

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3912 OF 2019

Gumanmal Bakhtavarmal Rathod	]	
Aged 44 years, Residing at 64/64/A,	]	
Shaikh Memon Street, 3 rd floor,	]	
Near Bhagat Tarachand, Mumbai – 400 002.	]	... Petitioner

V/s.

1.	Nilesh Fatechand Porwal	]	
	Tarabaug, Sapna Apartment,	]	
	Ground floor, Love Lane, Byculla,	]	
	Mumbai – 400 027.	]	
2.	Mukesh Tulsichand Jain	]	
	Residing at Shivaml Building,	]	
	“B” Wing, 2 nd floor, Room No.218,	]	
	10 th Kamathipura, Mumbai – 400 008.	]	
3.	The State of Maharashtra	]	
4.	Heena Mukesh Jain	]	
	Residing at Shivaml Building,	]	
	“B” Wing, 2 nd floor, Room No.218,	]	
	10 th Kamthipura, Mumbai – 400 008.	]	... Respondents

Mr. Ganesh Bhujbal for Petitioner.

Mr. Kamlesh Jain for Respondent No.1.

Mr. Rajesh Jain for Respondent No.2.

Ms. Sharmila S. Kaushik, A.P.P. for Respondent No.3-State.

Mr. Prabhanjay Dave a/w. Mr.Ankit Rajput i/b. Mr.Manoj Vishwakarma for Respondent No.4.

CORAM : A.S. GADKARI, J.

DATE : 13th June 2022.

ORAL JUDGMENT :-

1. By the present Petition under Article 227 of the Constitution of India, the Petitioner, first informant has impugned Judgment and Order dated 28th June 2019 passed in Criminal Revision Application No. 102 of 2018, dismissing the said Revision preferred by the Petitioner, thereby confirming the Order dated 1st November 2017, rejecting his Miscellaneous Application No. 42 of 2016 filed under Section 451 of the Criminal Procedure Code (for short, 'Cr.PC.) for return of property seized by the Police.

2. Heard Mr.Ganesh Bhujbal, learned Advocate for the Petitioner, Mr.Kamlesh Jain, learned Advocate for Respondent No.1, Mr.Rajesh Jain, learned Advocate for Respondent No.2 and Ms.Kaushik, learned A.PP. for Respondent No.3 and Mr.Dave, learned counsel for Respondent No.4. Perused record.

3. Record indicates that, on the basis of the First Information Report lodged by the Petitioner, a crime bearing No.200 of 2016 was lodged on 31st May 2016 with L.T. Marg Police Station, Mumbai, under Section 408 and 411 of the Indian Penal Code. After completion of investigation, police submitted chargesheet in the Court of Metropolitan Magistrate, 28th Court, Esplanade, Mumbai. Respondent Nos.1 & 2 are the accused persons in the said crime. Respondent No.4 is the wife of Respondent No.2.

4. It is the prosecution case that, the Petitioner had given 1180

grams and 500 milligrams of gold ornaments to Respondent No.1 for its sale. However, he sold the said ornaments to Respondent No.2, committed criminal breach of trust and defalcated the said property. During the course of investigation, 405.520 grams of gold ingot was recovered at the instance of Respondent No.2 from his house. It is the said stolen property of which interim custody is claimed by the Respondent No.4 i.e. wife of Respondent No.2.

5. Petitioner therefore filed M.A. No. 42 of 2016 and Respondent No.4 filed M.A. No. 55 of 2016, under Section 451 of Cr.PC. for return of the said seized property during the pendency of trial. Trial Court by its common Order dated 1st November 2017 rejected both the applications. Petitioner thereafter preferred aforestated Criminal Revision Application No. 102 of 2018 against the Order of trial Court, which has been dismissed by the Revisional Court by its impugned Judgment and Order dated 28th June 2019.

6. Mr.Bhujbal, learned Advocate for the Petitioner submitted that, the Petitioner is the informant and the said property belonging to him has been seized by the police during the course of investigation. That, the Petitioner had given ornaments to the Respondent No.1 for its onward sale. However, Respondent No.1 committed criminal breach of trust and defalcated it. He submitted that, in view of the law laid down by the Hon'ble Supreme Court in the case of *Sunderbhai Ambalal Desai Vs. State of Gujrat*, reported in

AIR 2003 SC 638, the property can be given in custody of Petitioner during pendency of trial. That, both the Courts below have committed error in not appreciating the said fact and preposition of law and therefore the impugned Judgment and Order passed by the Revisional Court needs to be quashed and set-aside by allowing M.A. No. 42 of 2016 filed by the Petitioner.

