

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL REVISION APPLICATION NO.18 OF 2016**

Shri Satish Ramakant Naik,
S/o. late Mr. Ramakant Naik,
aged about 65 years, retired,
Central Govt. Employee, Indian,
National and r/o. H.No.C7 - 2nd floor,
Near Anil Garage, Porvorim,
Bardez – Goa.

.... Petitioner

V/s

1. State of Goa,
Through Public Prosecutor,
Panaji-Goa.
2. Mr. Kalidas R. Raikar,
major of age,
having its shop at shop no.G9,
Ground Floor, Alfran Plaza,
Near Municipal Market,
Panaji-Goa.

.... Respondents

Shri Santosh H. Bharne, Advocate for the Petitioner.

Shri S.R. Rivankar, Public Prosecutor for the Respondent No.1.

Shri Ganesh Naik, Advocate for Respondent No.2.

CORAM : PRITHVIRAJ K. CHAVAN, J.

Reserved on : 30th September, 2019

Pronounced on : 27th November, 2019

JUDGMENT :

Revisional powers of this Court have been invoked by the

petitioner challenging an order dated 17/12/2014 passed by the JMFC, Mapusa in Criminal Misc. Application No.254/Release/2014/A and an order dated 10/03/2016 by the Additional Sessions Judge, Mapusa in Criminal Appeal No.12/2015.

2. Briefly stated, the facts are as follows:

On 13/04/2005, the petitioner filed a report with Porvorim Police Station against unknown persons on account of theft of golden ornaments, cash and his service pistol from his residence. On the basis of the said report, crime bearing no.34/2005 came to be registered under Sections 454 and 380 IPC. After investigation, a charge sheet was filed against the accused persons.

3. Meanwhile, a letter was received by the petitioner from the Investigating Officer informing him that part of the gold in a melted condition has been recovered from the accused person and was lying with the police station. It was informed that if the petitioner desires to get the said gold he may apply to the Court.

4. On 16/10/2007, the petitioner moved an application under

Section 457 of Cr.P.C. before the learned Magistrate. The learned Magistrate after considering the say of the police directed the respondent no.1 to release and hand over the said gold to the petitioner on executing an indemnity bond in the sum of ₹50,000/-. Thus, the petitioner, after executing the bond received the said melted gold which is in his possession.

5. The respondent no.2 is the goldsmith. After recording the evidence of the prosecution witnesses including that of the petitioner, by a judgment and order dated 28/05/2014, the accused came to be acquitted in Criminal Case No.47/S/2009/A.

6. After the acquittal of the accused, the respondent no.2 filed an application on 01/07/2014 under Section 452 of Cr.P.C. claiming custody of the melted gold. The learned Magistrate by the impugned order dated 17/12/2014 was pleased to direct the petitioner to deposit the muddemal i.e. melted gold in the Court and upon depositing the same directed the same to be delivered to the respondent no.2 on his executing an indemnity bond in the sum of ₹3,00,000/-. The learned Magistrate had also imposed a condition that the bond will remain in

force for a period of three months.

7. An appeal preferred by the petitioner challenging the said order also came to be dismissed by the Additional Sessions Judge by the second impugned order dated 10/03/2016 and, therefore, the petitioner has approached this Court questioning the legality, propriety and correctness of the impugned orders.

8. I heard Shri Bharne, learned Counsel for the petitioner, Shri Ganesh Naik, learned Counsel for the respondent no.2 and Shri S.R. Rivankar, Public Prosecutor for the respondent no.1.

9. Shri Bharne, drew my attention to the impugned orders, especially to the evidence of respondent no.2, who is the goldsmith, wherein he had categorically admitted that in the month of April, 2005 accused no.2 had been to his shop with gold ornaments comprising of four golden bangles and some raw material which he had purchased for a consideration of Rs.45,000/-. The total gold weighed 90 gms only.

10. Shri Bharne took me through Section 452 of Cr.P.C. which provides for disposal of property at the conclusion of a trial. He placed reliance on several judgments. He emphasised on the latest decision of the Hon'ble Supreme Court in case of ***Bharat Sanchar Nigam Limited V/s. Suryanarayanan & Anr. (Criminal Appeal No.170 of 2009)***.

11. Learned Counsel took me through the evidence of other witnesses including the say of the learned Additional Public Prosecutor, which was given in the Trial Court, wherein it has been clearly stated that during investigation one suspect Anthony Kenavadekar, who was placed under arrest, admitted stealing property and which was ultimately sold to the respondent no.2 at Panaji. The said article was recovered at the instance of the accused. There was one more accused namely, Brian Fernandes, who admitted that the stolen gold was disposed of by selling it to the respondent no.2. The respondent no.2, admittedly, purchased the said gold jewelery from the accused comprising four bangles and raw gold in the shape of biscuits from Anthony Kenavadekar and Brian Fernandes.

