

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.01.2019

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THE HONOURABLE MR.JUSTICE V.PARTHIBAN

Crl.R.C.Nos.56 & 57 of 2019

Mr.Amit Jain

.. Petitioner in
both the Cases

Vs

State rep. by
the Inspector of Police,
Sulur Police Station,
Coimbatore District.

... Respondent in
both the Cases

PRAYER : Criminal Revision Cases are filed under Section 397
r/w 401 of Cr.P.C. seeking to set aside the order dated
4.1.2019 in C.M.P.Nos.4267 and 4268 of 2018 passed by the
learned Judicial Magistrate, Sulur, Coimbatore.

For petitioners : Mr.V.Vijay Shankar

For Respondent : Mr.G.Harihara Arun Somasankar
G.A.(Crl.Side)

COMMON ORDER

These Criminal Revision Cases arise out of the common order passed by the learned Judicial Magistrate, Sulur, Coimbatore in CMP Nos.4267 and 4268 of 2018, dated 4.1.2019, in and by which, the relief sought for by the petitioner to return the petitions scheduled properties, came to be rejected.

2. Before the above said order dated 4.1.2019, similar Crl.Miscellaneous Petitions were filed before the Court below by the revision petitioner herein and the learned Judicial Magistrate dismissed the petitions for return of the properties on 22.10.2018 on the ground that there was strong objection from the prosecution and the investigation was also pending. Against the said order, Criminal Revision Cases were filed in Crl.R.C.Nos.1302 and 1303 of 2018 before this Court. This Court by separate orders, dated 5.12.2018, rejected the Revision Cases on the ground that there was no infirmity in the orders passed by the learned Judicial Magistrate.

3. The learned counsel appearing for the petitioner would submit that he has got valid licence to run the business of Pan masala products since 2011 and therefore, in the event of rejecting the petitions for return of properties, the petitioner would suffer exemplary loss and much hardship, which cannot be compensated. The learned counsel would also submit that the Hon'ble Supreme Court has repeatedly held that the trial Court should deal with the cases pertaining to the return of the properties expeditiously and promptly in order to avoid loss of value and decaying of perishable goods by efflux of time. The learned counsel would draw the attention of this Court to a decision reported in "2003(1) CTC 175 (SC) **(Sunderbhai Ambalai Desi versus State of Gujarat)**". He would specifically draw reference to paragraphs 7 to 11, 14 and also 19 to 21, which are extracted herein below:

"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 *Smt. Basawa Kom Dyanmangouda Patil v. State of Mysore and Anr.*, [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-

"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."

"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, Magistrate

should pass appropriate orders as contemplated under [Section 451 Cr.P.C.](#) at the earliest.

"12. & 13.

"14. In case, where such articles are not handed over either to the complainant or to the person from whom such articles are seized or to its claimant, then the Court may direct that such articles be kept in bank lockers. Similarly, if articles are required to be kept in police custody, it would be open to the SIIO after preparing proper panchnama to keep such articles in a bank locker. In any case, such articles should be produced before the Magistrate within a week of their seizure. If required, the Court may direct that such articles be handed over back to the Investigating Officer for further investigation and identification. However, in no set of circumstances, the Investigating Officer should keep such articles in custody for a longer period for the purpose of investigation and identification. For currency notes, similar procedure can be followed."

"15. to 18.

"19. For articles such as seized liquor also, prompt action should be taken in disposing it of after preparing necessary panchnama. If sample is required to be taken, sample may be kept properly after sending it to the chemical analyser, if required. But in no case, large quantity of liquor should be stored at the police station. No purpose is served by such storing.

"20. Similarly for the Narcotic drugs also, for its identification, procedure under [Section 451 Cr.P.C.](#) should be followed of recording evidence and disposal. Its identity could be on the basis of evidence recorded by the Magistrate. Samples also should be sent immediately to the Chemical Analyser so that subsequently, a contention may not be raised that the article which was seized was not the same.

"21. However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under [Section 451 Cr.P.C.](#) are properly and promptly exercised and articles are not kept for a long time at the police station, in any case, for not more than fifteen days to one month. This object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly."

