

(2011) 03 BOM CK 0083

In the Bombay High Court

Case No : Criminal Application No. 4376 of 2009 and Criminal Writ Petition No.1520 of 2009

Mr. Vinoskumar Ramachandran Valluvar

APPELLANT

Vs

The State of Maharashtra
 Essar Logistics Ltd. Vs
Vinoshkumar Ramchandran Valluvar and State of
Maharashtra

RESPONDENT

Date of Decision : 18-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 102(2)(3), 171(2), 204, 227
Penal Code, 1860 (IPC) — Section 120, 420, 465, 468, 471

Citation : (2012) 1 BC 5 : (2011) 113 BOMLR 1132 : (2011) CriLJ 2522 :
(2011) 3 KLT 38 (SN) : (2011) 2 MhLj 908 : (2011) 8 RCR(Criminal) 2412

Hon'ble Judges : Roshan Dalvi, J;R.C. Chavan, J;B.H. Marlapalle, J

Bench : Full Bench

Advocate : Pavan S. Patil, Vishwajeet Mohite and Sandip Babar, instructed by, . Abhay Ostwal, in Criminal application No. 4376/2009 and for Respondent No. 2 in Writ Petition No. 1520/2009 and Mahesh Jethmalani, Pranav Badheka and Prashant Pawar, instructed by Rishi Bhuta and Manoj Khatri, in Writ Petition No. 1520/2009, for the appearing parties; P.A. Pol, Government Pleader for Respondent No. 1, Mahesh Jethmalani, Pranav Badheka and Prashant Pawar, instructed by Rishi Bhuta and Manoj Khatri for Respondent No. 2 in Criminal Application No. 4376/2009 and Pavan S. Patil, Vishwajeet Mohite and Sandip Babar, instructed by , . Abhay Ostwal, in Writ Petition No. 1520/2009, for the Respondent

Judgement

Roshan Dalvi, J.—A short point of law u/s 102 of the Criminal Procedure Code (Cr.P.C.) is a part of this reference. The movable property being a bank account which a Police Officer is entitled to seize during investigation is the subject matter of the reference. The learned Single Judge (Bobde, J.) has formulated the question for reference thus:

Whether Section 102 of the Code of Criminal Procedure requires the issuance of a notice to a person before or simultaneously with the action of attaching the

Bank account?

2. The case of State of Maharashtra Vs. Tapas D. Neogy, has settled the law relating to seizure of bank accounts. The bank accounts are held to be property capable of seizure. We are called upon to answer the question under reference as to when the bank account is seized or sought to be seized, whether a notice to the person who is the account-holder, is required to be given before or at the time of such action of seizure.

3. The main contention on behalf of the person, whose bank account is seized, is the right of natural justice "the right of being heard and being informed of such an action as an aspect of audi alter am partem doctrine. It's contended that his right of natural justice would be impinged, hampered, restricted and even denied if prior to or at the time of the seizure of the bank account he is not given notice of the action. The main contention on the part of the opponent is that the doctrine of Audi alter am partem cannot be extended to a notice ator before seizing of a bank account by a Police Officer as it is a part of an act of an officer during investigation which excludes the procedural requirement of the principle of giving notice as an incident of the right of natural justice of a person. It is contended that it would be counter-productive and self destructive if an Investigating Officer, upon being convinced of such an action to be taken during investigation u/s 102 of the Cr.P.C., would-be enjoined to inform the party whose account is sought to be frozen, of such an act. It is argued that by its very nature and more specially in the current technological set up of banking and financial transactions any person even remotely can operate his account such as to withdraw or transfer its contents completely to thwart the Police action. Hence it is contended that the notice at the time of freezing of the bank account or immediately prior thereto is not required to be given.

4. The action of seizing a movable property, which includes freezing of the bank account, is taken u/s 102 of the Code of Criminal Procedure which runs 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 Magistratehaving 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."