7. Per contra, learned Advocates appearing for Respondent Nos.1, 2 and 4 opposed the application. Mr.Dave, learned counsel for Respondent No.4 submitted that, it is the case of the Respondent No.4 that, the gold ingot recovered by police from Respondent No.2 is infact prepared by him from the gold ornaments which were her stridhan and the said melting of her ornaments was effected with her consent. He submitted that, the Respondent No.4 has produced on record receipts of purchase of gold ornaments from M/s.S.V. Jewellers of Nagpada, Mumbai. Therefore the said gold ingot cannot be released in favour of the Petitioner during the pendency of the trial and it ought to have been given in possession of the Respondent No.4, as she is the lawful owner of the original ornaments. He further submitted that, in the trial of the said case i.e. Criminal Case No. 1/PW/2017, the prosecution has already examined one witness and the trial will be concluded in short time and therefore the interim custody of the said gold ingot may not be given in possession of the Petitioner. He submitted that, ultimately at the end of the trial, the learned Magistrate will have to pass necessary Orders under Section

452 of the Cr.P.C. and therefore also the said property may be released in favour of the Petitioner at this stage. He therefore prayed that, the present Petition may be dismissed.

8. Perusal of record indicates that, to Criminal Revision Application No. 102 of 2018 filed by the Petitioner, the Police i.e. Investigating Agency has filed its say, which is annexed at page No. 137 to the Petition. The Police have recorded a prima-facie finding that, the receipts produced by the Respondent No.4 of purchase of ornaments appears to be certainly unreliable. Police have given various reasons to reach to the said conclusion including the fact that, on the said bills 'VAT Tin No.' and 'CST Tin No.' have not been mentioned. The 'telephone number' of the said shop is also not mentioned on the receipt. Police have therefore expressed doubt about the genuineness of the said receipts. It is further stated in the report that, when a police personnel was deputed to verify the whereabouts of the said shop, it was not found at the address mentioned on receipts and instead at the said place one dispensary namely 'Dentoplus Family Dental Care' was in existence. It is to be noted here that, police have given 'no objection' for return of the said property in favour of the Petitioner.

9. As far as the contention of the learned counsel for the Respondent No.4 that, she instructed Respondent No.2 i.e. her husband to melt her stridhan and keep it in the form of gold ingot is an unconscionable submission

to be accepted. This Court is of the view that, no married women would tell her husband to melt her stridhan and keep it in the form of ingot in the house, without using the said ornaments for her personal use in her regular life or on certain occasions such as festivals.

10. Though, the police have recorded *prima-facie* finding that, the receipts produced by the Respondent No.4 are unreliable, rather not genuine, it is not appreciable that, the police did not further investigate the matter, as to who has prepared the said receipts and gave it to Respondent No.4. The Police have failed to investigate the fact, as to whether Respondent No.4 is helping Respondent No.2 in screening the evidence in a criminal prosecution. This aspect surely needs to be investigated by the Police, if wisdom prevails upon the concerned Police Officer. However, certainly Police cannot put rest to it by simply submitting its report to the concerned Court by noting such observations.

11. In view of the above and the fact that, the ornaments/ingot involved in the present crime is recovered at the behest of the Respondent No.2 by effecting a panchanama under Section 27 of the Indian Evidence Act and the fact that the Police have given no objection to return the said property in favour of the Petitioner, this Court is of the considered opinion that, during the pendency of the trial, the interim custody of said seized property can be handed over or entrusted in favour of the Petitioner, subject to certain

conditions.

12. Accordingly, M.A. No. 42 of 2016 filed by the Petitioner is allowed by setting aside impugned Judgments and Orders dated 28th June 2019 passed by Additional Sessions Judge, Gr. Mumbai in Criminal Revision Application No. 102 of 2018 and Order dated 1st November 2017 passed by Metropolitan Magistrate, 28th Court, Esplanade, Mumbai in M.A. No. 42 of 2016.

13. The Investigating Agency/Senior Inspector of Police attached to L.T. Marg Police Station, Mumbai is hereby directed to handover interim custody of the said gold ingot weighing 405.520 gram, as mentioned in its report dated 8th June 2018 in favour of the Petitioner on his furnishing continuing bank guarantee drawn on any Nationalized Bank for an amount of Rs.10,00,000/-.

14. The Petitioner is also directed to furnish indemnity bond and an undertaking before the Trial Court incorporating a specific clause that, the Petitioner shall not change nature of the said property without prior permission of the Trial Court during the pendency of trial and in the event Trial Court directs to produce the said property at the time of passing of Order under Section 452 of Cr.PC., the Petitioner will produce it without any demur.

15. Petition is allowed in the aforesaid terms.

[A.S. GADKARI, J.]