4. The learned counsel would submit that the Hon'ble Supreme Court has held that the property seized need not be kept for a long time at the police station for more than 15 days to one month and in such cases, the trial Court should act promptly and at the earliest. The learned counsel would also rely on an order dated 20.11.2013 passed by a learned single

Judge of this Court in CrI.O.P.No.27812 of 2013, wherein, the learned Judge has held on the aspect which is subject matter of consideration of this Court in the present Revision Cases. The relevant portion of the order as found in paragraphs 40 to 43, is extracted as under:

"40. It is pertinent to extract hereunder, the following observations of this Court in CHOLAMANDALAM FINANCE (supra):

"3. The learned counsel for the petitioners Mr.G.R.Swaminathan would contend that it is a known fact that if the vehicles were allowed to remain in open place and even if they were kept in a protected place, the utility and value of the vehicles will go down and to keep the vehicles till the disposal of the trial will not serve any purpose.

.....

6. When the Court finds that it is no longer necessary to keep the case property under the custody, it had to return the same to the person who is competent to get it. The Court is required to make an enquiry to ascertain who is the party eligible to get interim custody of the property. Likewise, if the property is of such a nature, that it would lose its value and utility, then the Court may also order for the sale of the property and direct that the proceeds be deposited into the Court. In one of such occasions arose before this Court in 2011 (1) MLJ 191 [Sundaram Finance Ltd., v. State of Tamil Nadu] C.T. Selvam,J. has expressed his view that the return of the vehicles and permission for sale thereto should be the general norm rather than the exception as it is today and in case where return of vehicles is sought and the claim therefor is highly contested, resort

to sale of vehicle and credit of the proceeds in fixed deposits pending disposal of the case would be the common good. The learned Judge has also referred the decision of Sundarbhai Ambalal's case (supra) and also other decisions of the Supreme Court and reached a conclusion that none gain when the mere shell or the remnants of the vehicle are returned to the person entitled thereto, after completion of the trial, that it would no surprise to find that several vehicles have not been so much as claimed after completion of trial, because of the worthless state they have been reduced to and that it is but natural to expect that a person eventually entitled would rather have the sale proceeds together with interest, than nothing at all. I am in respectful agreement with the opinion rendered by the learned Judge."

"41. Thus, power is available to the criminal courts under Section 451 Cr.P.C to give permission to the owner or to the persons entitled to sell the case-property even pending enquiry or trial, if the property is subject to speedy and natural decay or in other words, in the facts and circumstances of the case, if the Court is of the view that such permission is required to be granted. But, at the same time, in property offences and in other type of offences, where property is involved, the facts and circumstances of the case may need, production of them as material objects, as physical evidence during trial. Reading Sections 451 and 452 of Cr.P.C, it is seen that converted form of such physical evidence may also be produced before the court at the time of trial. As we have seen already in SUNDERBHAI AMBALAL (supra), the Honourable Apex Court enabled production of such converted form of evidence of case

properties.

"42. The Hon'ble Apex Court in SUNDERBHAI AMBALAL (supra) permitted photographing of the material object and obtaining the signature of the complainant and also of the accused thereon and keep them in the case-records to be exhibited at the time of trial. Under this category videographing also will come.

"43. In SUNDERBHAI AMBALAL (supra), the Hon'ble Apex Court also visualized a situation where the accused may refuse to sign/endorse. Thus, at paragraph 24 of its judgment the Hon'ble the Apex Court observed that, "it is made clear that in case where the accused disputes that he is not involved in the alleged incident and no article was found from him then such endorsement be taken on the photograph." Thus, when the accused disputes that he is not involved in the offence or he is disputing the property or he has certain contentions as regards the property, the same shall be endorsed in the photograph, his signature shall be obtained. It is accused putting his signature with prejudice/objection. Thus, the interest of the prosecution, the interest of the property owner, the need of the prosecution to produce it as evidence during trial and the right of the accused will be protected."

5. After advertng to the various case laws and the

decisions and the procedure contemplated under Sections 451 & 452 Cr.P.C., the learned Judge has set aside the order of the Magistrate refusing to return the properties. The learned counsel would emphasize that the properties as indicated in the list of the properties in the petitions filed before the learned Judicial Magistrate need not be retained and the return of the same would not hamper the investigation or trial. He would reiterate that the samples of the alleged properties had already been taken and in such circumstances, the other properties as indicated in the petitions may not be required for effective conclusion of the trial. In any event, the properties that were originally belonging to the petitioner, cannot be retained for indefinite period that too only on the ground that the investigation was still pending . If such objection is to be applied in all cases, in which case, the perishable properties cannot be retrieved at all by the original owners as normally, the investigation takes its own time. Therefore, the learned counsel would implore this Court to allow the present revision cases and direct the trial Court to return the properties forthwith.