(Emphasis supplied)

This is the stage of investigation. Just as much as the Investigating Officer is vested with the powers of seizing a movable property such as, for example, a knife used during the commission of a particular offence, he is invested with the like powers to seize the bank accounts. It need hardly be stated that for each seizure of movable property, such as a knife, the Investigating Officer is not required to inform any accused whose knife it would be, to inform him of his action either before or at the time of such seizure. The argument relating to the notice is made typical for a bank account which has been held to be capable of seizure by freezing in the case of *Tapas D. Neogy*(supra).

5. On behalf of Respondent No. 1 in the above Petition, whose bank account has been seized, a number of judgments, not directly on this point, have been shown to us.

6. In the case of *Dr. Shashikant D. Karnik Vs. The State of Maharashtra*, it has been held that the provisions of Section 102 are to be complied before an order of seizure is passed. Consequently, the fact of seizure is required to be communicated or reported to the relevant Magistrate. In that case, it was argued that the notice was required to be given to the Petitioner whose account was sought to be seized because it would affect him adversely. It was argued that in such a case the Petitioner would withdraw all the amounts and hence it was further argued that the notice could have been given to him and attachment of the account could have been made simultaneously. In that case, the Division Bench allowed the Petition upon noticing four essential requirements of Section 102 breached by the Investigating Officer.

7. In the case of *R. Chandrasekar Vs. Inspector of Police, Fair Land Police Station Salem and The Dy. Superintendent of Police, C.B., C.I.D.*, the Petitioner challenged the order of freezing his bank account as he was not served any prohibitory order but was only intimated by his bankers about the action. The accounts came to be frozen upon a confessional statement made by the accused relating to a transaction the accused had with the Petitioner. The Petitioner was not at all involved in the case nor had anything to do with the business of the accused. The accused had collected deposits from various persons and had failed to repay. He was charged with offences under Sections 465, 468, 471, 420 and 120 of the Indian Penal Code. His confessional statement showed that the Petitioner's father had received Rs. 5 Lakhs and certain other amounts from him.

It was observed that that was not a case of discovery of property. That had created suspicion that an offence was committed. There were no circumstances attendant upon the bank account or its operation that have led the Police to suspect that some offence had been committed. The bank account was a sequel to the discovery of the commission of the offence. Hence it was held in paragraph 9 of the judgment that that was not sufficient to attract Section 102 of the Cr.P.C., though it was sought to be shown by the Investigating Officer that some funds were suspected to be transferred by the Petitioner" s father to the Petitioner" s bank account. It was held that such a suspicion could have been verified by comparison of the entries in the two accounts and that did not justify freezing of the account of the Petitioner at all. It was held in paragraph 11 of the judgment that mandatory requirement of Section 102 of Cr.P.C.enjoining the Police Officer to report the seizure to the Magistrate and to give notice to the Petitioner and to allow him to operate the bank account subject to executing a bond undertaking to produce the amount in Court when required not having been given and the prohibitory order not served upon the Petitioner, the action u/s 102 was illegal.

8. In the case of Rajamani Vs. The Inspector of Police, Shevapet Police Station, The Inspector of Police, Suramangalam Police Station and The Dy. Superintendent of Police, CBCID, , the bank account of a third party was sought to be frozen. The nexus between the account of the third party and the alleged offence was not established. The seizure was held to be illegal.

9. In the case of Padmini v. Inspector of Police, Tirunelveli, 2008(3) Crimes 716 (Mad.) following the case of R. Chandrasekar (supra), it was held that when no report was made to the Magistrate of the seizure and when at that time no notice was issued to the Petitioner, the seizure could not be justified.

10. In the case of B. Ranganathan Vs. State, Indian Overseas Bank and Allahabad Bank, when the bank account not only of the accused but other members of his family was seized without following the procedure u/s 102 of Cr.P.C. requiring information to be given to the concerned Magistrate with notice of seizure to the accused, the seizure itself was held to be bad. In this case, there was no authority granted to freeze the bank account by the Superintendent of Police.

11. A reading of the aforesaid judgments shows that when the seizure is challenged it may be held to be invalid if the requirements of Section 102 of the Code of Criminal Procedure are not followed by the Investigating Officer or if, based upon the facts of the case, the account of the account holder may be held not prone to seizure. The consideration of issuing the notice, if any, was at the time the seizure was to be reported to the Magistrate and not before or at the time of seizure itself.

