**IN THE HIGH COURT AT CALCUTTA**
**CRIMINAL REVISIONAL JURISDICTION**
**<u>APPELLATE SIDE</u>**

PRESENT:

**THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE**

**C.R.R. 1802 of 2020**

**Md. Nizamuddin**
**Vs.**
**The State of West Bengal & Anr.**

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| For the Petitioner | : | Mr. Aneek Pandit<br>Mr. Priyabrata Mukherjee<br>Ms. Sonakshi Mitra<br>Mr. Abhijit Kundu |
| For the Income Tax Authority | : | Mr. Vipul Kundalia<br>Mr. Amit Sharma<br>Mr. Anurag Roy<br>Ms. Uweaza Ali |
| Heard on | : | 06.12.2022 |
| Judgment on | : | 21.12.2022 |

**<u>Ajoy Kumar Mukherjee, J.</u>**

**1.** Challenging the order dated 21.11.2020 passed by learned Additional Chief Judicial Magistrate at Alipore in Pragati Maidan Police Station case no. 3 dated 24.3.2020 under Section 41 of the Code of Criminal Procedure and Section 379 of the Indian Penal Code, the present application under Section 482 of the Code of Criminal Procedure has been preferred.

**2.** The petitioner contended that the petitioner was working in the Life Insurance Corporation of India (LICI) and retired from service on 31.10.2018. The employer of L.I.C.I. credited Petitioner's retiral and other dues to his Bank account No. 520301199790971 and petitioner received in the year 2017-2018 from LICI before his retirement a sum of Rs. 11,95,439/- as withdrawal by him from his provident fund account. Then on retirement on 31.10.2018, the petitioner received further amount of Rs. 37, 63,455/- on account of gratuity, commuted pension, leave encashment, PF entitlement etc through his said bank account of corporation Bank's branch at C.R. Avenue, Kolkata. The petitioner being income tax assessee has filed income tax return and the petitioner showed his income tax return for the year 2018-19 to Rs. 41,47,680/- as his total income including his retirement benefits. Out of the said amount, Rs. 31,36,352 pertains to his exempted income due to gratuity, commuted pension, leave encashment etc.

**3.** On 23.3.2020, the petitioner herein had given Rs. 29,08,800/- in cash out of money accumulated in his residence over a considerable long period being repaid by his sons, son-in-law and other family members who took financial help from time to time from him for their business and other personal requirements and returned the same in cash to him, to one Pritam Das, his authorised person for the purpose of depositing the said cash money in his another bank account No. 520101199854870 of the corporation bank at C.R. Avenue, Kolkata Branch through motorbike of his son and accordingly, said Pritam Das took the said cash amount of Rs. 29,08,800/- from the petitioner from his residence and left his home for going to the said bank. Subsequently the said Pritam Das informed the petitioner that he could not deposit the said money in the said account due to sudden physical illness of his wife and petitioner then advised him to look after his wife and to return the said money to the petitioner on the next date i.e. 24.3.2020. Accordingly, said Pritam Das along with cousin Rabi Kumar Das was coming to return said money contained in a jute bag riding the petitioner's son by motorbike and when they reached Parama Island, the police team inspected the motorcycle on that day i.e. 24.3.2020 at 5.25 p.m. and found the said cash money in the jute bag carried by Pritam Das. Petitioner further alleged without making any investigation whatsoever, police seized the said cash of Rs. 29,08,800/- from the possession of the said Pritam Das as stolen money and arrested the said Pritam Das and Rabi Kumar Das from the road along with seized motorcycle and at that point of time, said Pritam Das said police personnel that said money belongs to the petitioner herein and it was given to them for depositing in his bank account but the police personnel did not pay any heed to such statement and treating the said cash money as "stolen property" registered Pragati Maidan Police Station Case no. 3 dated 24.3.2020 under Section 41 of the Code of Criminal Procedure and Section 379 of the Indian Penal Code against the said Pritam Das and Rabi Kumar Das. The petitioner and his son subsequently went to Pragati Maidan Police Station on getting information of such arrest and repeatedly stated to police personnel that said money belonging to the petitioner and the petitioner has every document to prove the ownership of said cash amount and requested to record his statement but the petitioner alleged that he was ill treated by the police personnel and was threatened with dire consequence to implicate in money laundering cases. During investigation, the petitioner submitted all relevant documents to the police in respect of lawful source of his seized money like income tax return, bank passbook etc.

**4.** Later on said Pritam Das got a notice on 2.6.2020 from the income tax department to submit his reply as per requirement of the said notice and accordingly said Pritam Das sent his reply on 4.6.2020. Subsequently the petitioner herein was also served with a similar notice on 28.7.2020 through E-mail to submit his documents and accordingly, the petitioner sent all relevant documents as desired by the income tax department but the income tax department has not intimated the petitioner about the result of said enquiry by the said authority.

**5.** During investigation, learned Additional Chief Judicial Magistrate called for investigating officer's report on the point of releasing the said cash amount as prayed by the petitioner in his application under Section 457 of the Code of Criminal Procedure, on 6$^{th}$ July, 2020. It is alleged that the Investigating officer intentionally did not send his opinion as to whether the said money could be released in favour of the petitioner. The Income tax department raised objection regarding return of the seized money but in spite of asking income tax department to submit a report, no report was submitted by the income tax department. On 20.10.2020, the petitioner's prayer for return of the seized vehicle was allowed.