6. Per contra, the learned Government Advocate (Crl.Side) for the prosecution would submit that these Revision Cases are not maintainable since already, this Court was approached by the petitioner in earlier round of litigation and this Court had dismissed Revision Petitions on 5.12.2018. According to the learned Government Advocate, as per Section 397(3), second revision peititon is not maintainable. With the same breadth, the learned counsel would also draw reference to Section 362 Cr.P.C. which reads as under:

"362. Court not to alter judgement.

Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

7. According to the learned Government Advocate, the

Court cannot alter or review its order except to correct a

clerical or arithmetical error. The learned Government Advocate would also strongly object not to release the properties on the ground that the investigation is still pending and in the event of the properties being returned, it will certainly affect the free flow of the investigation and trial. According to the learned Government Advocate, there is no change of circumstances from earlier rejection order by the learned Magistrate and the present rejection order as on both occasions, the investigation was not yet over. Therefore, the petitioner is not entitled to the relief as prayed for. In fact, on behalf of the prosecution, a detailed counter affidavit has been filed in support of the submissions made by the prosecution.

8. This Court has placed its anxious consideration to the submissions made on behalf of both the revision petitioner as well as the respondent/prosecution.

9. Although, this Court has already dismissed the revision petitions by its order dated 5.12.2018, it appears that the revision petitioner has once again approached the trial

Court for return of the properties in view of considerable passage of time. The trial Court once again, after consideration of the objections and after taking into account the submissions made on behalf of the prosecution, dismissed the petitions substantially on the same reasons which weighed with the trial Court while passing its earlier order dismissing the petitions for return of the properties. This Court finds that though the petitions were dismissed on the ground that the investigation was not yet over, however, the trial Court did not apply its mind in regard to the issue as to whether retention of the properties as indicated in the petitions, were actually required for further investigation or trial. It appears that the trial Court has passed mechanical order guided by the objections raised by the prosecution and also by the fact that the investigation was not over.

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10. The trial Court ought to have seen that the samples had already been taken by the police as early as in April 2018 and sent for examination and once the samples were taken and sent to Laboratory, whether it was necessary

to retain the other properties which were seized at the time of inspection by the police or not. In this case, it appears that the petitioner is a legitimate licence holder of manufacturing of Pan masala products and in the course of business, he has been in possession of several other products including electric machineries and accessories. Not only those machineries and accessories were seized, but also certain files which pertain to the day to day business of the petitioner. How far those items are still required to be retained in the custody of the respondent police is a moot point.

11. In this case, as rightly contended by the learned counsel for the petitioner in the cases pertaining to return of properties, the Courts have to be pragmatic and practical in dealing with such objections. In fact, the Courts have the power to even sell the products pending finalization of the trial, which deems fit in the circumstances of the case. While that being the case, how the investigation being strengthened merely by retaining the seized properties for indefinite period of time. It is needless to mention that the properties either will

lose its core value by passage of time and some of the goods indicated will perish after some time with no return to the owner. In such case, it is incumbent upon the Magistrate to apply his mind as to whether the properties are mandatorily required for completion of investigation and trial. In this case, such application of mind is completely absent and it appears that the learned Magistrate concerned has merely rejected the petitions without due examination and scrutiny on the basis of plea set forth by the petitioner herein.

12. The objections raised on behalf of the respondents, namely, that present revision petition amounting to reviewing the earlier order passed by this Court, cannot be sustained in law for the simple reason that this Court is not called upon to alter or review its earlier decision dated 5.12.2018. Once the Magistrate has entertained the second petition and passed orders on merits, the revision petitioner has one more cause of action to approach this Court by filing a fresh revision and this Court is therefore, called upon to decide the case once again on merits in respect of the second

revision case filed under Sections 451 and 457 Cr.P.C. Therefore, the objections raised by the learned Government Advocate that the provisions under Section 392(3) and 362 Cr.P.C. are attracted, is not a valid objection. As regards 397(3) is concerned, the purport of the section is that if a person chooses to invoke revisional remedy either before the Subordinate Court or the High Court, he cannot be allowed to resort to second revision petition. In this case, the fact is that the petitioner has chosen to file a revision petition only before this Court and therefore, Section 397(3) has no application at all.

