

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

(Appellate Side)

FMA 3518 of 2014

With

IA No. CAN 1 of 2012 (Old No. 8146 of 2012)

Siddheswar Ghosh

-Vs.-

The State of West Bengal & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Apurba Sinha Ray

For the Appellants : Mr. Debabrata Saha Roy, Adv.
 Mr. I. Mitra, Adv.
 Mr. S. Das, Adv.
 Mr. N. Basu, Adv.
 Mr. S. Biswas, Adv.

For the State : Mr. Srijan Nayek, Adv.
 Mrs. R. Maitra, Adv.

For the respondent nos. 3, Mr. Arunava Ghosh, Adv.
to 6 Mr. Tapas Kr. Bhattacharyya, Adv.
 Mr. Aviroop Bhattacharyya, Adv.

CAV On : 21.12.2022

Judgment On : 11.04.2023

Apurba Sinha Ray, J. :-

1. The factual matrix of this case is that the appellant took loan from Krishnanagar City Cooperative Bank after mortgaging gold ornaments along with others. Initially the appellant was unable to liquidate the outstanding dues, and according to him, he time and again requested the bank authority to reduce the amount of outstanding dues for enabling him to liquidate all the outstanding dues but it is alleged that such request was not paid heed to. It was subsequently found that fake gold was submitted by the appellant for the purpose of obtaining loan from the bank and for which the appellant, who was an employee of the said bank, was dismissed from service. However, by an order of the Hon'ble Court the appellant was reinstated but subsequently at the time of superannuation, his outstanding loan amount was deducted from the amount of gratuity. It was also alleged on behalf of the appellant that in similar circumstances, the Hon'ble High Court passed favourable orders in respect of two accused persons after payment of their outstanding dues. The decision of the High Court in one of such cases was affirmed by the Hon'ble Supreme Court. If that be so, the appellant contends that he being a similarly situated person should be allowed either to receive Gold ornaments which he deposited or the equivalent sum of money thereof, if ornaments were lost from the custody of the bank.

2. The bank, on the other hand, submitted that the appellant was an employee of the bank and he was the mastermind behind the entire plan,

that is, to obtain financial loans from the bank after depositing fake gold. It is also alleged that as he was an employee, the bank trusted him and no appraiser was appointed to examine the value of the gold or genuineness of the same at that point of time. The name of the appellant was found as nominee of all the gold loans in respect of all those persons who were granted gold loans at the relevant time. The bank has further submitted that when the said Loanees were not paying their outstanding dues, the bank decided to sell the mortgaged gold ornaments. At that time it came to the notice of the bank authorities that fake gold had been submitted by the concerned persons at the instance of the appellant to obtain financial loans from the bank. Accordingly, a complaint was lodged against the appellant and others, and after completion of investigation a charge sheet was submitted against 21 persons including the appellant under sections 408/420 IPC and the said criminal case is still pending before the Learned Court of Judicial Magistrate at Krishnanagar. It is also alleged that due to burglary, genuine gold ornaments were taken away by thieves leaving fake gold in the bank. It is submitted on behalf of the bank that the two instances referred to by the appellant have no application in this case since the appellant being the employee of the bank masterminded the entire plan, and further the pendency of the criminal proceedings was not brought to the notice of the Hon'ble Court properly in these two cases. With the consent of the appellant, the Bank's outstanding dues were deducted from the amount of his gratuity.

3. As the appellant was unable to persuade the bank authorities to return his gold ornaments or equivalent money thereof, the petitioner was compelled to file writ application being No. 2209(W) of 2012 praying for issuance of writ of mandamus etc. The Hon'ble single Judge did not allow the prayer of the appellant/ writ petitioner on the ground that criminal proceedings were pending before the concerned court at Krishnanagar. Against such judgment and order dated 02/04/2012 the appellant has preferred this appeal stating, inter alia, that the judgment and order passed by the Hon'ble single Judge on 02/04/ 2012 is bad in law and the same should be set aside.

4. The relevant observations of the Hon'ble Single Judge are reproduced herein below:

“At this juncture, it may be observed that the writ court ought not to go into the aspect of the merits of the contents of the chargesheet, since the entire matter is before the court of the Chief Judicial Magistrate, Sadar, Krishnanagar, Nadia. However, so far as the prayers made in the writ petition are concerned, in the facts and circumstances of the instant case, this court does not deem it fit and proper to use its discretionary powers under Article 226 of the Constitution of India to issue a writ in the nature of mandamus commanding the bank

authorities to accept the offer of the writ petitioner for repayment of the loan.

For the reasons stated above, the writ Petition is liable to be dismissed and is accordingly dismissed''

5. After passing of the above judgment, some events like retirement of the appellant, deduction of outstanding dues from his retiral benefit etc. have taken place. Therefore, the present issue revolves round the question whether or not the appellant is entitled to gold ornaments or the equivalent money value since the bank's outstanding dues were deducted from his retiral benefits.