12. It may be mentioned that Section 102 requires the Police Officer to report the seizure to the Magistrate having jurisdiction or to his immediate superior. It

may also be mentioned that Section 102 mandated the execution of the bond undertaking in case of a seized property which cannot be conveniently transported till the Court so that custody of it could be given to the person from whom it is seized upon the execution of the bond to produce the property when required before the Court. In a case where the discovery of the account did not create suspicion of the commission of the offence the seizure itself was held unjustified.

13. In the case of *Saran Sabharwal v. Commissioner of Police*, 1988 CRI LJ 241, which preceded the case of *Tapas D. Neogy (supra)*, the question relating to whether the bank account was property was *inter alia* considered which has later been settled in the case of *Tapas D. Neogy (supra)*.

14. The relevant words in Section 102(2)(3) "report the seizure" specifically show that the seizure duly effected has to be reported thereafter (1) to the officer and (2) to the Magistrate. The conjunction "and" in Section 102(3) shows the two-fold action required of the Investigating Officer (1) to report the seizure to the Magistrate having jurisdiction and (2) when the property is seized is not transportable to give custody to any person upon executing a bond. Sub-section (3) though requires the Investigating Officer to report the seizure to the Magistrate does not enjoin him to inform, intimate or report the fact to any accused or any other person whose bank account is frozen or whose property is seized.

15. Our attention has been rightly drawn by the Ld. Counsel on behalf of Respondent No. 1 in the above Petition to the case of *Gurudev datta VKSSS Maryadit and Others Vs. State of Maharashtra and Others*, which lays down the elementary rule of literal interpretation of the plain meaning of a Statute which is clear and unambiguous "such a provision has to be given its plain meaning. No further words are required to be imported therein. Each word is required to be given effect to. Consequently, in Section 102(2)(3) the word "report" must relate only to the two authorities mentioned in the aforesaid two Sub-sections and none else.

16. The Learned Senior Counsel on behalf of the Petitioner drew our attention to the judgment in the case of AIR 2003 SC 2103, which mandates a Court not to read anything into a statutory provision which is plain and unambiguous. It observes thus:

A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said, "Statutes should be construed, notes theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lenigh Valley Coal Co. v. Yensavage*.) This view was reiterated in *Union of India v. Filip*

Tiago De Gama of Vedem VascoDe Gama (SCC p.284, para 16)."

"The legislative *casus omissus* cannot be supplied by judicial interpretative process.

17. The judgment, upon which the point of reference came fully answered relied upon by the learned Senior Counsel on behalf of the Petitioner, is the case of Union of India and another Vs. W.N. Chadha, . The case related to freezing of account in Swiss Bank under a Letter Rogatory. In that case, the Letters Rogatory were sought to be issued upon a Swiss Bank to freeze a particular account by the Special Judge, CBI. This was without notice to the account-holder. Upon the principle of *audi alter am partem* and upon the premise that no one was to be condemned unheard under dehumanizing principle of law and fairness to secure justice, the High Court sought to set aside the Letters Rogatory. That was the investigating stage of collecting evidence. It was contended that the accused had no right to control or interfere in any manner with the evidence which was to be collected and, therefore, that, by its very nature, could not affect any right of an accused giving the accused the extension of the rule of *audi alter am partem* at that stage. In paragraphs 77, 78, 79, 80 and 81 of the judgment, it has been observed thus:

77. The rule of *audi alter am partem* is not attracted unless the impugned order is shown to have deprived a person of his liberty or his property. In the present case, no such consequences have arisen from the letter rogatory. If the letter rogatory is accepted by the foreign Court and acted upon it will then disclose only the relevant facts about the identity of the account holders, quantum of the amounts standing in the names of the individual account holders representing the credit of Bofors money and the nature of such accounts. The follow up consequences would be that the corpus of the offence would be preserved intact from preventing the withdrawal of the money from those accounts or closure of the accounts by the account holder still the merit of the case is decided.