12. As already stated, the learned JMFC by an order dated 18/10/2007 directed release of the gold in favour of the petitioner. It is contended by Shri Bharne that when the gold in question was directed to be released in favour of the petitioner, the respondent no.2 did not claim the said property. However, after the acquittal of the accused on 28/05/2014, respondent no.2 moved an application under Section 452 of the Cr.P.C. claiming to be the owner of the melted gold and claimed its possession.

13. Thus, it is contended that both the learned Magistrate and the Additional Sessions Judge have committed grave error in law in directing release of the melted gold in favour of the respondent no.2.

14. On the other hand, Shri Ganesh Naik, supported the impugned orders by contending that the petitioner had failed to tender any documentary evidence in support of his claim over the valuable muddemal. He argued that since both the accused have been acquitted and as the complainant had failed to identify the gold, he is not entitled to claim it. Shri Naik, contends that the decision of the Hon'ble Supreme Court in case of *Bharat Sanchar Nigam Limited*

(supra) is not applicable to the case at hand.

15. Shri Naik has relied upon the judgment of Hon'ble Supreme Court in case of ***Pushkar Singh V/s. State of Madhya Bharat*** reported in ***AIR 1953 SC 508***. The Supreme Court in case of ***Bharat Sanchar Nigam Limited*** (supra) while referring to the decision in case of ***Pushkar Singh*** (supra) observed thus :

*“The decision in **Pushkar Singh** (supra) involved prosecution for offences under Sections 449 and 372 of the Gwalior Penal Code. The Magistrate held that no case was established against the accused and the money which was recovered from his house belonged to him. There was a specific finding that the money did not belong to the complainant. The Sessions Judge dismissed the revision by the complainant. The High Court was moved for the return of the amount to the complainant and not to the accused, which application was allowed. This Court held that in view of the clear finding of fact by the Magistrate to the effect that no offence was committed in respect of the sum of money and that it did not belong to the complainant, followed by the acquittal of the accused, the amount recovered had to be delivered to the accused. Hence, the view of this Court was that following the acquittal of the accused and since there was a specific finding that the money belonged to him, an order for return of the money to the complainant could not be countenanced.”*

16. In the said case, it was held by the Supreme Court that in view of the clear finding of fact by the Magistrate to the effect that no offence was committed in respect of the sum of the money and that it

did not belong to the applicant followed by the acquittal of the accused, the amount recovered had to be delivered to the accused. Thus, it was held that following the acquittal of the accused and since there was a specific finding that the money belonged to him, an order for return of money to the complainant could not be countenanced.

17. The facts of the case are different than what has been laid down by the Supreme Court in *Pushkar Singh's* case (supra). The authority can be distinguished accordingly.

18. Shri Naik, then placed reliance on another judgment of the Supreme Court in case of *N. Madhavan V/s. State of Kerala* reported in *(1979) 4 SCC 1*, which has also been considered by the Supreme Court in case of *Bharat Sanchar Nigam Limited* (supra).

19. In *N. Madhavan* (supra), the appellant was charged under Section 302 of IPC for shooting dead a person by his licensed gun. While the Trial Court acquitted him holding that he had killed the deceased in self defence, it at the same time directed, without assigning any reason that his gun shall be confiscated to the

Government. A revision petition was filed against this order which was dismissed by the High Court observing that the order was made “by way of sufficient safeguard against its use again”. The Supreme Court allowed the appellant's appeal by special leave and held that the words “may make such order as it thinks fit” in Section 452(1) of Cr.P.C. vest the Court with a discretion to dispose of the property in any of the three modes viz. (i) destruction, (ii) confiscation, or (iii) delivery to any person entitled to the possession thereof. The Supreme Court observed that the exercise of such discretion is inherently a judicial function. The choice of the mode or manner of disposal is not to be made arbitrarily, but judicially in accordance with sound principles founded on reason and justice, keeping in view the class and nature of the property and the material before it. It is observed that the appellant had never used or attempted to use the gun for commission of any offence. In the absence of any special circumstances, it was held that the Trial Court was not justified in passing order for confiscation, without giving any reason and opportunity of hearing to the appellant. Thus, the Supreme Court directed that the possession of the gun be restored to the appellant. This ratio also would not be of any help to the learned Counsel for the

respondent no.2.

20. While entertaining a revision, the scope is limited to the extent of considering as to whether the orders impugned are legal, proper and correct. A few facts which are no more in dispute are as under:

(i) Purchase of four golden bangles weighing 90 gms by respondent no.2 from accused no.2 Brian Fernandes in the month of April, 2005 for a consideration of ₹45,000/-.

(ii) Respondent no.2 melted the said four golden bangles which were subsequently handed over to the Porvorim Police Personnel.