**6.** The petitioner further submits that the income tax department has not filed any written application whatsoever for getting the seized money from learned court's custody while the petitioner's application under Section 457 of the Code of Criminal Procedure was lying pending since 6th July, 2020 before the court below. Ultimately on 21.11.2020, vide impugned order the learned court below was pleased to reject the prayer made by the petitioner with regard to return of seized cash amount of Rs. 29,08,800/- without giving any hearing of the petitioner's petition dated 16.9.2020 challenging the *locus standi* to oppose petitioner's prayer for return by PP/APP or learned Advocate on behalf of the Income Tax department.

**7.** Being aggrieved and dissatisfied with the aforesaid order dated 21.11.2020 passed by the learned Additional Chief Judicial Magistrate, Alipore rejecting the aforesaid prayer made by the petitioner, under Section 457 of the Code of Criminal Procedure, the present application under Section 482 of the Code has been preferred.

**8.** Learned advocate for the petitioner submits that the court below wrongly held that power conferred under Section 457 of the Code is discretionary power upon the court with respect to the disposal of seized property during investigation. The learned court below ignored the settled principle of law as enunciated by different High Courts and Supreme Court. The petitioner further submits that the income tax department cannot intervene in the disposal of the petitioner's petition under Section 457 of the Code for releasing the cash money to the petitioner on the ground that income tax act is a special statute. Income tax department was not a contesting party in that case and learned court below wrongly applied the principle laid down in Section 451 of the Code which deals with the situation during inquiry or trial and not during investigation. The police investigating agency could not prove that the seized money is stolen property and income tax department never seized money under the Income Tax Act, 1961 and it was seized by police and this aspect was ignored by the learned court. The learned court below should have applied his judicial mind not in a cavalier manner and mechanical method. The income tax department has no authority to seize the money by any stretch of imagination.

**9.** The petitioner in order to support his claim relied upon the following documents:

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| i) | Income Tax Returns for the year 2016-2017 | Rs. 12,46,477/- |
| ii) | Income Tax Returns for the year 2018-2019 | Rs. 10,89,012/- |
| iii) | Income Tax Returns | Rs. 41,48,796/- |

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|---|---|---|
| | for the year 2019-2020 | |
| iv) | Pass Book entries showing balance as on 09.02.2020 | Rs. 31,38,121/- |
| v) | Pass book entries dated 11.02.2020 showing withdrawal of cash | Rs. 31,00,000/- |
| vi) | Pass Book entries showing major withdrawal | |

**10.** The petitioner submit further that by the aforesaid documents he has prima facie shown his source of income as well as the withdrawal of cash from lawful and accounted income to the tune of Rs. 31,00,000/-. But by the impugned order, learned court below was pleased to reject the petitioner's prayer for return of the seized money in favour of the petitioner and was pleased to held that the seized cash cannot be handed over to the petitioner at this stage and the same should instead, be hand over to the income tax department. Accordingly, the learned court below directed the State investigating agency to hand over the seized cash as per seizure list to the authorized representative of the income tax department after due verification and identification and after preparation detailed panchnama of the currency notes.

**11.** Learned advocate for the opposite party no. 2 by filing affidavit-in-opposition contended that in spite of getting adequate opportunity given by the income tax department to explain the source of seized cash amounting to Rs. 29,08,800/-, no satisfactory explanation has been provided by the petitioner and the same remained unexplained. Since the source of cash is not explained and during investigation and verification of documents placed by the petitioner, it was found that said cash amount of Rs. 29,08,800/- is unaccounted income, the same is required to be handed over to the income tax department under Section 132A of the Income Tax Act, 1961 to proceed further with the matter. It is not correct that the pass book entries dated 11.02.2020 shows that cash amounting to Rs. 31,00,000/- was withdrawn from the bank account of the petitioner. The income tax return for assessment year 2016-17, 2018-19 and 2019-20 do not show the source of seized cash amounting to Rs. 29,08,800/- or that the same is accounted money of the petitioner. The transaction in connection with pass book of the Union Bank of India having account no. 5201011999790971 dated 11.2.2020 of Rs. 31,00,000/- are not the cash withdrawal instead the said entry dated 11.2.2020 is pertaining to RTGS transfer made to other account of the petitioner in the same bank having account no. 520101199854870. The Opposite party no. 2 further submits that regarding transaction/entry made on 11.2.2020 from the said account of the petitioner, they have made query to the said bank and they also satisfied with the aforesaid transfer of Rs.31,00,000/- from petitioner's one bank to other bank account through RTGS. In fact, no cash withdrawal has been made by the petitioner and as such the petitioner's claim of cash withdrawal of Rs. 31,00,000/- is incorrect and far from the truth. On the contrary on perusal of bank statement it transpires that there were various small ATM self withdrawal amounting to Rs. 10,000/- from the bank on different occasions. Such small withdrawals do not establish seized cash amounting to Rs. 29,08,800/- have been withdrawn from the bank account of the petitioner. The small withdrawal on different occasions of about Rs. 10,000/- do not establish the said cash withdrawal of three financial years i.e. 2017-18 to 2019-20 is the cash in hand or that is the actual source of seized cash. The said small withdrawals may be made for the purpose of meeting daily basic expenditure. Even if the expenditure was not done, then the source of expenditure for three financial years is to be explained, which was not explained by the petitioner, before the income tax department. The opposite party no. 2 also denied that the petitioner is a bona fide tax payer or that money in his possession is accounted money or disclosed in the return of income filed by the petitioner. It is incorrect to say that said seized cash amounting to Rs. 31,00,000/- was withdrawn from his bank account prior to 9.2.2020. The withdrawal of small amount from ATM has also been mentioned as per following chart:

