

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 4463 OF 2022

Saraswati Bhawan Education Society	.. Petitioner
Versus	
The State of Maharashtra	.. Respondent

Mr. Laxman Deshmukh for the petitioner
Mr. K. L. Vyas, Spl. P. P for the Respondent-State.

CORAM : BHARATI DANGRE, J.

DATE : 20th APRIL, 2023

JUDGMENT:

1. The present Petition filed by Saraswati Bhawan Education Society, a Public Trust registered under the provisions of the Maharashtra Public Trust Act, 1949 seek quashing and setting aside of the order dated 02/12/2021, passed by Additional Sessions Judge, Pune in Criminal Misc. Application No. 77 of 2021 and pursuant thereto, it seeks permission to operate its bank account no. 919010053280525 of Axis Bank, Indrayani Nagar, Bhosari Branch.

The Petition being filed through its Chairman, raise challenge to the impugned order on the ground that the account has been freezed during the course of the investigation, without following

the prescribed procedure, u/s 102 of Code of Criminal Procedure.

2. The brief background in which the relief stated above, is sought, would reveal that, on 19/10/2019 at the instance of one Mr. Kisan Bhujabal, C.R. No. 403 of 2019 was registered with Band Garden Police Station against several accused persons in distinct capacities, as officials of Education Department as well as the Head Master, Secretary of Saraswati Prathamik Vidya Mandir, and this included one Sambhaji Subhash Shirsat, the Secretary of the Petitioner Trust.

The complaint filed against 28 accused persons specifically alleged that huge amounts have been received from various teaching / non-teaching staff on the pretext of regularizing their services on the aided posts. By misusing the positions, several persons were asked to make payments and by conspiring with each other, huge amounts were defalcated.

The complainant working as Extension Officer (Education Department), Primary Zilla Parishad, Pune, in his detailed complaint narrated the misdeeds in relation to several Education Societies and this included appointments of teachers by issuing forged appointment orders to the posts, which were not in existence and this was done without prior permission of the

Education Department. It was thus alleged that the officials of the Education Department also conspired with the accused persons and specific allegation is leveled against Sambhaji Subhash Shirsat, that he precluded the complainant from discharging his official duty and also threatened him not to step in the school premises.

3. I have heard learned Special P. P., Mr. Vyas for the State who has placed before me a compilation of documents, comprising of statements of several witnesses, throwing light on the alleged conspiracy and also the statements of witnesses recorded u/s. 164 before the Magistrate, which reveal that the appointment orders were issued in their favour and specific allegations are raved against Sambhaji Subhash Shirsat, who is stated to be in-charge of the entire affairs of Saraswati Prathamik Vidya Mandir, Akurdi Pune.

In any case, I do not intend to go into the minute details of the said statements, but suffice to note that from the statements of Raju Bhimrao Avad, Dyairyashil Lavand, Sandeep Dattatrya Pokale and Manoj Vamanrao Thakare, it is reflected that approximately sum of Rs.16,00,000/- was deposited by these witnesses in the account belonging to the Petitioner - Trust i.e.

account no. 919010053280525.

Apart from this, various cheques also came to be deposited in the said account and as per the Spl. P.P. who has placed the details of these cheques, the amount is approximately to the tune of Rs.19,00,000/-.

4. It is in these circumstances, when C.R was under investigation, the Investigating Officer, ACB, EOW, Pune City addressed a communication to the Branch Manager of Axis Bank, Bhosari on 22/12/2020, informing that the accused Sambhaji Subhash Shirsat was holding two bank accounts in the said Bank and for the purpose of investigation, they were directed to be freezed. The said communication was in respect of two accounts i.e. account no. 915010045328077, individually belonging to Sambhaji Subhash Shirsat and the second account being account no. 919010053280525, in the name of Saraswati Bhavan Education Society.

