

(2015) 06 CAL CK 0010
In the Calcutta High Court
Case No : C.R.R. Nos. 696 and 2342 of 2014

Hari Om Export of Mahabirasthan

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 03-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 398, 399, 400, 401
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 34, 364

Citation : (2016) CriLJ 1014

Hon'ble Judges : Shib Sadhan Sadhu, J

Bench : Single Bench

Advocate : Debasish Roy, Sagar Bandyopadhyay, Soma Kar Ghosh and Niladri Banerjee, for the Appellant; Manjit Singh and Amarta Ghose, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Shib Sadhan Sadhu, J.—The aforesaid two (2) revisions are being disposed of by a common judgment as common issue of law based on similar facts arise for consideration.

2. By filing these two applications under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C. for the sake of brevity) the petitioner seeks to set aside/quash the impugned order dated 30.06.2014 passed by the Learned Additional Sessions Judge, 4th Court, Jalpaiguri in Criminal Revision No. 09 of 2014 dismissing the revision preferred challenging the order dated 05.01.2013 passed by the Learned Chief Judicial Magistrate, Jalpaiguri in connection with G.R. Case No. 5078 of 2012 and also for setting aside/quashing the impugned orders dated 07.02.2014 and 24.02.2014 passed by the Learned Additional Sessions Judge, Fast Track 1st Court, Jalpaiguri in connection with Session Case No. 78 of 2013.

3. The factual matrix leading to the instant Revisional Applications may be set out in the following lines:

"The present petitioner Ashok Agarwal who is the power of attorney holder lodged a written complaint before the Inspector-in-Charge of Bhaktinagar Police Station to the effect that one of his employees namely Govinda Kamta who was carrying about 4.762 kg of gold boarded train from Sealdah Railway Station for New Jalpaiguri railway station but he was missing. On the basis of that complaint Bhaktinagar P.S. Case No. 1420 of 2012 dated 17.10.2012 was registered and the case was investigated into. On completion of investigation charge-sheet was submitted against seven (7) accused persons, one of whom is a Superintendent of Customs, Bidhannagar under Sections 364/392/302/201/120B/411/34 IPC. That gold was recovered and was seized as stolen property of the case. The present petitioner prayed for return of the seized gold before the Learned Chief Judicial Magistrate, Jalpaiguri who vide his order dated 19.11.2012 allowed such prayer on condition to furnish a bond of Rs. 2,00,00,000/- (Rupees Two Crores) and on condition not to change the nature and character of the seized gold and not to dispose of the same till further order and on further condition to produce the seized gold as and when called for at his own costs. The Learned Magistrate also directed the I.O. to take photographs and make video recording and inventory lists of the seized gold articles before handing the same over to the petitioner. Thereafter on 04.12.2012 the petitioner filed a petition before the Learned Magistrate for permission to sell the said gold. On hearing both sides and on considering the objections raised by the Investigating Officer, the Learned Magistrate rejected the prayer for permission to sell the gold by passing the impugned order dated 05.01.2013. Being dissatisfied with such order, the petitioner preferred a Revision being Criminal Revision No. 09 of 2009 before the Learned Additional Sessions Judge, 4th Court, Jalpaiguri who by passing the impugned order dated 30.06.2014 dismissed the revision. He observed that the impugned order passed by the Learned Magistrate does not suffer from any illegality nor it has caused any miscarriage of justice and he, therefore, found no reasons to interfere. By the impugned orders dated 07.02.2014 and 24.02.2014 the Learned Additional Sessions Judge, Fast Track 1st Court, Jalpaiguri directed the present petitioner to produce the seized gold and golden materials which was taken back by him by executing the bond of Rs. 2,00,00,000/- (Rupees Two Crores) at his own risk and to depose in the case. Being aggrieved by the said orders, the petitioner has now approached this Court with the instant revisional applications."

4. I have heard Mr. Debasish Roy, Learned Advocate appearing on behalf of the petitioner and Mr. Manjit Singh, Learned Public Prosecutor appearing on behalf of the State. I have also perused all the available materials on record including the impugned orders with meticulous care.

5. Mr. Roy, Learned Advocate appearing on behalf of the petitioner submitted that when the photographs - both still and video of the seized gold materials have been carried out and also inventory of the same was made by the Investigating Officer in pursuance of the order passed by the Learned Magistrate the same can very well be used as secondary evidence and there cannot be any

necessity of physical production of the seized gold and gold materials. He further submitted that the petitioner has been suffering financial loss to the tune of Rs. 1,00,000/- per month as he cannot pay back the loan amount which he took for purchasing the gold. According to him the law is well-settled that the Court is authorized to permit disposal of the seized materials by its lawful owner in appropriate cases and thus the petitioner being the lawful owner he could very well be permitted to sell the seized gold. He submitted yet further that the Learned Trial Court did not record any specific or proper reasons justifying the physical production of the seized gold. He concludingly submitted that the impugned orders are not tenable and are liable to be set aside and the petitioner be permitted to sell the seized gold. He relied on the decision reported in *Sunderbhai Ambalal Desai and C.M. Mudaliar Vs. State of Gujarat*, AIR 2003 SC 638 : (2002) 10 JT 80 : (2002) 10 SCC 283 : (2002) 3 SCR 39 Supp : (2003) 1 UJ 590 in support of his submission.

6. Mr. Singh, Learned Public Prosecutor appearing on behalf of the O.P./State on the other hand submitted that the petitioner was given only the interim custody of the seized gold for its safe custody on his execution of a bond in which he covenanted himself not to change the nature and character of that gold, not to dispose of the same and also to produce the same before the Court as and when asked for. He further argued that the photography and inventory of the seized gold were made for preserving the sanctity and originality of the same so that its nature and character are not changed but not for adducing as secondary evidence. He contended yet further that the trial of the case is protracted only for refusal on the part of the petitioner to produce the seized gold in Court for its identification. According to him since the trial of the case is not concluded, no final order of disposal of the seized gold can be made. He thus insisted upon dismissal of the present Revisional Applications. He, however, undertook to arrange for full security for production of the seized gold by the petitioner to the Court.

