

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.11.2020

PRONOUNCED ON: 11.12.2020

CORAM

THE HON'BLE MR. JUSTICE P.N.PRAKASH

W.P.No.14030 of 2020

C.Ramasubramaniam
The Liquidator for Surana
Corporation Limited
'RAJI' 3B1, 3rd Floor
Gaiety Palace, No.11L
Blackers Road, Mount Road
Chennai - 600 002

Petitioner

vs.

1. The Inspector of Police
Central Bureau of Investigation
SPE-CB ACB
3rd Floor, Shastri Bhawan
No.26, Haddows Road
Nungambakkam
Chennai - 600 006
shobacchn@cbi.gov.in

2. State Bank of India
Overseas Branch
Chennai - 600 001
Represented by
Deputy General Manager

Respondents

Writ Petition filed under Article 226 of the Constitution of India, for issuance of a writ of mandamus directing the 1st respondent to hand over the remaining 103.864 kgs. of gold to the petitioner.

For petitioner : Mr.Lokesh Kumar
for M/s.India Law LLP
For R1 : Mr.K.Srinivasan
Special Public Prosecutor
for CBI Cases
For R2 : Mr.P.Elayaraj Kumar
for M/s.Ramalingam & Associates

ORDER

This writ petition has been filed seeking a writ of mandamus directing the first respondent to hand over the remaining 103.864 kgs. of gold to the petitioner.

2. To appreciate the nub of the dispute, it is essential to state the bare minimum facts chronologically:

2.1 Based on source information, the Central Bureau of Investigation (in short "the CBI") registered an FIR in Crime No.24 of 2012 on 13.06.2012 for the offences under Section 120-B r/w 420 IPC and Section 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988 (in short "the PC Act"), against the officials of Minerals & Metals Trading Corporation of India (in short "MMTC"), Chennai and Surana Corporation Limited (in short "Surana"), on the allegation that MMTC had shown undue favour to Surana, who were importing gold and silver.

2.2 After registration of the FIR, the CBI searched the office building of Surana at New No.161 (Old No.79), NSC Bose Road, Chennai and prepared a search list showing that they had seized 400.47 kgs. of gold. The seized gold in the form of bars and ornaments were kept in the safes and vaults of Surana under the lock and seal of the CBI in the presence of mahazar witnesses.

2.3 According to the CBI, they have submitted the keys of the locker to the Principal Special Court for CBI Cases, Chennai (in short "the Special Court"). However, in their counter, they have not stated the date, on which, they have handed over the keys to the Special Court and that is why, this Court is unable to state with certainty that they have handed over the keys.

2.4 During the course of investigation in Crime No.24 of 2012, the CBI found that the gold that was seized by them did not have a bearing on that case, but, they found that the said gold was imported in violation of the Foreign Trade Policy (FTP), inasmuch as, the officials of the Export Processing Zone had given Nominated Agency Certificate (NAC) to Surana illegally, on the strength of which, the latter had imported gold and silver.

2.5 On these allegations, the CBI registered a fresh case in Crime No.39 of 2013 on 16.09.2013 for the offences under Section 120-B r/w 420 IPC and Section 13(2) r/w 13(1)(d) of the PC Act, against seven accused, including the partners of Surana.

2.6 After registering the second FIR, the CBI gave an application under Section 91(1) Cr.P.C. in CrI.M.P.No.5647 of 2013 in Crime No.39 of 2013 in the Special Court, requesting the Court to transfer the 400.47 kgs. of gold that was seized by them in Crime No.24 of 2012, to the file of Crime No.39 of 2013.

2.7 Thus, it is the case of the CBI that, though the gold was seized in Crime No.24 of 2012, it was not required for that case, but, was required to prove the case in Crime No.39 of 2013. The Special Court, allowed the request of the CBI and transferred the gold to the file of the Crime No.39 of 2013. At this juncture, it may be pertinent to state that there was no physical inventorisation by the Court, because, the gold was kept in the vaults of Surana and there was only transfer on paper from one case to the other.

2.8 In the meanwhile, the CBI completed the investigation in Crime No.24 of 2012 and filed a final report in C.C.No.37 of 2013 in the IX Additional Special Court for CBI Cases, Chennai, against the officials of MMTC and Surana.