13. The decision of the Hon'ble Supreme Court (cited supra) relied on by the learned counsel can be applied on the factual matrix of the present case on the ground that the samples have already been taken and sent for test and examination, this Court does not see any useful purpose for retaining the other properties for indefinite period till the completion of investigation or trial. In any case, some of the properties which are sought to be returned are perishable and

some other properties are electronic items and files pertaining to the business activity of the petitioner, the retention of the same would undermine the interest of the petitioner for his legitimate business. In any event, the respondent can always take inventory of the items and also obtain necessary guarantee from the petitioner to the extent of valuation of the properties to be returned to him to safeguard the interest of the prosecution. Allowing the properties to perish and lose its value only due to efflux of time, is not going to be any use to the petitioner nor it shall be of any effective use for the prosecution as well. Ultimately, the property would become completely useless and waste.

14. For the above said reasons, the impugned orders, dated 4.1.2019 made in CMP No.4267 and 4268 of 2018 are hereby set aside and accordingly, the Criminal Revision Cases are allowed.

- i) The learned Judicial Magistrate, Sulur, Coimbatore is directed to take inventory of the properties and obtain signatures of the petitioner on the photographs of the properties;

- ii) The learned Judicial Magistrate is directed to obtain a declaration from the petitioner as to the approximate value of the properties sought to be returned. On such declaration being given by the petitioner, the petitioner should be directed to execute a bank guarantee to the extent of the value of the properties being returned to him;
- iii) The learned Judicial Magistrate shall record the features of the electronic and other allied items and records and other relevant materials shall be kept in tact till the completion of the trial;
- iv) The petitioner on furnishing proper bank guarantee for the properties to be returned to him, is entitled to deal with the same as he deems fit.
- v) The learned Judicial Magistrate is directed to pass orders as expeditiously as possible, but not later than two weeks from the date of receipt of copy of this order.

31.01.2019

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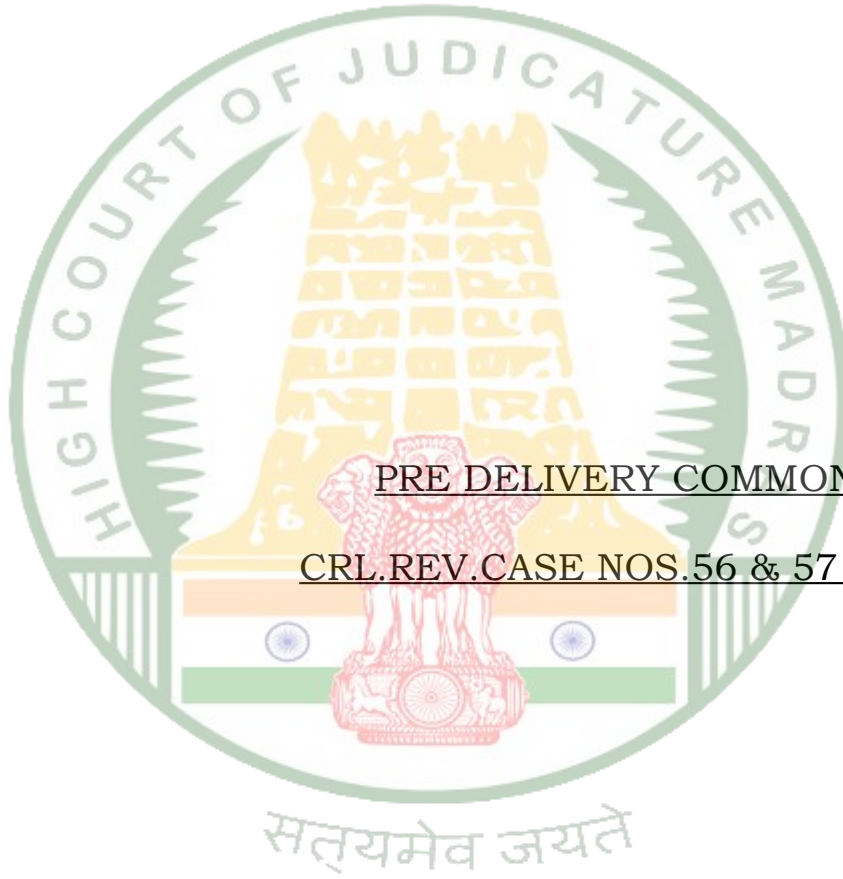
To

The Judicial Magistrate, Sulur, Coimbatore.

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V.PARTHIBAN, J.

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PRE DELIVERY COMMON ORDER
IN
CRL.REV.CASE NOS.56 & 57 OF 2019

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