5. Since the second account belonged to the Petitioner - Trust, it moved an Application before the Sessions Judge, informing that Sambhaji Subhash Shirsat is the Secretary of the Trust, and he is also the Head Master working in private aided school since 2015. It was informed that the Trust or any of its Trustees are not

arraigned as accused in the subject C.R. and the Trust is having a saving bank account bearing account no. 919010053280525 in Axis Bank, and the Trust operates the said account through authorized persons for making payment of its employees, towards constructions and other expenses. Since this account freezed has nothing to do with the private account of Sambhaji Subhash Shirsat, who was a distinct person than the Trust and an independent entity, the prayer was made to de-freeze the account.

In the said Application, it was specifically pleaded that no circumstances are mentioned in the letter dated 22/12/2020, which could justify it's freezing and apart from this, there is no compliance of the procedural requirements u/s 102 of Cr.P.C. and in particular, sub-section (3).

It was also stated in the Application that on a Petition being filed before the Bombay High Court, there is restrain order imposed for filing of charge-sheet, and therefore since the trial has not yet commenced, the Trust would face difficulties if it is not permitted to operate its account.

6. This Application was strongly opposed by stating that Sambhaji Subhash Shirsat was the Secretary of the Saraswati

Bhawan Education Society, and he is the main accused in the subject CR. It was also pointed out that huge amounts have been deposited in the said account and therefore it was necessary to freeze it, as it is revealed that huge amounts have been transacted in the said account and these transactions were of suspicious nature. It was also pleaded that there is every chance that the accused would withdraw the amount from the said account if permitted to be de-freezed and would misappropriate the amount lying therein.

7. Thus, the Application came to be rejected by the Additional Sessions Judge on 02/12/2021, though it was recorded that there was no compliance by the Investigating Officer, of Sub-Section (3) of Section 102, as no report has been admittedly submitted to the Magistrate, forthwith after the seizure. However, the learned Judge assigned the following reasons in support of the rejection:

"7. Total amount in the account is around Rs.22,00,000/-. As per the chart submitted by the prosecution, nearly Rs.16,00,000/- have been deposited by the different teachers who are the accused in the case, or whose appointments are under scanner. Prima facie, there was no reason to deposit huge sums in lakh of rupees in the account of institute. It appears to be a case of unlawful gratification. Therefore, these funds cannot be allowed to be released. The matter is not merely of defreezing of account but of allowing the deposits to be withdrawn and utilized by the accused

persons. This cannot be allowed particularly when there is strong prima facie case with the prosecution.

8. So far as non compliance of Section 102(3) of Cr.P.C is concerned, there is no doubt that the report of freezing of account should have been forwarded to the Court immediately by the investigation officer. There is catena of judgments on this points. Certainly there is mistake committed on the part of the investigating officer in this regard. Non observance of this mandatory provision may entitled the applicant to claim defreezing of the account. However, as observed above, the amount lying in the account is prima facie of unlawful gratification. When it is so, the Court cannot take risk allowing it utilization by the accused, at least till the forensic audit is completed..."

8. Without touching the merits of the matter, learned counsel for the Petitioner would vehemently submit that the non-compliance of the Sub-Section (3) of Section 102 is fatal to the prosecution and he would place reliance upon the decisions of the Division Bench of this Court in case **Dr. Shashikant D. Karnik v. State of Maharashtra**¹ which was subsequently followed by two single Judges of this Court in case of **Manish Khandelwal and Others vs. State of Maharashtra**² as well as in case of **Shri Vilas s/o Prabhakar Dange vs. State of Maharashtra**³.

The learned counsel would submit that the procedure

1 2008 CRI. L. J. 148

2 2019 SCC OnLine Bom 1412

3 Criminal Writ Petition No. 1033 of 2017

contemplated under Sub-section (3) of Section 102, mandate the reporting of seizure of the property to the Magistrate and where this mandate is not followed, it will entail the consequences of giving directions to de-freeze the bank account / accounts. Reliance is also placed upon the decision of Madras High Court in case of ***T. Subbulakshmi vs. Commissioner of Police***⁴.