(iii) Recovery of the ornaments of the petitioner, which were stolen from his house were discovered at the instance of the accused, as a part of their confessional statement from the shop of respondent no.2 Kalidas.

(iv) The accused in the case have never claimed the melted gold at any point of time.

(v) Pursuant to the disclosure made by the accused, the ornaments were recovered in the melted form from the respondent no.2, who never objected the seizure nor did he make any endeavour to seek the possession of the same during trial.

(vi) Interestingly, respondent no.2 waited till the conclusion of the trial. When the accused were acquitted of the charge on 28/05/2014, then the respondent moved an application on 01/07/2014 under Section 452 of Cr.P.C., the contents of which are in contrast with his evidence on oath before the Trial Court.

21. Section 451 of Cr.P.C. provides as follows:

Order for custody and disposal of property pending trial in certain cases.

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.*

Section 452 of Cr.P.C. provides as follows :

Order for disposal of property at conclusion of trial.

(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.

22. It will be apposite to refer the relevant portion of the judgment in case of ***Bharat Sanchar Nigam Limited*** (supra), which reads thus :

“We are unable to subscribe to the submission which has been urged on behalf of the first respondent that when it makes an order under Section 452, the court is merely required to determine the source from which the property was seized. Indeed, if this construction were to be placed, it would mean that the right of a person who claims title to the property would be subordinate to the claim of a person from whose possession the property was seized. A claim of title to the goods which have been seized is a relevant consideration while passing an order under Section 452. Where there are conflicting claims of entitlement to the property, the Magistrate may deal with them or, where it is found that the rival claims need to be resolved after an evidentiary trial, relegate the conflicting claimants to prove their rights and entitlements before a competent court.(emphasis supplied)

*Indeed this is the basis of the decision of this Court in **Madhavan** (supra). In that case, the accused was charged for an offence under Section 302 IPC for shooting a person dead with a licensed gun. He was acquitted of the charge of having committed the offence on the ground that he had exercised his right of self-*

defence. Yet the trial court had confiscated the weapon to the government. This Court set aside the judgment of the High Court which had upheld the view taken by the Sessions Court. The principle which has been laid down by this Court is as follows:-

“The words “may make such order as it thinks fit” in the section, vest the court with a discretion to dispose of the property in any of the three modes specified in the section. But the exercise of such discretion is inherently judicial function. The choice of the mode or manner of disposal is not to be made arbitrarily, but judicially in accordance with the sound principles founded on reason and justice, keeping in view the class and nature of the property and the material before it. One of such well recognised principles is that when after an inquiry or trial the accused is discharged or acquitted, the court should normally restore the property of class (a) or (b) to the person from whose custody it was taken. Departure from this salutary rule of practice is not to be lightly made, when there is no dispute or doubt – as in the instant case – that the property in question was seized from the custody of such accused and belonged to him.”

*The above observations indicate that the authority which is entrusted to the Court under Section 452 of the CrPC (equivalent to Section 517 of the Code of 1898) is judicial in nature. As a judicial power, it has to be exercised for valid reasons keeping in view the class and nature of the property and the material before the Court. Normally the Court would, following the discharge or acquittal of the accused, restore the property to the person from whose custody it was taken. A departure from this rule of practice is not lightly made when there is no dispute or doubt that the property which was seized from the custody of the accused belongs to him. These observations in the decision of this Court in **Madhavan***

(supra) clearly indicate that ordinarily the person from whom the property was seized would be entitled to an order under Section 452, when there is no dispute or doubt that the property belongs to him. It is only when the property belongs to the person from whom it was seized that such an order can be passed.

Where a claim is made before the court that the property does not belong to the person from whom it was seized, Section 452 does not mandate that its custody should be handed over to the person from whose possession it was seized, overriding the claim of genuine title which is asserted on behalf of a third party. It must be noted that in Madhavan case (supra), there was no dispute that the weapon of offence belonged to the accused from whom it had been seized.” (emphasis supplied)

23. As such, it is expedient from sub-section (1) of Section 452 that when an inquiry or trial is concluded before a criminal Court, the Court is empowered to pass appropriate orders for the disposal by destruction, confiscation or delivery to any person claiming to be entitled to the possession thereof or otherwise. Entitlement as has been observed by the Supreme Court postulates a right. The Court necessarily exercises its judicial function. The Court must have due regard to the entitlement claimed by the person who seeks the possession of the property. It would not be proper to say that while making an order under Section 452 Cr.P.C. the Court is only required to determine the source from which the property was seized. If this

meaning is to be applied, it would tantamount to put down the right of a person, who claims title to the property than to the person from whom possession of the property was seized. The principles laid down by the Supreme Court in *Bharat Sanchar Nigam Limited* (supra) are squarely applicable to the present set of facts.