2.9 The CBI completed the investigation in Crime No.39 of 2013 and filed a closure report, holding that the accused had not committed any offence, but, by issuing the Nominated Agency Certificate to Surana, they have only violated certain circulars, for which, departmental action was recommended against the officials. However, coming to the gold in question, the CBI, in their closure report in Crime No.39 of 2013 that was filed in the Special Court, have stated as follows:

"49. Thus, as there is no adequate evidence forthcoming in support of the allegation to o for successful prosecution against the accused persons it is therefore prayed that the Hon'ble Court may be pleased to pass:

(i) Appropriate orders pertaining to disposal of case property i.e.400.47 kgs of Bullion and Jewellery items, as aforesaid, subject to the outcome of the action taken by the Adjudicating Authority in accordance with the provisions contained in Sections 12(2)(8) & (9) of the Foreign Trade (Development and Regulation) Act, 1992 and as amended by the Foreign Trade (Development and Regulation) Amendment Act, 2010 and

(ii) Order to close the case in RC MA1 2013 A 0039, and thus render justice."

2.10 The Special Court, by order dated 26.02.2015, accepted the closure report filed by the CBI in Crime No.39 of 2013 and passed the following order:

"8. In the result,

(a) this petition is allowed.

(b) it is ordered to close the FIR filed in RC MA1 2013 A 0039 dated 19.06.2013 on the file of the petitioner/complainant.

(c) Further, an order is passed granting permission to the petitioner/complainant to produce the case properties namely 400.47 kgs. of Bullion and Jewellery items before the appropriate authority viz., Directorate General of Foreign Trade (DGFT), Department of Commerce, Government of India, New Delhi."

2.11 Thus, the gold that was seized by the CBI stood transferred on paper to the Director General of Foreign Trade (in short "the DGFT") by virtue of the order dated 26.02.2015 passed by the Special Court. Aggrieved by this, Surana filed CrI.R.C.No.254 of 2015 before this Court and contended that the gold should not have been handed over to the DGFT without hearing them.

2.12 This Court allowed CrI.R.C.No.254 of 2015 on 14.07.2015 with the following directions:

"17. In the circumstances, the order of the learned VIII Additional Judge, C.B.I. Cases, Chennai, passed in CrI.M.P.No.828 of 2015 in RCMA1 2013 A 0039 dated 26.02.2015 so far as clause 8(c), directing producing of the gold bullions weighing 400.47 kgs. To the Directorate General of Foreign Trade, New Delhi, is set aside. The trial Court will give reasonable opportunity to all the parties, permit them to file their counter, etc., if any and hear all the parties and pass orders in accordance with law at an early date. All the parties shall appear before the VIII Additional Judge, C.B.I. Cases, Chennai, on 03.08.2015."

2.13 Now, this Court should advert to the happenings in a parallel story.

2.14 Surana had borrowed monies from various banks viz., State Bank of India, Punjab National Bank, Industrial Development Bank of India (IDBI), Bank of India, Standard Chartered Bank and Central Bank of India and had defaulted in repayment. It is stated that a sum of Rs.1,160 crores was due from Surana to various banks. The State Bank of India initiated proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal (in short "the NCLT"), Chennai, against Surana in C.P.No.550/(IB)/2018. The NCLT, by order dated 05.10.2018, appointed one Mr.C.Ramasubramaniam as Interim Resolution Professional to take charge and manage the assets of Surana.

2.15 Now, let us for a moment shift to the happenings on the criminal side. Pursuant to the order dated 14.07.2015 in Crl.R.C.No.254 of 2015 passed by this Court, the Special Court issued notice to Surana in Crl.M.P.No.828 of 2015 relating to return of gold.

2.16 On coming to know that the gold belonging to Surana is available, the State Bank of India filed Crl.M.P.No.5916 of 2015 in the Special Court, asking for the gold. Surana filed Crl.M.P.No.7885 of 2015 in the Special Court, for return of the gold to them. Thus, all of them, like the famous character Colorado played by the late Omar Sharif in the Hollywood blockbuster, Mackenna's Gold, went on a gold hunting expedition to the Special Court. Like Colorado entering into an agreement with Monkey, the apache, to share the spoils of gold, the State Bank of India and Surana entered into an agreement and filed a compromise memo before the Special Court in Crl.M.P.No.5916 of 2015, requesting the Court to hand over the gold weighing 400.47 kgs. to the State Bank of India for settlement of the dues to the Banks.