9. Per contra, learned Spl. P.P. would rely upon the recent decision of the Single Judge from the High Court of Jammu & Kashmir and Ladakh at Srinagar in case of ***Ruqaya Akhtar vs. UT Through Crime Branch***⁵ which, in turn, has approved the view taken by a Single Judge of Punjab and Haryana High Court in case of ***Narrottam Singh Dhillon and Another vs. State of Punjab (Criminal Misc. No. 43768 of 2004)*** and decision of Allahabad High Court in case of ***Amit Singh vs. State of UP (Criminal Misc. Writ Petition No. 11201 of 2021)***.

10. Once again, the question has been raised before this Court, whether the non-compliance of the Sub-section (3) of Section 102 would render the action of the investigating agency invalid.

In order to arrive at the conclusion, it must be examined whether the provision is mandatory or directory. Section 102 of

4 2013(3) MWN (Cr) 40.

5 CRA(M) No. 223 of 2022

Cr.P.C reads thus:

"102. Power of police officer to seize certain property :-

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:

Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale."

The said section must be necessarily read in connection with section 457 of the Cr.P.C. contained in Chapter XXXIV of the Code

dealing with 'Disposal Of Property'. Section 457 set out the procedure to be followed by the police, upon seizure of the property and read thus:

"457. Procedure by police upon seizure of property:-

(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

11. The two provisions will have to be read together, to ascertain the nature of the consequences that would fall upon, in case of non-compliance of the requirement of Sub-Section (3).

In case of **Anwar Ahmed vs. State of U.P.**⁶ while dealing with the section 514(1) of the (old) Code Justice Fazal Ali, J. held that in the facts of the case, where during the course of the

⁶ (1976) 1 S.C.R

investigation the police recovered the car alleged to have been taken away by the fraud and it was handed over to the appellant on supratnama on executing a personal bond, whereby the appellant undertook to produce the car in the Court whenever necessary, and in the case of failure to do so, bound himself to pay a penalty of Rs.5,000/-. After two years, when the Magistrate called upon the appellant to produce the car he was unable to do so and therefore notice was issued u/s 514 of the Code of Criminal Procedure for forfeiture of the bond. The magistrate ordered the forfeiture and also imposed the penalty. In Appeal the said order was upheld and even the revision application was dismissed.

The question that arose before the Apex Court was about the execution of the bond before the police officer and while dealing with the said issue, section 523 of old code was considered, which read thus:

"Section 523 - The seizure by any police officer of property taken under section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property."

On perusal of the said provision, it was held that the moment a police officer seizes a property suspected to have been stolen or which is the subject matter of an offence, he has to report the matter to the Magistrate concerned and it is for the magistrate to pass such orders as he thinks fit regarding the disposal of the property. Attention of His Lordships was invited to the Regulation 165 of the Government of Uttar Pradesh Police Regulations, to contend that the power conferred on the police officer to take possession of the property seized and to give it on supratnama to any respectable person.

While dealing with this provision, it was held that neither section 523 nor the rule contained in Uttar Pradesh Police Regulations authorize the police officer to take a bond from the person to whom the property is entrusted as execution of the bond involves a civil liability and it must be necessarily executed before the Court. In this factual background it was held as under:

"The perusal of this section clearly shows that a bond for the production of the property seized by the police must be executed before the Court. This section also clearly enjoins that a bond can be forfeited only if it is executed before a Court or before a Presidency Magistrate or a Magistrate of the first class. In the present case, therefore, once the car was seized by the police, it was the duty of the police under section 523 to report the

matter to the magistrate and get an order from him regarding the custody of the car. This does not appear to have been done."

In fact since it was held that the bond executed by the appellant was not legally enforceable, the order of the Courts below forfeiting the bond were liable to be quashed. A specific observation in the said law report read as under:

"Before closing this judgment, we would like to observe that even in the new Criminal Procedure Code, there is no express provision which empowers the police to get a bond from the person to whom the property seized is entrusted. This may lead to practical difficulties, for instance in cases where a bulky property, like an elephant or a car is seized and the magistrate is living at a great distance, it would be difficult for a police officer to report to the magistrate with the property. In these circumstances, we feel that the Government will be well-advised to make suitable amendments in the Code of Criminal Procedure to fill up this serious lacuna by giving power to the police for taking the bond in such circumstances."