| Date | Amount in Rupees |
|---|---|
| 01/09/2017 | 10,000.00 |
| 09/10/2017 | 10,000.00 |
| 15/11/2017 | 10,000.00 |
| 01/01/2018 | 10,000.00 |
| 01/01/2018 | 10,000.00 |
| 29/01/2018 | 10,000.00 |
| 31/01/2018 | 10,000.00 |
| 09/02/2018 | 10,000.00 |
| 28/03/2018 | 10,000.00 |
| 13/04/2018 | 10,000.00 |
| 19/04/2018 | 10,000.00 |
| 24/04/2018 | 10,000.00 |
| 10/05/2018 | 10,000.00 |
| 09/02/2018 | 10,000.00 |
| 01/09/2017 | 10,000.00 |

**12.** It is further submitted on behalf of opposite party No. 2 that the petitioner's statement made in supplementary affidavit in different paragraphs are contradictory and inconsistent in as much as in one hand, the petitioner contends that seized cash was withdrawn on 11.2.2020 from his bank account and on the other hand, he contends that said seized cash were withdrawn prior to lock down on 9.2.2020, the said contradictory statements negate claim of the petitioner and proves that the said seized cash amounting to Rs.31,00,000/- is unaccounted money of the petitioner and accordingly proceeding has to be initiated against the petitioner in accordance with law by the income tax department, which they could not do due to grant of stay by this court.

**13.** In the present case, admittedly the money was seized not from the petitioner but from one Pritam Das and Rabi Kumar Das. The petitioner contended that they are his employee but no such document furnished in respect of the same, nor the aforesaid persons had filed any income tax return. In fact, when the learned Magistrate called for a report from investigating agency about the petitioner's prayer for return of the seized money, the investigating agency raised objection by their report dated 24.3.2020. It appears that in the letter dated 17.8.2020, the investigating agency recommended for seeking direction from the Magistrate to hand over possession of the seized cash to the income tax department as the claim of Pritam Das that the seized cash amount of Rs.29,08,800/- belongs to petitioner herein is doubtful and his statements are contradictory and Pritam Das does not file income tax return. Moreover it was further noted in the correspondence that the seized cash amount cannot be construed as consisting of various cash withdrawals spanning in three financial years from the bank account of the petitioner and the said amount does not consist of gratuity, pension or leave encashment receipt of the petitioner. Moreover, it was further noted that the petitioner furnished unsigned copies of documents which are not reliable and did not furnish any documents showing TDS on the salary payment made to his said employee, Pritam Das. On the contrary the petitioner herein has shown huge unsecured loan in the financial year 2019-20, source of income of which is not established and it is further noted that the petitioner has fabricated/manipulated story to cover up the unaccounted money.

**14.** Section 457 of the Code of Criminal Procedure provides that when a property is seized during investigation and when the person who is entitled to get the said property is known, the possession should be handed over to such person who is entitled to possession and if such person cannot be ascertained respecting the custody and production of such property but when there is serious controversy as to the person entitled to the delivery of such property, law does not require the Magistrate to finally adjudicate upon the said controversy. In the present case, the said investigating agency at first has taken up the investigation and later on as reported by the said investigating agency, the income tax department is also processing for proceeding for enquiry in the aforesaid seized money. When there is allegation and counter allegation and when it is still the subject matter of enquiry by the concerned authority that is the income tax department as to whether said money is accounted money or not, I find that the Magistrate was justified in passing the impugned order as enquiry has not yet been completed. It is submitted that due to stay order granted by this court, the income tax authority could not proceed for the enquiry or investigation by taking custody of the said property.

The expression “entitled to possession” would normally mean lawful or rightful title to hold the property. When the other enquiry authority on a preliminary enquiry came to a finding that prima facie the petitioner has failed to show that the money seized by the said police investigating agency is accounted money, ultimate finding of the order impugned does not call for any interference at this stage. However this order will not preclude the petitioner from making similar prayer for return of seized money on furnishing appropriate bond at a subsequent stage after completion of investigation/enquiry and if such prayer is made, such application shall be disposed of in accordance with law.

**15.** Accordingly, CRR 1802 of 2020 is accordingly disposed of.

**16.** However, the income tax authority is directed to conclude their entire proceeding within a period of six months from taking change of seized property.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

**(Ajoy Kumar Mukherjee, J.)**