

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.2671 OF 2022**

Vihar Rajubhai Shah	]	Petitioner
Vs.		
State of Maharashtra	]	Respondent

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Mr. Aditya Khandeparkar a/w Ms. Aekta Patel and Ms. Sayali Nikam i/b Khandeparkar Law Office, for Petitioner.

Mr. J.P. Yagnik, A.P.P, for Respondent-State.

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**CORAM : REVATI MOHITE DERE &
PRITHVIRAJ K. CHAVAN, J.J.**

**DATE : 2nd January, 2023.
(In Chambers)**

ORDER: [Per Prithviraj K. Chavan, J.]:

1. Heard.

2. Rule.

3. Rule is made returnable forthwith. With the consent of the parties, petition is taken up for final disposal.

4. Learned A.P.P waives notice on behalf of respondent-State.

5. By this petition under Article 226 of the Constitution of India and under section 482 of the Code of Criminal Procedure,1973 (for short 'Cr. P.C'), the petitioner seeks quashing of the First Information Report i.e Special L.A.C No.03 of 2019 registered with the Sahar Police Station, Mumbai for the offences punishable under sections 3 and 25 of the Arms Act, 1959 and consequently, Charge-sheet bearing No.3002/PW/2022 pending before the Metropolitan Magistrate 63rd Court, Andheri, Mumbai.

6. A few facts germane for disposal of this petition are summarized as follows.

7. The petitioner is an Associate Manager of Modtech Machines Private Limited having its office at New Ahmedabad Industrial Estate, Moraiya, Ahmedabad. The said company deals with the business of providing cutting edge investment casting

products in the field of robotics and industrial automation. As an Associate Manager of the aforesaid company, the petitioner has to travel extensively across various countries to meet the requirements of the clients situated therein.

8. In the month of January, 2019, the petitioner's employer (Modtech Machines Private Limited) required the petitioner to travel to Frankfurt (Germany) to install newly supplied wax injection machine at Delupa Turbotechnik GmbH.

9. On 2nd January, 2019, the petitioner reached Ahmedabad Airport and checked in one bag in AI-614 flight from Ahmedabad to Mumbai. The said check-in bag was locked by the petitioner with a lock and key. He had kept the key with him.

10. The said check-in bag had an outer compartment with a zip. The said outer compartment did not have a locking mechanism nor was it capable of being locked at all. Conscious of this fact, the petitioner had not kept anything in the outer zip.

11. The Air India flight-AI-614 from Ahmedabad to Mumbai took off around 7.45 a.m. The petitioner, thereafter, boarded the connecting Air India Flight AI-125 from Mumbai to Frankfurt which departed around 10.00 a.m on the same day from Mumbai.

12. The petitioner was given a "thorough check-in" by Air India at Ahmedabad. As such, the first airport of departure for the petitioner was Ahmedabad where his bag was checked in and the final destination was Frankfurt in Germany. Thus, there was no question of any physical contact between the petitioner and his check-in bag at Bombay Airport, at all.

13. At the time of boarding Flight No. AI-614 from Ahmedabad Air Port, after the security check and scan, the petitioner was handed a baggage tag by Air India bearing No.AI754070. Nothing objectionable or suspicious article was found in the outer compartment or anywhere in the said check-in bag of the petitioner at Ahmedabad while being checked-in and, therefore, the bag was loaded on the aircraft flight AI-614.

14. On 2nd January, 2019, the petitioner landed at Frankfurt Airport around 2.00 p.m local time. He proceeded to the conveyor belt at Frankfurt Airport to collect his check-in bag, but to his dismay, the bag did not turn up on the belt. Upon inquiry at the Air India counter at Frankfurt, he was shocked to learn that his check-in bag, after reaching Bombay by AI-614 had not been loaded abroad flight AI - 125 at all. The petitioner was informed that the Mumbai International Airport Security had found an objectionable item in petitioner's check-in bag prior to being loaded in Flight AI-125. It later transpired that the said object suspected to be a live cartridge in the outer zip compartment of the petitioner's bag.

15. Post his return from Frankfurt on 16th January, 2019, the petitioner went to Mumbai Airport to collect his bag as advised by Air India. The Air India staff, however, took the petitioner to Sahar Police Station at about 10.30 a.m. After reaching the Police Station, the Police examined his bag and took out one cartridge from the outer zip compartment of the said bag. The main compartment of the bag remained locked as the petitioner

had locked it after packing his bag and it was not opened at all.

16. Meanwhile, the petitioner moved an application seeking pre-arrest bail in the Court of Additional Sessions Judge at Dindoshi. The learned Additional Sessions Judge conditionally allowed his application by an order dated 25th August, 2021.

17. As a result of investigation, a charge-sheet has been laid against the petitioner, as stated above, alleging that he was found in possession of an unauthorized 9 MM live Pistol cartridge which is a prohibited ammunition.

18. We have extensively heard Mr. Khandeparkar, learned Counsel for the petitioner and Mr. Yagnik, the learned A.P.P.

19. At the outset, learned Counsel for the petitioner would argue that ingredients of the offence under section 3 and 25 of the Arms Act are conspicuously absent in the present case, for, there is absolutely no iota of evidence or material on record indicating that the petitioner was in conscious possession of a

live cartridge in the zip of outer compartment of his check-in bag. He submits that the petitioner had absolutely no knowledge as to how the said cartridge was found in the outer zip of his bag, which had been duly checked in post a security scan at Ahmedabad Airport.

20. Learned A.P.P is fair enough to submit that there is no material on record indicating conscious possession of the said live cartridge in the outer compartment of the check-in bag of the petitioner.