Subsequent to the above observations, sub-section (3) is inserted with effect from 23/06/2006 with an intention to give greater discretion to the police for releasing the seized property, where there is difficulty in securing proper accommodation for the custody of the property or where the continued retention of the property in police custody is not considered necessary for the

purpose of investigation. The proviso also carved out another exception where the seized property is of perishable nature and its value is less than five hundred rupees, then the police is empowered to sell the same auction.

12. The provision in sub-section (3) of section 102, which makes it imperative for the investigating officer to report the seizure of the property serves a definite purpose, being the Magistrate exercising supervisory control over the investigating agency in certain area. The provision is couched in mandatory form and it contemplates that whenever such a seizure takes place, subject to the exception carved out, in the provision itself, it must be reported to the Magistrate.

It is settled position of law that whenever the power is permitted to exercised under a statute, its exercise shall be permitted exactly in the manner in which it is provided, and in no other way than the one which is prescribed.

13. The Division Bench of this Court in case of **Dr. Shashikant D. Karnik (supra)**, while dealing with the non-compliance of the sub-section (3) of section 102 has observed as under:

"20. Third requirement of sub-section (3) of Section 102, lays down a mandate that every police officer acting under sub-section (1) shall forthwith report the seizure

or attachment of accounts to the Magistrate having jurisdiction. Admittedly, this is not done in the present case. Paragraph 5 of the second affidavit of Mr. Pardeshi, quoted above is very clear in this regard as well as the oral submission of Mr. Mhaispurkar. It will be therefore clear that there is absolutely no compliance to any of the provisions of sub-sections (1), (2) and (3) of Section 102 of Cr. P.C, in this matter. Consequently, the petition is required to be allowed and the orders are required to be quashed as prayed."

The aforesaid decision being binding precedence has been followed by learned Single Judge (S. S. Shinde, J) in case of ***Manish Khandelwal (supra)*** by recording as under:

"26. Accordingly, the learned Single Judge directed to defreeze the bank accounts which were frozen by the concern bank pursuant to directions of concerned police officer. Admittedly, in the present case, the Investigating Agency/Officer, in freezing the accounts of the Petitioners, has not reported freezing of the accounts of the Petitioners to the learned Magistrate which is mandatory requirement under sub-Section (3) of Section 102 of Cr.PC. As disclosed in the petition it is an admitted position that accused No.1 Vipul Desai and his wife Arti Desai appears to be the Directors of their own company viz. E2E, and both the Petitioners herein were and are running their companies viz. B M Financial Services and Reliance Securities. Prima facie it appears that no report as contemplated under sub-section (3) of Section 102 of Cr.P.C. was forwarded to the learned Magistrate till filing of this petition. It is required to be noted that freezing of bank account is an act of investigating officer/agency and therefore, duty is cast upon the investigating agency/officer under sub-section (3) of Section 102 of the Cr.P.C., to report the same to the learned Magistrate having the jurisdiction."

14. The ruling by the Division Bench is also followed by another Single Judge (N. J. Jamadar, J) in Criminal Writ Petition No. 4521 of 2021 in the following words:

"10. Following the aforesaid judgment, this Court in the cases of Manish Khandelwal Vs. State of Maharashtra & Ors. and Shri Vilas s/o. Prabhakar Dange Vs. State of Maharashtra has quashed the actions of freezing of accounts under section 102 for failure to report the seizure to the jurisdictional magistrate forthwith."

