respondent Nos.2 and 3 to account for that cash, if ultimately the trial of the offence was held. Thus, as on date, there is no finding of the competent Court to the effect that seized property is either stolen property or property fraudulently obtained. As such, it cannot be forfeited to the State and the Order impugned to that effect is totally illegal.

16 It is seen from the record that with passage of time, after intimation of seizure of cash from respondent Nos.2 and 3 to the Income-tax Department, the said Department has reopened the assessment. Even the petitioner along with his affidavit filed in October 2016 has annexed Assessment Orders passed by the Income-tax Department for the assessment year 2012, as well as the appellate Order of the Commissioner of Income-tax (Appeals) dated 13/08/2015. In Ground No.4 of the appellate order, it is found that seized cash amounting to Rs.80,00,000/- is being dealt with by the appellate authority. This is the stand which is also taken in the case in hand by the learned Advocate appearing for the Income-tax Department. As against this, the Certificate issued by the Chartered Accountants and annexed at Exhibit A to the petition shows that it is an accounted cash belonging to petitioner's two Companies and the petitioner as well as his nearest relatives. Section 132A of the Income-tax Act, 1961 and particularly, Sub-Clause (c) thereof deals with any assets which have not been disclosed for the purpose of the Income-tax Act, 1961. With passage of time, it cannot be said that these assets viz.

cash amount of Rs.80,00,000/- is not disclosed to the Income-Tax Authority. In fact, it is now being dealt with by the Income-Tax Department as per the provisions of law. The learned Senior Counsel appearing for the petitioner made a statement that the petitioner will have to abide by the ultimate result of proceedings initiated by the Income-Tax Authority. Therefore, it cannot be said that merely because of Warrant of Authorization was issued long back, the Income-tax Department is entitled to the seized cash. There is serious dispute regarding the fact as to whether the seized cash was accounted for or unaccounted and now the proceedings in respect of that amount are being taken up by the concerned authority.

17 Powers of this Court under Section 482 of the Code are required to be exercised for securing ends of justice and for preventing abuse of process of law. In the case in hand, cash of Rs.80,00,000/- came to be seized by Oshiwara Police Station long back on 28/12/2010. Since then the petitioner is claiming that amount by moving applications. Even the State is not disputing that the petitioner is owner of that cash as the same belongs to his two Companies, his wife, his daughter as well as he himself. The criminal proceedings initiated against accused persons are ultimately stopped under Orders of the competent Court. The Order directing confiscation of the seized property is totally perverse and illegal. In this view of the matter, the petitioner cannot be denied the relief as sought. Therefore, the Order :

(i) The petition is allowed.

(ii) Impugned Orders passed by the learned Metropolitan Magistrate as well as the learned Additional Sessions Judge rejecting the application for return of property and the Order of the learned Metropolitan Magistrate dated 09/11/2016, so far as it relates to forfeiture of seized cash to the State, are quashed and set aside.

(iii) Respondent No.1 State is directed to forthwith return the seized cash along with accrued interest, if any, to the petitioner under required acknowledgment.

(iv) Needless to mention that the proceedings initiated before the concerned authority of the Income-tax Department are not interfered with by this Court.

(v) Rule is made absolute in above terms and the petition is disposed of accordingly.

18 In view of disposal of the petition, pending Criminal Applications stand disposed of.

(A.M.BADAR J.)