2.17 The Special Court accepted the joint compromise memo and passed the order dated 12.12.2017, handing over the gold to the State Bank of India being the leader of the consortium of six banks, to whom, Surana owed money. Mr.C.Ramasubramaniam, Interim Resolution Professional, moved the NCLT to give a direction to the CBI to hand over the gold to the State Bank of India as directed by the Special Court, so that, he would be able to complete the Corporate Insolvency Resolution Process without any further delay. The CBI opposed the prayer stating that the gold vested with DGFT albeit the order passed by the Special Court.

2.18 The Ministry of Commerce and Industry, not wanting to be left out in the great bullion chase, filed Crl.R.C.No.687 of 2019 in this Court, challenging the order dated 12.12.2017 passed by the Special Court and prayed for the return of gold to them. This Court heard the State Bank of India, CBI and Surana in Crl.R.C.No.687 of 2019 and passed final orders on 16.07.2019, the operative portion of which, is as under:

"12. Taking into consideration the facts and circumstances of the case and the submissions made by the learned counsel on either side, this Court is of the opinion that NCLT is the appropriate Forum to decide the rival claims of the parties in respect of bullion. Since now that the FIR has been closed and further criminal proceedings have been terminated, this Court is also of the opinion that the order passed by the learned Principal Judge, Special Court

for CBI Cases/VIII Additional City Civil Court, Chennai, in CrI.M.P.No.5916/2015 dated 12.12.2017 has to be set aside.

13. In the result, the Criminal Revision Petition stands allowed and the order passed by the learned Principal Judge, Special Court for CBI Cases/VIII Additional City Civil Court, Chennai, in CrI.M.P.No.5916/2015 in RC MAI 2013A 0039 dated 12.12.2017 is set aside. The petitioner shall approach NCLT and NCLT shall decide the Bullion/gold afresh in accordance with law after affording opportunity to all the parties concerned. However, a direction is issued to CBI to hand over the custody of 400.47 Kgs of Bullion/gold to the State Bank of India, Overseas Branch, Chennai, the 1st respondent herein, and the 1st respondent herein viz., SBI, shall not dispose of the property, viz., 400.47 Kgs of Bullion/Gold, till the issue is decided by NCLT."

2.19 Now, the scene shifts to the NCLT. The NCLT, by order dated 27.12.2019, rejected the request of the Ministry of Commerce and Industry and directed that 400.47 kgs. of gold be handed over to the Interim Resolution Professional-cum-Liquidator in the presence of the officials of the State Bank of India, Punjab National Bank, Industrial Development Bank of India (IDBI), Bank of India, Standard Chartered Bank and Central Bank of India. The operative portion of the said order is as under:

"6. In view thereof, for the 1st respondent having already withdrawn the criminal case filed before CBI Court, the respondent shall deliver the custody of the asset to the liquidator within one week hereof and the liquidator shall take all precautions to keep the gold in the safe custody of SBI. To complete this process smoothly, the liquidator shall do paper work in compliance with law. At the time of delivery of this gold to SBI by the CBI, Bank of Baroda, Punjab National Bank, Standard Chartered Bank, Industrial Development Bank of India (IDBI) and Central Bank of India shall be present at the time of handing over this gold by CBI to SBI in the presence of Resolution Professional.

7. Accordingly, this MA/64/2019 is hereby disposed of."

2.20 As directed by the NCLT, the CBI, along with the representatives of all the banks and Surana, inventorised the gold that was kept in the vaults of Surana at New No.161 (Old No.79), NSC Bose Road, Chennai, from 27.02.2020 to 29.02.2020. To the great shock and surprise of all, the total gold that was found, weighed only 296.606 kgs. and not 400.47 kgs. as projected by the CBI in their search list. Thus, there was a shortage of 103.864 kgs. of gold, for which, the CBI was not able to properly account for. Under such circumstances, the Interim Resolution Professional-cum-Liquidator, has filed the present writ petition for a direction to the CBI to hand over 103.864 kgs. of gold.

