

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.2801 OF 2019

Jitendra Kantilal Jain ... **Petitioner**
Versus
The State of Maharashtra ... **Respondent**

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Mr.Niranjan Mundargi with Mr.Shantibhushan Nirmal with
Ms.Nilofer Sayed & Shama Khan i/b Ms.Shweta R. Rathod and
Mr.Prashant Mairale, Advocate the Petitioner.

Mr.A.A.Palkar, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 15th OCTOBER 2019.

ORAL JUDGMENT :

1 The learned Counsel for the petitioner seeks
permission to delete respondent Nos.2 to 5 from array of
respondents. Leave, as prayed, is granted. Amendment be
effected forthwith.

2 Heard.

3 Rule. Rule returnable forthwith. Heard finally by
consent of parties.

4 By this petition, the petitioner is challenging the Order dated 4th August 2018 passed by the learned Additional Chief Metropolitan Magistrate, 22nd Court, Andheri, Mumbai thereby rejecting the application filed by the petitioner under Section 451 of the Code of Criminal Procedure for *supurnama* of gold seized from him during the course of investigation by the prosecuting agency i.e. MIDC Police Station, Mumbai.

5 Heard the learned Counsel appearing for the petitioner. He argued that on the basis of alleged confessional statement of accused Pramod Pande, who happens to be an employee of the First Informant, recovery is shown to have been made from the petitioner. The learned Counsel for the petitioner drew my attention to the confessional statement allegedly made by accused Pramod Pande and argued that the gold which was seized from the petitioner, who happens to be a Jeweller by occupation was purchased by him from the Bank of Nova Scotia under various invoices and perusal of the recovery panchanama itself shows that certificate number of gold purchased by the petitioner is reflecting thereon. Hence, according to the learned Counsel for the petitioner, in view of the law laid down by the Honourable Apex Court in the matter of ***Sunderbhai Ambalal Desai versus State of Gujarat***¹, the learned Magistrate ought to have given the seized gold in custody of the petitioner from whom it was seized. The impugned Order, according to the learned Counsel for the

1 (2002) 10 Supreme Court Cases 283.

petitioner, is bereft of legal reasoning and it is passed in a mechanical manner.

6 The learned Additional Public Prosecutor opposed the application by contending that the gold seized deserves to be kept in the custody of police during pendency of the trial.

7 I have considered the submissions so advanced and also perused the charge-sheet.

8 The FIR came to be lodged on 06/05/2015 by Hafiz Virani, Director of M/s.Pure Gold Jewellers and Diamonds (I) Pvt. Ltd. (hereinafter referred to as “M/s.Pure Gold” for the sake of brevity). According to the prosecution case, as reflected from the FIR as well as the charge-sheet, M/s.Pure Gold used to manufacture gold and diamond ornaments and it used to sell those ornaments from its own shops at Mumbai, Pune, Baroda, Ahmedabad, Delhi etc. The prosecution alleged that employees of that Company viz. Amar Nanavati - Chief Executive Officer and Executive Director as well as Kunal Shah - Stock Accountant , Vijay Pardeshi – Custodian Dispatch and Pramod Pande – Commercial Manager indulged in conspiracy and misappropriated gold and diamond by selling those precious articles in open market. This, according to the prosecution case, took place for a period from April 2012 to April 2015. The misappropriation came to be

detected when audit of the M/s.Pure Gold was conducted by Authorized Auditor – Firoz Merchant. The prosecution alleged that the employees of M/s.Pure Gold namely Amar Nanavati, Kunal Shah, Vijay Pardeshi and Pramod Pande had sold 12 kg. Gold and 1829 carat diamonds owned by the Company in open market privately.