21. We have meticulously perused the charge-sheet, *panchanama* and the statements of various witnesses recorded by the Investigating Officer. The law on the point of conscious possession is no more *res integra* as it has been decided in a catena of decisions of this Court. The underline principle laid down by this Court as well as various High Courts in identical facts is that mere possession of fire arm or ammunition would not constitute an offence under section 3 and 25 of the Arms Act. Essential ingredient is the knowledge of possession or

power of control over the arm or ammunition when not in actual possession. This has been observed by a Division Bench of this Court in case of **Rachelle Joel Oseran Vs. The State of Maharashtra and another**,¹. The Division Bench has placed reliance on the earlier pronouncement in case of **Nurit Toker Vs. State of Maharashtra**,² and upon an unreported decision in case of **Pallavi d/o Santgprasad Satsangi Vs. The State of Maharashtra**³.

22. In view of the said legal position which has been consistently enumerated by this Court in the aforesaid judgments, we have perused the charge-sheet and found it to be a fit case which needs to be quashed by exercising our inherent powers under Section 482 of the Cr. P.C. We say so for the reasons to follow.

23. The complainant is one Dipak Vishwanath Kadam. He was working as an Assistant Manager (Security) at Mumbai International Airport Limited at the relevant time. On 2nd

1 2018 SCC Online Bom. 1047

2 2012 ALL Mr (Cri) 942

3 Criminal Writ petition No.2912 of 2016 decided on 29th November, 2016

January, 2019 around 9.26 a.m while Auto Screening Machines for the baggage which were to be loaded in AI 125 flight for Frankfurt, Security Officer Mr. Naresh Ainapure found some suspicious article at Level -2 in the check-in bag of the petitioner. He forwarded the said bag to Level - 3 where, another officer Ms. Laxmi Ghati forwarded it to Level - 4 for it's physical checking. An officer namely Hujefa Kachwala had suspected a live cartridge in the said check-in bag and, therefore, he directed the Office of Air India to call the said passenger (petitioner) to Level-4, however, by that time, Flight AI-125 had already left for Frankfurt.

24. It is surprising and equally shocking to note as to how the Security at Ahmedabad Airport could not notice any objectionable article in the check-in bag of the petitioner, when admittedly, it was a 'thorough checked-in bag'? The bag must have been scanned and screened at Ahmedabad Airport for the simple reason that it would be loaded directly in the connecting flight from Bombay to Frankfurt without the petitioner coming into physical contact with it. It is even more surprising as to why

the said check-in bag had not been physically checked at Level - 4 by Mr. Hujefa Kachwala when it was sent for that purpose?

25. It reveals from the charge-sheet that from 2nd January, 2019 till 16th January, 2019 bag was lying with the Air India Officer - Girish Bhide Senior Manager and R.S. Sonawane - Air India Security, till it was taken to the Police Station.

26. At the Police Station in the presence of *panch* witnesses and the petitioner, when zip of the outer compartment of the check-in bag was opened, a live 9MM P SBP cartridge was found. No doubt, it was a live cartridge which is evident from the report of the Ballistic Expert indicating that it was a 9MM pistol cartridge which was successfully test fired through a 9 mm caliber pistol from Laboratory stock.

27. There is nothing on record to indicate as to why the petitioner was allowed to board the flight AI-125 for Frankfurt when his bag was found with some suspicious/objectionable article. Without completing the check-in, the Airport Authorities

permitted the petitioner to board the flight for Frankfurt. It is, therefore, difficult to accept the prosecution's case that the petitioner was in conscious possession of a live cartridge in his check-in bag. Had it been so, they would not have allowed the petitioner to board the flight for his further journey to Frankfurt.

28. Considering the fact that there was no lock to the outer compartment of the check-in bag, possibility of planting a live cartridge in the zip of outer compartment of the check-in bag cannot be ruled out in light of the fact that nothing objectionable could be noticed at Ahmedabad Air Port when the said bag was "thoroughly checked in". It is not even the case of the prosecution that the petitioner possesses a licence to carry a fire arm or ammunition, especially when a prohibited ammunition of 9MM is found in the check-in bag of the petitioner. As a matter of fact, civilians are not permitted to carry, possess or acquire prohibited ammunition. It is unfathomable why a civilian like the petitioner would carry a 9 MM live prohibited ammunition in his check-in bag incurring such a high risk? It is especially in light of the fact that the petitioner had extensively travelled to

various countries viz; United Kingdom, U.S.A, New Zealand, China, Belgium, Germany, Hungary, South Africa, France, Sweden, Italy, Czech Republic, Tunisia, Spain, Poland, Mexico, Cambodia, Singapore by virtue of his employment, which is evident from the photostat copies of Visa's of aforesaid countries tendered on record.

29. The allegations made in the charge-sheet, even if are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence, much less, under sections 3 and 25 of the Arms Act against the petitioner. Even the uncontroverted allegations in the charge-sheet and the material collected in support of the same, do not disclose the commission of any offence or make out a case against the petitioner.

30. Considering the peculiar facts of the present case, there is no impediment in allowing the petition.

31. The petition is accordingly allowed. The FIR i.e Spl LAC No.03 of 2019 registered with Sahar Police Station, Mumbai, as

against the petitioner and consequently, the charge-sheet bearing No.3002/PW/2022 pending before the learned Metropolitan Magistrate's 63rd Court, Andheri, is quashed and set aside.

32. Rule is made absolute. Petition is disposed of accordingly.

33. Seized cartridge shall be disposed of in accordance with the provisions of Chapter VIII of the Arms Rules, 2016.

34. All concerned to act on the authenticated copy of this order.

[PRITHVIRAJ K. CHAVAN, J.] [REVATI MOHITE DERE, J.]