

(2020) 01 DEL CK 0507

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 1660 Of 2017

Major General Ss Dhaka

APPELLANT

Vs

CBI

RESPONDENT

Date of Decision : 21-01-2020

Acts Referred:

Constitution Of India, 1950 — Article 227
Prevention of Corruption Act, 1988 — Section 13(1)(e), 13(2)
Indian Penal Code, 1860 — Section 109
Code of Criminal Procedure, 1898 — Section 517
Code Of Criminal Procedure, 1973 — Section 452, 452(1)

Citation : (2020) 01 DEL CK 0507

Hon'ble Judges : Suresh Kumar Kait, J

Bench : Single Bench

Advocate : Dr. Amit George, Alex Joseph, Piyo Harold, Raya Durgam Bharat, Rishabh Dheer, Amol Acharya, Anupam S. Sharrma, Parikshitt Sharma, Apoorv Bansal

Final Decision : Disposed Of

Judgement

Suresh Kumar Kait, J

1. Present petition is filed under section 482 Cr.P.C. read with Article 227 of the Constitution of India seeking discharge of petitioner as surety and endorsement made on FDR of Rs. 15,00,000/- and Rs. 3,00,000/- bearing account No.30591443808 and 31654984400 respectively be removed/cancelled and instructions/directions be given to the bank to encash the said FDRs as and when presented.

2. Brief facts of the case are that the Respondent prosecuted one Mr.Samir Baron Ray, accused no.1 and his wife Dr. Asha Ray, accused no.2 for the offence punishable under section 13(2) of the Prevention of Corruption Act, 1988 and under section 109 of IPC read with Section 13(I) (e) and Section 13(2) of the said Act. Petitioner stood as a surety to accused No.2, for release of cash

amounting to Rs.11,95,600/- found in their house during the search. Ld. Trial Court vide its order dated 23.07.2011 in C.C. No. 06/2013 directed that Rs.11,95,600/- seized in cash from the residence of accused no.2 be released on execution of bank guarantee or security in any other form to the satisfaction of the Court. In compliance of the said order, accused no.2 presented surety bond of Petitioner in form of two FDRs of Rs.15 Lakhs and Rs.3 Lakhs and an endorsement 'not to encash the FDR without the orders of the Ld. Trial Court' was made on the original FDR. On said terms, cash of Rs.11,95,600/- was released. Trial Court vide its judgment dated 29.08.2014 in C.C. No. 06/2013 convicted accused No. 1, Mr.Samir Baron Ray, and acquitted accused No. 2 from all the charges and found her not guilty.

3. As per final judgment dated 29.08.2014, an amount of Rs.11,95,600/-was found to have been received from the sale of shop No. G- 37, Vardhaman City Mall, Dwarka, New Delhi belonging to accused no.2, who has been acquitted. The accused No.1, Mr.Samir Baron Ray, filed an appeal bearing CrI. Appeal No. 1447 of 2014 before this Court and the same is pending in the category of 'Regulars' matters. The respondent herein has also filed an appeal as CrI. Appeal No.181 of 2015 for the purpose of enhancing the sentence given to accused No.1 and the same is also pending in the category of "Regulars" before this Court. However, no appeal has been filed by the respondent against acquittal of accused No.2, Dr. Mrs.Asha Roy.

4. Learned counsel appearing on behalf of petitioner submits that in the aforesaid facts and circumstances, accused no.2 Dr. Mrs. Asha Roy had filed an application bearing CrI.M.A.3692/2016 in CrI.A.1447/2014 to release her passport and sureties. This Court was pleased to consider said application on 02.03.2016 and ordered to move application before Ld. Trial Court. Accordingly, petitioner being the surety, has moved an application before Trial Court and prayed for discharging him as surety, removing/cancelling the endorsement made on FDR of Rs. 15,00,000/- and Rs. 3,00,000/- bearing A/c No.30591443808 and 31654984400 respectively and directing the bank to encash the said FDRs as and when presented. However, respondent filed its reply stating inter alia that "the amount which the applicant has prayed for releasing is case property".

5. In addition to the aforesaid averment, learned Trial Court recorded in its order that 'the application qua which order dated 02.03.2016 was passed by the High Court did not include the present application and the said order was in respect to other application of Dr. Asha Roy for release of passport and sureties etc. who has been acquitted in the matter'. Moreover, Respondent CBI has also verbally submitted before the Trial Court that Petitioner has neither approached this Court for such relief nor got any direction to file such an application before Trial Court and his application cannot be entertained by Trial Court without getting any such permission from this Court as to that of one given to second accused.

6. In view of above, petitioner being a surety and being left with no other option, sought permission of Trial Court to withdraw his application and to approach this

Court for requisite necessary permission. Ld. Trial Court allowed the Petitioner to withdraw application vide its order dated 03.02.2017 in CC No. 06/2013 and granted liberty to him to adopt appropriate recourse available to him.