9 So far as the petitioner is concerned, according to the prosecution case, on the basis of confessional statement of accused Pramod Pande – Commercial Manager of M/s.Pure Gold, gold weighing 6 kg. owned by M/s.Pure Gold was sold to the petitioner. On 08/05/2015, confessional statement of accused Pramod Pande – Commercial Manager of M/s.Pure Gold came to be recorded whereby he showed his willingness to show shop of Jugraj Jewellers. On the basis of this confessional statement, co-accused Pramod Pande had led the police team to Jugraj Kantilal and Company. The petitioner is reported to be partner of this Company. From the office of this Company gold weighing 5.5 kg. came to be seized. The recovery panchanama was then prepared. Recovery panchanama shows that gold was recovered in the form of some bricks of 1 kg. each and some biscuits of 100 gm. each containing the certificate number and name of the Manufacturer. Perusal of the recovery panchanama shows that seized gold is shown to be manufactured by Company named 'SUISEE'. The serial number of the certificate under which it was sold is also mentioned in the recovery panchanama. Undisputedly, the gold

came to be seized from Jugraj Kantilal & Co. of which the petitioner is one of the partner. The same is reported to be seized through the petitioner as reflected from the charge-sheet.

10 The petitioner has drawn my attention to various purchase invoices under which seized gold was purchased by him from the Bank of Nova Scotia. The petitioner has also produced the certificates showing the serial numbers. Serial numbers from the certificates at Exhibit 'P' with paper-book are tallying with the serial numbers mentioned on seized bricks and biscuits of the gold reflected in the recovery panchanama. The said certificate numbers are also reflected in the purchase invoices which are in the name of Jugraj Kantilal and Co. of which the petitioner is partner.

11 It is thus *prima facie* seen that the seized gold was purchased by the petitioner under purchase invoices issued by the Bank of Nova Scotia and the petitioner is holding the certificates of which the numbers are embossed on the bricks and biscuits of the gold seized by the prosecution.

12 At this juncture, it is apposite to quote paragraph Nos. 7 to 11 from the Judgment of the Honourable Supreme Court in the matter of ***Sunderbhai Ambalal Desai (supra)***. Those read thus :

“7. In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:-

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation;

2. Court or the police would not be required to keep the article in safe custody;

3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and

4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

8. The question of proper custody of the seized article is raised in number of matters. In *Basawa Kom Dyanmangouda Patil v. State of Mysore* [1977] 4 SCC 358, this Court dealt with a case where the seized articles were not available for being returned to the complainant. In that case, the recovered ornaments were kept in a trunk in the police station and later it was found missing, the question was with regard to payment of those articles. In that context, the Court observed as under- (SCC p.361, para 4)

"4. The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police, it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the Court or should be in its custody. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and

has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance." (emphasis supplied)

9. The Court further observed that where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property.

10. To avoid such a situation, in our view, powers under Section 451 Cr.P.C. should be exercised promptly and at the earliest.

Valuable Articles and Currency Notes

11. With regard to valuable articles, such as golden or silver ornaments or articles studded with precious stones, it is submitted that it is of no use to keep such articles in police custody for years till the trial is over. In our view, this submission requires to be accepted. In such cases, the Magistrate should pass appropriate orders as contemplated under Section 451 Cr.P.C. at the earliest."

13 Thus, as precious matter i.e. gold weighing 5.5. kg. was seized from the petitioner and *prima facie* it is seen that the

said gold was purchased by him under purchase invoices as well as certificates, the petitioner is entitled for custody of the same during pendency of the trial. It will not be proper to keep such a precious matter at MIDC Police Station, Mumbai till disposal of the trial. The learned trial Court has missed these aspects and rejected the application for custody of seized gold moved by the petitioner without any justifiable reason. Therefore, the petition deserves to be allowed and, as such, the Order :

ORDER

- (i) Rule is made absolute in terms of prayer clause (a) and (b).
- (ii) The Petitioner to execute Indemnity Bond for Rs.1,51,25,000/- for getting possession of the seized gold.
- (iii) The Petitioner should produce the seized gold or gold in same quantity as and when directed by the learned trial Court and he should abide by the final Order passed by the learned trial Court with regard to the disposal of the muddemal property.
- (iv) The Investigating Officer should take photographs of the seized gold prior to handing over the possession thereof to the petitioner and the same be produced before the learned trial Court.

- (v) The detail panchanama be prepared while handing over possession of the gold to the petitioner in terms of this Order.
- (vi) Parties to act on authenticated copy of this Order.
- (vii) The Petition is disposed of accordingly.

(A.M.BADAR, J.)