78. In fact the Special Judge in Delhi is not possessed with any power or authority to deprive the liberty of the Respondent residing out of the jurisdiction of Indian Courts and having his property in question in a foreign country. Only in case where a public officer has got such a power, the question of " *airplay in action*" will be attracted. This rule was explained by Lord Denning M.R. in *Schmidt v. Secretary of State of Home Affairs* (1969) 2 CD 149 stating that " where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf."

79. The above explanation is quoted in *Mrs. Maneka Gandhi Vs. Union of India* (UOI) and Another, .

80. The rule of *audi alter am partem* is a rule of justice and its application is excluded where the rule will itself lead to injustice. In *A.S. de Smith's Judicial Review of Administrative Action*, 4th Ed. at page 184, it is stated that in

administrative law, a prima-facie right to prior notice and opportunity to be heard may be held to be excluded by implication in the presence of some factors, singly or in combination with another. Those special factors are mentioned under items (1) to (10) under the heading "Exclusion of the Audi alter am partem rule".

81. Thus, there is exclusion of the application of audi alter am partem rule to cases where nothing unfair can be inferred by not affording an opportunity to present and meet a case. This rule cannot be applied to defeat the ends of justice or to make the law "lifeless, absurd, stultifying and self-defeating or plainly contrary to the commonsense of the situation" and this rule may be jettisoned in very exceptional circumstances where compulsive necessity so demands.

Hence it was observed that:

89. when the investigating officer is not deciding any matter except collecting the materials for ascertaining whether a prima-facie case is made out or not and a full enquiry in case of filing a report u/s 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of Audi alter am partem superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether audi alter am partem is implicit, but where the occasion for its attraction exists at all.

90. Under the scheme of Chap. XII of the Code of Criminal Procedure, there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceeding is in the stage of an investigation by a police officer.

(Emphasis supplied)

Further upon considering the case of *State of Haryana v. Bhajan Lal*, 1992 Supp(1) SCC 335 at 359 upon citing the decision of the Privy Council in the case of AIR 1945 18 (Privy Council), the Supreme Court while distinguishing the right of the accused to hearing under specific Sections 227, 228, 239, 235 and 248 of the Code of Criminal Procedure observed thus:

91. ... the field of investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the Courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation....

92. More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report u/s 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued u/

s 204 of the Code, as the case may be.

The Court observed that under Chapter XII, which related to investigation, the accused had no right of prior notice or hearing as that part of the Code was "silent in this respect". The Court further laid down the object why it was so and that was to preserve secrecy in the mode of investigation lest valuable evidence would be lost. The Court further distinguished the aspect of attachment of money of the accused and freezing of the accounts during investigation. Considering that opportunity of hearing to be given to the accused before taking action would frustrate the proceeding, obstruct the action, defeat the ends of justice and make the provisions of law relating to investigation lifeless, absurd and self-defeating, it set out the total lack of statutory obligations in that behalf.

18. It is, therefore, clear that like any other property a bank account is freezable. Freezing the account is an act in investigation. Like any other act, it commands and behoooves secrecy to preserve the evidence. It does not deprive any person of his liberty or his property. It is necessarily temporary i.e. till the merit of the case is decided. It clothes the Investigating Officers with the power to preserve a property suspected to have been used in the commission of the offence in any manner. The property, therefore, requires to be protected from dissemination, depletion or destruction by any mode. Consequently, under the guise of being given information about the said action, no accused, not even a third party, can overreach the law under the umbrella of a sublime provision meant to protect the innocent and preserve his property. It would indeed be absurd to suggest that a person must be told that his bank account, which is suspected of having been used in the commission of an offence by himself or even by another, is being frozen to allow him to have it closed or to have its proceeds withdrawn or transferred upon such notice.

19. The question before us, therefore, is stark in its framing. The word "before or simultaneously" in the question specifically requires us to consider whether before freezing the account or at the time of freezing the account a notice has to be issued upon the concerned person. Our answer can only be in the negative. Section 102 of the Code of Criminal Procedure does not require issuance of notice to a person before or simultaneously with the action of attaching (his) bank account. We answer accordingly.

20. The above Criminal Application and the Criminal Writ Petition be sent to the concerned Court for disposal on merits.