7. Learned counsel submits, it is settled law that any person standing as a surety, undertakes that accused shall personally remain present in court on each and every date till the trial is pending. But if the accused fails to appear in court, the surety amount will be forfeited. However, in the present case, accused no.2 has been acquitted and the petitioner herein stood surety to said accused, regarding money recorded in raid from house of accused, therefore, there is no reason not to release the FDR furnished by petitioner.

8. On the other hand, learned counsel for respondent submits that regarding movable assets and cash recovered from Flat No. 603, Rio Grande, Fortaleza Complex, Kalyani Nagar, Pune (item No. 38); cash recovered from Room No. 6, Arjun, COD Officers Mess, 58, Kirby Place, Delhi (item No. 39) and cash recovered from Locker No. 227, ICICI Bank, "C" Block, Vasant Vihar, New Delhi (item No. 40) is totalling to an amount of Rs.11,95,600/- . Trial Court has considered that total Rs.18,30,000/- be added as cash in hand at the end of check period presuming that cash received during the search was also a part of sale consideration. It is further observed that cash amount in hand on account of sale consideration received in cash against shop No. G-37, Vardhman City Mall in the sum of Rs.18,30,000/- be also added. However, learned trial Court has acquitted the accused No. 2 by observing that the prosecution has not led any positive evidence so as to prove on record any aiding or abetment made by A2 to commission of the offence. There is not even an iota of evidence that A2 has in any manner instigated, aided, abetted or facilitated the commission of offence. The Court has to be pragmatic while appreciating evidence on record. In context of Indian society, unless and until there is a specific evidence on record, it cannot be presumed that the wife aids and abets or instigates the husband in such type of offences. Accordingly, the Court held that the prosecution has miserably failed to prove any direct evidence in this regard. But, fact remains that total amount recovered in raid, is case property and Accused-1 has been convicted. Therefore, amount may not be released.

9. As discussed above, an amount of Rs.11,95,600/- was recovered from the Flat No. 603, Rio Grande, Fortaleza Complex, Kalyani Nagar, Pune, Cash recovered from Room No. 6, Arjun, COD Officers Mess, 58, Kirby Place, Delhi and Cash recovered from Locker No. 227, ICICI Bank, "C" Block, Vasant Vihar, New Delhi, respectively. It is not disputed that PW-2, Sh. Harbhagwan Gupta, buyer of shop No.G-37, Vardhman Plaza, Sector - 19, Dwarka deposed on oath that he purchased this shop from A2 Dr. Asha Ray through A1 Samir Baron Ray for a consideration of Rs.28 lakhs. The witness proved the agreement to sell dated 14.08.2008 as Ex.PW2/A. It is pertinent to mention here that on the agreement to sell, A1 Samir Baron Ray had signed on behalf of the A2, Dr. Asha Ray. The witness stated that at the time of execution of agreement i.e. 14.08.2008, he

had paid an amount of Rs.1.50 lakhs. The witness also identified photocopies of cheques dated 25.08.2008 in the sum of Rs.1.25 lakhs, Rs.1.95 lakhs, Rs.2 lakhs and Rs.3.30 lakhs issued by PW2, his brother Raj Kumar Gupta, Bal Kishan Gupta and his wife Hemlata in favour of A2. The witness stated that the remaining payment of around 18 lakhs was made by him in cash to A1 on the date when sale deed was registered. However, the witness stated that he had made entire payment before 31.08.2008. PW2 also proved the carbon copy of certificate regarding receipt of entire sale consideration in the sum of Rs.28 lakhs as Ex.PW2/D. As per receipt, out of sale consideration of Rs.28 lakhs, payment of Rs.9.70 lakhs was made by cheque and remaining payment of Rs.18 lakhs was made in cash. In the cross examination, the witness admitted that the final deal took place on 25.08.2008 and on that day, entire payment was made by them to A1 and A2.

10. It is also not in dispute that PW9, Sh. Udesb Sharma, Manager (Accounts) deposed regarding transaction in respect of Shop No. G-37 and G-78, Vardhman City Mall, Sector 23, Dwarka, New Delhi. The witness had handed over documents pertaining to said shop vide production memo dated 29.10.2008, Ex.P113. The witness stated that shop No. G-37 was booked by A2 Dr. Asha Ray and the total payment made by her was Rs.26,52,645/- during the period 20.04.2005 to 25.08.2008. Similarly, Shop No. G-78 was booked by A2 Dr. Asha Ray and the total payment made by her was Rs.57,61,944/- during the check period 25.01.2006 to 01.02.2007.

11. Regarding Shop No. G-37, CBI has included this property at item No.

13 in the list of assets at the end of check period. CBI showed a sum of Rs.26,52,645/- on accounts of this asset. PW-2 in his testimony made a specific statement on oath that he purchased this shop from accused persons for a sum of Rs.28 lakhs. The witness also made a specific statement that he made payment of Rs.9,70,000/- through cheques and Rs.18,30,000/- through cash and final deal took place on 25.08.2008.