24. It is a settled position of law that the statement made by the accused to the police as to the ownership of the property which was the subject matter of the proceedings against the accused although inadmissible as evidence against them at the trial for the offence with which they are charged, were admissible as evidence with regard to the ownership of a property in an inquiry held by the Criminal Procedure Code. This is the view taken by the Division Bench of the Bombay High Court in case of *Queen Empress V/s. Tribhovan Manekchand* reported in *ILR 9 Bombay 131*. The Supreme Court has reiterated the said view in case of *Mahesh Kumar V/s. State of Rajasthan* reported in *(1990) 33 SCC 541* and reiterated that though there is a bar in Section 25 of the Evidence Act, or in Section 162 of Criminal Procedure Code for being made use of as evidence against the accused, this statement could be made use of in an inquiry under

Section 517 of Cr.P.C. when determining the question of return of property. In case of *Mahesh Kumar* (supra), the same view has been confirmed in the sense that confessional part of the statement made by the accused leading to discovery within the meaning of Section 27 of the Evidence Act or 162 of Cr.P.C. can be made use of for the purpose of and the disposal of the property under Section 452 of Cr.P.C.

Para 25 is expunged as per the directions of Hon'ble Supreme Court vide order dated 02.07.2021 and this Court vide order dated 02.12.2021.

Sd/-

Private Secretary

25. ~~The Courts below, to my mind, have committed a grave error both in law and facts in evaluating the testimony of respondent no.2 who, as a matter of fact, ought to have been prosecuted under Section 411 of the IPC, for, it is quite apparent from his evidence as well as the other attending circumstances that he had knowingly, or, I may say dishonestly, received stolen bangles of which he had every reason to believe that they were not the genuine ornaments of the accused no.2. The Courts below instead directed the melted gold to be delivered to him merely because it was seized from his possession and the petitioner could not place any documentary evidence entitling him to claim the gold. These observations are fortified from the evidence of the respondent no.2 in the Trial Court which speaks for itself.~~

26. The *ipsissima verba* of the respondent no.2 are that in the month of April, 2005, accused no.2 came to his shop with gold ornaments in order to sell the same and informed the witness that the gold ornaments belonged to his mother. Accused no.2 sold four golden bangles and some raw material which was purchased by respondent no.2. It weighed 90 gms. Respondent no.2 paid ₹45,000/- towards purchase of the gold ornaments. After few days, the police had been to the shop of the respondent no.2. On being asked, the respondent no.2 informed the police that he had purchased gold ornaments from accused no.2 Brian Fernandes. Respondent no.2 was declared hostile.

27. Very vital admissions were given by respondent no.2 in the course of his cross-examination. He testified that in the month of April, 2005, when accused no.2 had been to his shop, he might have been accompanied by one more person. He admits that he had melted the golden ornaments which were sold to him by accused no.2 and the said melted gold was handed over to Porvorim Police Station Personnel. He admits that he was informed by the police that the said gold ornaments were stolen. His further cross-examination reveals that he had no receipt to show that he purchased the gold ornaments

from respondent no.2. He had no documents of any kind to show what type of golden ornaments were sold by the accused. He did not possess any documents to show that he had paid ₹45,000/- to the accused towards purchase of golden ornaments.

28. He further admits that whenever he purchased gold from any customer, it is melted within one month from the date of his purchase. He even could not tell the weight of the golden bangles and the raw material which he had purchased from the accused. He even did not possess any document to show the weight of the melted gold qua the four bangles and the raw material. The cross-examination further indicates that he had only two items of melted gold one weighing 90 gms and the other 50 gms.

29. Last but not the least, a very vital admission in cross is that he has denied the suggestion that the muddemal no.1, that is, the melted gold is not prepared from the stolen ornaments. This vital piece of evidence clearly indicates that despite having knowledge of the fact that golden bangles sold by the accused did not have any authentic title and there was every reason to believe that the respondent no.2

being a goldsmith must be aware that it was not coming from an authentic source ought not to have purchased the same. By doing so, he would be incurring the risk of being prosecuted under Section 411 of IPC. His evidence speaks volume.

30. Had it been his gold, he would not have waited till the acquittal of the accused and then applied for the same under Section 452 of the Cr.P.C.

31. His evidence further reveals that he does not maintain any record in respect of payment made to the customer towards purchase of gold which is quite strange. He further admits that he does not maintain any record in respect of the weight of the gold purchased from the customer. Be that as it may. Since the aforesaid part of the evidence was relevant while deciding the present revision, I deem it essential to refer the same.

32. In view of the forgoing discussion, the impugned orders warrant interference in revision. As such, the impugned orders dated 17/12/2014 passed by the learned JMFC, Mapusa and 10/03/2016

passed by the learned Additional Sessions Judge, Mapusa are quashed and set aside. Rule is made absolute. Revision stands disposed of in the aforesaid terms.

PRITHVIRAJ K. CHAVAN, J.

NH