3. Heard Mr.Lokesh, learned counsel representing M/s. India Law LLP, learned counsel on record for the petitioner/Liquidator, Mr.K.Srinivasan, learned Special Public Prosecutor for the first respondent/CBI and Mr.P.Elayarajkumar, learned counsel representing M/s. Ramalingam & Associates, learned counsel on record for the second respondent/State Bank of India.

4. The petitioner/Liquidator and the second respondent/State Bank of India are on the same page and their adversary is the first respondent/CBI. The petitioner and the State Bank of India produced unimpeachable documents to show that the CBI had seized 400.47 kgs. of gold, but, on actual verification, what was found was only 296.606 kgs. of gold and therefore, the CBI should have to return the balance of 103.864 kgs. of gold.

5. The CBI has filed a counter signed by S.Manikavel, Inspector of Police, CBI, in which, it is stated that the CBI had used the weighing machine that was available in the office of Surana and the total weight showed by the machine was 400.47 kgs. of gold and they had kept the seized gold in the safe vaults, sealed them in the presence of the independent witnesses and produced the 72 keys of the vaults and safes in the Special Court; in the presence of the officials of the banks and Surana, the vaults and safes were inspected from 27.02.2020 to 29.02.2020 and at that time, the seals that were affixed on the vaults were found to be intact; therefore, the CBI is not liable for the shortage of gold and if at all the banks need a remedy, the remedy is not a writ petition, but, elsewhere.

6. Mr.K.Srinivasan, learned Special Public Prosecutor, took this Court through the search list dated 20.06.2012 and submitted that the gold chains were weighed not individually, but collectively; but, in the inventory that was prepared on 27.02.2020 to 29.02.2020 in the presence of bank officials, each

item of gold was weighed individually with the help of sophisticated machines and that is why, there is a discrepancy in weight.

7. In short, the contention of the CBI is that they seized only actually 296.606 kgs. of gold, but, had mistakenly shown in the inventory as 400.47 kgs. of gold.

8. This Court asked Mr.K.Srinivasan, learned Special Public Prosecutor, a straight question. The panchanama (search list) that was prepared by the CBI in the presence of the independent witnesses at the time of seizure shows that the gold weighed 400.47 kgs. Had the gold been physically entrusted to the Special Court by the CBI as material objects, the Property Clerk would have proceeded on the weight of the gold mentioned in the panchanama and would have made the entry in the property register as 400.47 kgs.; subsequently, while passing orders either under Section 451 Cr.P.C. or Section 452 Cr.P.C., if it had been found that the gold weighed only 296.606 kgs., the CBI would have cried foul from the roof top and demanded the scalp of the Special Judge and his Property Clerk. The Special Judge and the Property Clerk would have been placed under suspension and would have even been arrested by the police for theft. Fortunately, perhaps, by the will of Providence, this did not happen, because, the CBI filed a report saying that the gold seized in Crime No.24 of 2012 was not required for that case, but, required for Crime No.39 of 2013 and followed it up by filing a closure report in Crime No.39 of 2013.

9. The next question posed to Mr.K.Srinivasan, learned Special Public Prosecutor, by this Court was, "Had any property been lost either from the malkhana (property room) of the Court or from the malkhana of the CBI, what should have been done?" The answer to this question is obvious. A regular FIR for theft should have been registered in the jurisdictional police station and the police investigation under Chapter XII of Cr.P.C. should have been conducted. At the end of the investigation, the Investigating Officer may come to the conclusion that the actual gold that was seized was only 296.606 kgs., but, it was mistakenly entered in the inventory as 400.47 kgs. Strangely, this has not been done in this case till date. One can understand if the difference had been a few grams, but, this Court is unable to fathom as to how there could be a discrepancy of more than 100 kgs. in the weight of gold. Gold will not diminish in weight like ganja by efflux of time. Unfortunately, it appears that all parties to the great bullion expedition have deflected the golden question as to where this alleged gold weighing 103.864 kgs. actually was.