7. Having regard to the rival submissions advanced by the Learned Advocates appearing for the parties I would like to say at the very outset that the Section 451 of the Code deals with the custody and disposal of property during an enquiry or trial. The Explanation appended in the Section gives a very wide meaning to the word property which includes property of any kind or document in respect of which an offence appears to have been committed or which appears to have been used in commission of an offence or which has been produced before the Court or which is in custody of the Court.

The mode of disposal of property may include its destruction, confiscation, delivery to the person having title or possession of property, restoration to the person dispossessed or sale etc.

This section gives power to the Court to order the custody and disposal of property pending enquiry or trial which has been exhibited. The Court may order it to be given in custody to any party during inquiry or trial on furnishing an

indemnity bond.

This section applies to any kind of aforesaid property, which is produced before the Court or is in custody of the Court during inquiry or trial in a criminal case.

The section empowers the Magistrate to order the custody and disposal of property pending investigation or trial using his discretion and such discretion should not be arbitrary. He should also give an opportunity to the parties claiming interest in the seized property to be heard in the matter.

He may order interim custody of the property under this section where it is deemed necessary but in no case the custody of the seized property should be given to the accused or the complainant until the final disposal of the case.

The order of interim custody shall, however, depend on the nature of the property and the circumstances of the case. Where the Magistrate finds that the person who is given custody of the property under this Section is not taking proper care to look after it, or is misusing it, he may pass fresh order regarding the custody of such property. It is for this reason that the order passed by the Court under Section 451 is not final, it is essentially an interlocutory in nature and hence no revision lies against such order.

The Magistrate may order the property which is perishable or subject to natural decay to be disposed of by sale. He may also order any other property to be disposed of by sale if he thinks it expedient to do so in the circumstances of the case.

It must be stated that while passing an order under Section 451, the Court merely decides about the custody or disposal of the property involved in the case, but does not decide the question of title or rights of the parties over the property. The term "production before the Court" with reference to the property used in this section does not necessarily mean actual physical possession or custody by the Court. The Court may have control over the property even without its actual possession or custody.

8. It is needless to mention that when the property has any evidentiary value, it is to be kept intact and the condition of non-alienation is imposed to ensure its production during the course of evidence for the purpose of marking as a material object. However, when the property has no evidentiary value, and only the value of the property is to be properly secured for passing of final order under Section 452 of the Code the necessity of keeping such property intact by imposing onerous conditions, prohibiting its alienation or transfer would not be necessary in law. Further, the production of property which has evidentiary value during evidence is a part of fair trial.

9. Admittedly and undisputedly in the instant case the property i.e. the gold was seized as evidence and thus it can be returned to the owner only after final judgment.

10. In the case of *Sunderbhai Ambalal Desai V. State of Gujarat* (supra) the Hon"ble Supreme Court has observed as follows:

"12. For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken place, then seized articles be handed over to the complainant after:--

(1) preparing detailed proper panchnama of such articles;

(2) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and

(3) after taking proper security.

13. For this purpose, the Court may follow the procedure of recording such evidence, as it thinks necessary, as provided under Section 451, Cr.P.C. The bond and security should be taken so as to prevent the evidence being lost, altered or destroyed. The Court should see that photographs of such articles are attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Still however, it would be the function of the Court under Section 451, Cr.P.C. to impose any other appropriate condition."

11. Therefore, there remains no scope for harbouring even the slightest doubt to accept the legal proposition that the Learned Magistrate is quite empowered to hand over the seized articles to the complainant after taking a bond that those articles would be produced at the time of trial if necessary and that the Court has also power to impose any other appropriate condition. Thus it cannot be said that the impugned orders under challenge are illegal, unreasonable or arbitrary orders. On the other hand I find that those are eloquent and sound orders after due deliberation and on proper appreciation of fact and law. The contention is, therefore, baseless and unacceptable.

12. In the case of *Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke*(2015) 2 AD 129 : (2015) CriLJ 1259 : (2015) 1 Crimes 90 : (2015) 2 JCC 930 : (2015) 1 RCR(Criminal) 570 : (2015) 1 SCALE 457 : (2015) 3 SCC 123 : (2015) 2 SCJ 253 the Hon"ble Supreme Court held in Paragraph 14 of the judgment as follows:

"14.

Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 Cr.P.C. is not to be equated with that of an appeal. Unless the finding of the Court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly

unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

13. In the case in hand I find that the Learned Additional Sessions Judges took into account all the attending facts and circumstances of the case and the available materials on record and thereafter passed the impugned orders affirming the rejection order passed by the Learned Magistrate on 05.01.2013 and by directing the present petitioner to appear and depose as a witness and to produce the seized gold lying in his custody. Therefore, no fault can be found with such orders nor can those be said to be arbitrary, illegal or beyond the jurisdiction warranting any interference by this Court. Accordingly, the petitioner is directed to appear before the Learned Additional Sessions Judge, Fast Track 1st Court, Jalpaiguri to depose and to produce the seized gold as per direction of the Learned Judge. The Learned P.P. is requested to ensure full protection and security with escort to the petitioner so that he can produce the seized gold in Court from his residence and come back without any difficulty.

14. For the aforestated reasons I do not find any merit in the instant Revisional Applications and the same are accordingly dismissed. No order as to costs.

15. The interim order of stay if any stands vacated.

16. Criminal Section is directed to deliver urgent photostat certified copy of this judgment to the parties, if applied for, as early as possible.