12. In case of N. Madhavan vs. State of Kerala, (1974) 4 SCC 1, the Hon"ble Supreme Court observed that the material part of Section 517 Code of Criminal Procedure, 1898 [which has been re-enacted as Section 452(1) in the Code of 1973 reads as follows:]

When an inquiry or trial in any criminal court is concluded, the court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for commission of any offence.

It is further observed in the aforementioned case that the words "may make such order it thinks fit" in the section vest the court with a discretion to dispose of the property in any of the three modes specified in the section. But the exercise of

such discretion is inherently a judicial function. The choice of the mode or manner of disposal is not to be made arbitrarily, but judicially, in accordance with sound principles founded on reason and justice, keeping in view the class and nature of the property and the material before it. One of such well-recognized principles is that when after an inquiry or trial the accused is discharged or acquitted, the court should normally restore the property of class (a) or (b) to the person from whose custody it was taken. Departure from this salutary rule of practice is not to be lightly made, when there is no dispute or doubt - as in the instant case - that the property in question was seized from the custody of such accused and belonged to him.

13. In case of *Savudi Karuppanan Ambalam vs. Guruswami Pillai and Anr.*, held that general rule in such case is that, where a person accused of theft is acquitted and claims as his own the property seized from him by the police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary.

14. In case of *P.K. Rai vs. The State of Madhya Pradesh*, 2016 SCC OnLine MP 8253, wherein the appellant was prosecuted for the offences under section 13(1) (e), read with section 13(2) of the Prevention of Corruption Act before the Special Judge (Prevention of Corruption Act) Bhopal in Special Case No. 08/2004. In the process of his prosecution it was found that he is in possession of the assets beyond his known source of income. Certain valuable documents, securities and ornaments belonging to his wife Smt. Saroj Rai were also seized by the police authorities. During the course of the investigation and prosecution ornaments were also seized from the joint bank locker bearing No. 4 Allahabad Bank, Branch at Arera Colony, Bhopal vide seizure memo. However by detailed judgment dated 05/03/2013 pronounced by trial Court, appellant has been convicted for the aforesaid offences. Against his conviction Criminal Appeal No. 749/2013 (*P.K. Rai v. State of M.P.*) has been filed by the appellant and same is pending consideration before this Court. However, by referring to the findings recorded by the trial court in its judgment dated 05/03/2013 with regard to the assets of his wife Smt. Saroj Rai, which is said to have been raised by her as "Stridhan" from her family during the time of marriage.

15. In the *P.K. Rai (Supra)*, learned counsel for the appellant pointed out that once the trial court has found that these ornaments seized are not assets of the accused/appellant Shri P.K. Rai, then they do not form part of the assets which are found to be disproportionate to the known source of income of appellant, hence power under section 452 of the Cr.P.C. ought to have been exercised and seized property be released. The Court held that "Stridhana" is the property of the wife which did not form part of the disproportionate property of the appellant and therefore seeking direction for release of those properties IA was filed in the appeal, however IA was disposed of by order dated 02/07/2014 in Cr.A No. 749/2013 as referred to herein above. It is a fact that the respondents have not filed that any appeal against the acquittal in so far as portion to the property in

question. That being so, merely because against conviction the appellant preferred Cr.A No. 749/2013, it cannot be a ground for denying return of the property in question belong to his wife to the appellant particularly when the ingredients necessary for release of property as contemplated under section 452 of the Cr.P.C. are available.

16. As per Section 452(1) Cr.P.C., if the assets are confiscated and accused is acquitted, the Court has power to release the recovered assets in favour of accused.

17. In the present case, accused no. 2, Asha Ray has been acquitted and the acquittal has attained finality and amount recovered Rs.11,95,600/- is from the sale proceeds of her shop and petitioner herein stood surety for the said amount, therefore, keeping in view the fact that the trial Court has held that accused No. 2 neither abated nor facilitated the accused No. 1 in commission of offence, therefore, they cannot be held guilty for the offences punishable under the Act. It is on record as mentioned above, the shop G-37 was in the name of accused no. 2, who sold and received an amount of Rs.9,70,000/- by cheque and an amount of Rs.18,30,000/- in cash.

18. It is pertinent to mention here that pursuant to the order dated 12.05.2018, the prayer was amended, whereby the petitioner seeks direction thereby to discharge the surety and the FDR be released in favour of the petitioner and endorsement made thereon be deleted.

19. Accordingly, since FDR is lying in the bank, I hereby direct the Bank Manager of SBI, Greater Noida Branch to release the FDR in favour of the petitioner and delete the endorsement made thereupon and the amount be deposited in the account of the petitioner.

20. In view of the above, the petition is disposed of.

21. Needless to state that the observation made in this order shall not in any way favour the appeal filed by the respondent/ CBI against the accused no. 1.