10. When this Court expressed its opinion, as to why no FIR was registered for theft, the learned Special Public Prosecutor submitted that an internal enquiry is being conducted by the CBI in this regard. He requested this Court to give a direction to the CBI to register an FIR for theft and conduct investigation. He even suggested that this Court could direct the CBI of the neighbouring State or the National Investigating Agency to conduct the investigation.

11. This Court explained to the learned Special Public Prosecutor that Caesar's wife should be beyond suspicion, to establish which, investigation by a totally different agency is the panacea. That apart, under the Delhi Special Police Establishment Act, 1946, the CBI does not have the authority to register a theft case, which falls within the domain of the local police. For this, the learned Special Public Prosecutor submitted that the CBI investigation can be ordered by the High Court in exercise of its power under Article 226 of the Constitution of India, even in a case of this nature.

12. It is true that CBI investigation can be ordered by this Court in any matter, but, subject to the law laid down by the Supreme Court in *State of West Bengal vs. The Committee for Protection of Democratic Rights*¹.

13. The learned Special Public Prosecutor contended that the prestige of the CBI would come down, if investigation is done by the local police. This Court cannot subscribe to this view, because, the law does not sanction such an inference. All policemen have to be trusted and it does not lie in the mouth of one to say that the CBI have special horns, whereas, the local police have only a tail. Apposite it would be to quote a sapient passage from the celebrated judgment of the Supreme Court in *Aher Raja Khima vs. State of Saurashtra*²:

".....The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration."

14. It may be an Agni Pariksha for the CBI, but, that cannot be helped. If their hands are clean, like Sita, they may come out brighter, if not, they would have to face the music. Averments with regard to weight in a panchanama cannot be taken

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lightly, especially in a case of this nature when the difference is not a few grams, but, a whopping one lakh grams. Be it noted, in NDPS Act cases, weight of the contraband determines the quantum of punishment.

15. Without intending to hypothesize or speculate, the facts, as unfurled supra, bring out three distinct possibilities on the fate of the gold which require investigation:

- First, the alleged shortfall of 103.97 kgs. of gold could be a genuine mistake as contended by the CBI, or
- Secondly, the CBI officials, in collusion, with the panchas and others, may have illegally dealt with the gold while maintaining the weight of the gold as 400 kgs. in the seizure mahazar, as a shortfall therein would have made Surana cry foul.
- The third possibility is that the CBI officials, in collusion with Surana and others, may have permitted Surana to deal with 100 and odd kgs. of gold after effecting the seizure of 400 kgs.

16. This Court is not expressing any opinion on these possibilities. Suffice it to say that a free and fair investigation is, therefore, imperative to unearth the truth in this case.

17. The prayer in this writ petition is for a writ of mandamus to return the remaining gold, which cannot be granted without finding out what has actually happened to the alleged shortfall of 103.864 kgs. of gold, as it would amount to putting the cart before the horse. As this exercise necessarily involves an investigation into several disputed questions of fact, which obviously cannot be undertaken in a writ petition under Article 226 of the Constitution of India, to meet the ends of justice, the following directions are issued:

- The petitioner/Liquidator shall give a petition narrating the entire facts to the CB-CID, Metro Wing, Chennai;
- On such petition being filed by the petitioner/Liquidator, the CB-CID shall register a regular FIR for theft and entrust the investigation of the case to an officer of the rank of Superintendent of Police in CB-CID;
- All the stakeholders, including the CBI officials, shall assist the CB-CID in the investigation of the case;

- The investigation shall be completed within six months from the date of registration of the FIR; and
- Be it a charge sheet or a closure report, the same shall be filed before the jurisdictional Metropolitan Magistrate in Chennai and copy furnished to the petitioner, who is the Liquidator appointed by the NCLT.

With the above directions, this writ petition stands disposed of. Costs made easy.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

nsd/cad

To

1. The Inspector of Police
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2. The Superintendent of Police
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3. The Deputy General Manager
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+2ccs to M/s.Ramalingam & Associates, SR.No.40791
+2ccs to M/s.Vipin Warrior, Advocate, SR.No.41019
+1cc to M/s.K.Srinivasan, Advocate, SR.No.40269

W.P.No.14030 of 2020

BP (CO)
KKV/29/12/2020