15. The use of word 'shall' in sub-section (3) of section 102 has definitely created an imperative mandate for reporting of the seizure to the Magistrate having jurisdiction and the said provision is found to be contained in Chapter VII which lays down the processes to compel production of things and empower the police officer to seize certain property, which may be alleged or suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of offence. The police officer who is empowered with discretionary power of seizure of any property, which he suspect to have been stolen or found under circumstances which creates suspicion of commission of any offence, is expected to exercise the power subject to the limitation and restrictions imposed upon its exercise. One of its part, is to forthwith report the seizure to the

Magistrate having jurisdiction and thereupon permitting the Magistrate to pass such order as he deem fit in respect of disposal of the property, if it is not produced during any inquiry or trial or delivery of it to the person entitled to its possession or in absence of the person being ascertained as regards the custody or production of such property. Therefore, it is ultimately the Magistrate who would decide upon the disposal of the property or its delivery or making over the custody of the same to such person who is entitled to its possession.

In absence, of reporting, as provided by sub-section (3) of section 102, the provision of section 457 would become nugatory, which definitely is not the intention of the framers of the Code.

16. Learned Spl. P.P. relied upon a series of judgments including the one delivered by Punjab and Haryana High Court in case of ***Narottam Singh Dhillon & Anr (supra)***, the decision of the Allahabad High Court in ***Amit Singh (supra)*** as well as decision of High Court of Jammu & Kashmir and Ladakh at Srinagar in case of ***Ruqaya Akhtar (supra)*** which would serve a guiding principle for me but definitely not a binding precedent for me.

The aforesaid decisions proceeds on the footing that since the provision do not prescribe the consequence of its non-

adherence, it cannot be said to be mandatory in nature, despite the use of word 'shall'.

True it is that mere use of the word 'shall' in a provision do not create a mandatory impact unless the provision also prescribe the consequences for non-observation of the mandatory condition and in that case it will have to be construed to be directory.

The High Court of Panjab and Hariyana in case of ***Narottam Singh Dhillon (supra)*** relied upon the decision of the Apex Court in case of ***Nasiruddin and Ors. v. Sita Ram Agarwal*** where reference was made to Sutherland, Statutory Construction, 3rd edition, Vol.3 at p.107 and the proposition of law was relied upon the effect that if the act is required to be performed by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefore are specified. As a corollary of the rule outlined, it was held that the fact, that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction but it was clarified that is only an element to be considered and is by no means conclusive.

17. With due respect to the learned Judge who has applied above noted test to the provision of section 102(3) of the Code, it is noted that in view of the pronouncement of the Apex court in the case of *Nasiruddin* came in case of consequences to be followed upon in default in deposit of rent and the question was regarding applicability of section 5 of Limitation Act and the question that arose was whether the delay in deposit of rent could be condoned under Rajasthan Premises (Control of Rent & Eviction) Act, 1950 and whether provision of section 5 of Limitation Act is applicable where there is condition to deposit of rent within the stipulated time by tenant. While dealing with the issue, it was categorically held that it is the duty of the Court to give effect to the provision in the statute and it is not open to change its texture or fabric but although ironing out the fabric is permissible, the Court cannot add or subtract the words to a statute or read something into it which is not there nor it can re-write or recast a legislation. The real intention of the legislation must be gathered from the language used. A settled position of law was reiterated, by holding that use of expression 'shall or may' is not decisive for arriving at a finding as to whether statute is directory or mandatory, but the intention of the legislature must

be ascertained from the scheme of the enactment.

18. It is in this background, the test laid down in Sutherland, Statutory Construction was invoked and applied, with a word of caution with the following effect:

"But this is only an element to be considered, and is by no means conclusive."

19. This is for the aforesaid reason, I am unable to persuade myself to substitute to the view adopted by Jammu and Kashmir High Court which has in turn relied upon the decision of Allahabad High Court in case of **Anil Singh (supra)**.

20. In the wake of the aforesaid discussion, since there is no compliance of sub-section (3) of section 102, the Petition deserved to be allowed by directing the de-freezing of account no. 919010053280525, which has been freezed by the order dated 02/12/2021. The impugned order passed by the Additional Session Judge, Pune on 02/12/2021 is quashed and set aside.

(BHARATI DANGRE, J.)