6. The factual scenario of the present case, in my view, involves civil as well as criminal law. Undoubtedly there were agreements between the appellant and the concerned bank on several dates in respect of several gold loans as referred to above. In other words there were contractual relations between the appellant and the concerned bank to the effect that he was obtaining financial loan from the concerned bank on certain conditions including that on demand he shall repay the amount of loans which were taken by him after mortgaging the gold ornaments. The allegation of the appellant or the writ petitioner is that in spite of outstanding dues of loan being liquidated, the bank authority was not returning his gold ornaments. Therefore, the appellant's allegations pointed out that the concerned bank violated the relevant contracts between the appellant and the bank by not

respecting the terms of the concluded contracts. This goes to show that the matter relates to civil disputes and that should be adjudicated in a civil court of law since the writ court should not deal with serious factual aspects which require evidence to be adduced for adjudicating the 'lis'. If the bank fails to respect its obligation by not handing over the gold ornaments in spite of outstanding dues having been paid off, the proper remedy for the appellant is to sue the bank for breach of contract.

7. The other aspect of this case is that the bank is alleging that fraud was practiced upon the bank and the appellant obtained the financial loan after depositing fake gold ornaments and therefore he is liable for punishment in the criminal court of law. Undoubtedly, a criminal case is pending against the appellant under Section 408/420 IPC. The allegation against the appellant and other accused persons is that they obtained the loans after hypothecating fake gold ornaments as genuine. After completion of investigation, the concerned I.O. has submitted chargesheet against the appellant and twenty other accused persons. Therefore there appear to be prima facie materials against the appellant and others indicating commission of offence under section 408/420 IPC, by way of using fake gold ornaments as genuine. As the power of granting custody of the case property is dealt with in Section 451 of Criminal Procedure Code pending trial, the concerned Judicial Magistrate is the proper authority who can pass necessary order under Section 451 of the Code in favour of a person with whom the case property is required to be kept during pendency of trial. The

writ court should not usurp the said jurisdiction of the concerned Judicial Magistrate, First Class, who has been empowered under Section 451 of the Criminal Procedure Code to deal with the prayer for return of properties which are the subject matter of the case. As the said gold ornaments are subject matter of the said criminal proceeding, the concerned Judicial Magistrate is the proper authority to deal with the prayer of the present appellant regarding return of the gold from the concerned bank.

8. This case has another angle. According to the complainant as well as the police authorities, the gold ornaments which were submitted by the appellant and others are fake gold ornaments. Now the question is if they are fake, adulterated ornaments, can they be returned to the appellant? In other words when false and fabricated documents, spurious articles, fake gold ornaments etc. become the subject matter of a criminal case and are material evidence in the case, the same should not be handed over to the accused persons since there is chance of destruction of such material evidence. Therefore when false, fabricated, spurious, adulterated goods etc. are seized or have become the subject matter of a criminal case, they are not usually handed over to the accused persons not only to prevent occurrence of offences of similar kind but also to prevent destruction of material evidence. The principles enunciated in case law reported in **AIR 1969 Delhi 315** can be referred to since the said case law has pointed out the importance of preservation of material evidence in connection with a criminal case. As the allegation is that the gold ornaments which are the

subject matters of the criminal proceeding are fake, we think that the Writ Court rightly refused to allow the relevant prayer of the appellant in this regard.

9. It is true that in respect of two accused persons there are favourable orders but if we peruse the entire allegation we shall find that in the Affidavit-in-Reply to the supplementary affidavit the bank authority's allegations in paragraph No. 7 that the appellant was nominee of all gold loans in respect of other persons and he arranged for such loans, were are not denied by the appellant by submitting any counter affidavit to that effect. It is also found that since 1984 the appellant has been taking gold loans but there is not a single scrap of paper showing that he has tried to pay a single penny for liquidating his loan till 2011. Moreover, the appellant has failed to show that he ever tried to liquidate the outstanding dues by sending any letter to that effect to the bank authority prior to 2011. It is further true that in the case of Madan Mahanto it was submitted before the Hon'ble Single Judge Hon'ble Justice Jyotirmay Bhattacharyya that though the complaint was lodged before the police authorities but the police was doing nothing, but this submission was beyond record and does not tally with the actual state of affairs. The record shows that charge sheet was submitted in the relevant criminal case within two months of initiation of the investigation and therefore when the order of the Hon'ble Single Judge was passed, the charge sheet in the relevant criminal case already stood submitted, and therefore, it cannot be said that the police was doing nothing. As such the

submission before the Learned Single Judge at that point of time was not at all correct and as such the appellant cannot take advantage of the same.

10. Considering all the aspects of the case we do find that the Learned Single Judge has rightly come to the conclusion in writ application being No. 2209(W) of 2012 to the effect that the Learned Court did not deem it fit and proper to use its discretionary power under Article 226 of the Constitution of India to issue a writ of mandamus as the entire matter is pending before the concerned Judicial Magistrate at Krishnanagar Nadia.

11. We do not find any cogent reason to interfere with such findings of the Learned Single Judge. Accordingly the present appeal is dismissed but without any order as to costs.

12. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(APURBA SINHA RAY, J.)

(ARIJIT BANERJEE, J.)