IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 20.12.2022
Pronounced on:23.12.2022

CRM(M) No.223/2022

RUQAYA AKHTER ... PETITIONER(S)

Through: - Mr. Bhat Fayaz, Advocate.

Vs.

UT THROUGH CRIME BRANCH …RESPONDENT(S)

Through: - Ms. Asifa Padroo, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged order dated 24.03.2022 passed by Special Judge, Anti-Corruption, Kashmir, Srinagar, whereby application of the petitioner for defreezing of her bank account has been partly allowed and she has been permitted to operate salary transactions from her account but at the same time the amount that stood to the credit of her bank account on the date of freezing of her account has been allowed to remain frozen.

2) It appears that a preliminary verification was conducted by the respondent relating to fake recruitment orders in respect of 33 candidates as Junior Assistants and Orderlies in the office of Advocate General, Srinagar. After conducting the preliminary verification, the respondent registered FIR No.56/2021 for offences

under Section 13(D) of Prevention of Corruption Act read with Sections 420, 467, 468, 471, 120-B of IPC and 66 IT Act and started investigation of the case. During the investigation of the case, the bank statement of account pertaining to main accused Mohammad Yaqoob Bhat was obtained which revealed that an amount of Rs.1.00 crore has been credited into his bank account with effect from 01.01.2018 to 20.07.2021 out of which Rs.48.00 lacs has been credited by the candidates figuring in the fake appointment order. It was also found that an amount of Rs.29.00 lacs has been credited into the said account by certain employee of Advocate General's office including the petitioner herein who is working as Ward and Watch in the Advocate General's office at Srinagar. It was also revealed that 20 candidates were introduced to main accused Mohammad Yaqoob Bhat by the petitioner and many other candidates have paid amount in cash to the petitioner and transferred amount into her account No.12966 and account No.9063. It has also been found that an amount of Rs.12.90 lacs has been transferred from the account of petitioner to the account of main accused and that an amount of Rs.4.72 lacs has been retained by her as her share in the illegal transactions. Accordingly, account No.12966 of the petitioner was seized on 10.12.2021 and as on said date, a credit balance in her account was Rs.4,60,818.40/.

3) The petitioner filed an application on 19.02.2022 before the learned Special Judge seeking defreezing of her bank account. It is pertinent to mention here that prior to that, another application was made by

the petitioner before the said Court but without any success. The learned trial court after hearing the parties permitted the petitioner to operate the account to the extent of salary transactions whereas a further direction was issued that the amount that was lying in the account of the petitioner at the time of its seizure shall remain frozen.

4) The petitioner has thrown challenge to the aforesaid order, primarily, on the ground that the requirements of Section 102(3) of the Cr. P. C have not been adhered to by the respondent before freezing the account of the petitioner, inasmuch as the matter has not been reported to the concerned Magistrate.

5) I have heard learned counsel for the parties and perused the material on record.

6) There is nothing in the objections filed by the respondent to indicate that the matter regarding freezing of bank account of the petitioner has been at any point in time reported by the respondent to the concerned Magistrate though the petitioner has taken a specific plea in her petition in this regard. The question that falls for consideration is as to what would be the effect of non-furnishing of the report to the concerned Magistrate about the seizure of petitioner's bank account in the instant case. Before answering this question, it would be apt to refer to the provisions contained in Section 102 of the Cr. P. C. It reads as under:

> *"**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, 2 [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."*

7) From a perusal of the aforesaid provision, it is clear that a police officer after seizing any property, has to forthwith report the seizure to the Magistrate having jurisdiction and in case it is not convenient to transport the seized property to the court, he may give custody thereof to any person on his executing a bond undertaking to produce the property as and when required.

8) There has been a divergence of opinion of different High Courts about the question as to whether the provisions contained in Section 102(3) of the Cr. P. C are mandatory or directory in nature.

While the High Courts of Madras in the case of **Tmt. T. Subbulakshmi and Ors. vs. The Commissioner of Police,** MANU/TN/1718/2013, Bombay High Court in the case of **Manish Khandelwal and Ors. vs. State of Maharashtra and Ors.** MANU/MH/20141/2019, and Delhi High in the case of **Swaran Sabharwal vs. Commissioner of Police,** MANU/DE/0066/1990, have taken a view that the provisions contained in Section 102(3) of the Cr. P. C are mandatory in nature and in case the same are not followed, the order of freezing the bank account is liable to be quashed. However, a contrary view has been taken by the Punjab & Haryana High Court in the case of **Narottam Singh Dhillon and another vs. State of Punjab (**Criminal Misc. No.43768 of 2004 dated 10th January, 2007) as also by a Division Bench of Allahabad High Court in the case of **Amit Singh vs. State of UP** (Criminal Misc. Writ petition No.11201 of 2021 decided on 18.04.2022).

9) In order to determine as to which of two views is more reasonable and acceptable, the provisions contained in Section 102 of the Cr. P. C are required to be meticulously analyzed. Upon undertaking such an exercise, it is revealed that the purpose of reporting the seizure to the Magistrate is to enable the Magistrate to pass orders as regards the disposal of the seized property. Therefore, in my opinion, whether the non-adherence to the provisions contained in Section 102(3) of the Cr. P. C would cause prejudice to the owner of the property or a person who is interested in the said property will be a question of fact, which has to be determined on a

case-to-case basis. If non-adherence to the said provision in a particular fact situation results in prejudice to the owner/person interested by of the seized property, the same would be fatal to the act of seizure but in a case where no prejudice would be caused to the owner/person interested by non-adherence to this provision, the same may not render the seizure of the property illegal. To illustrate, in a case where the property seized is subject to speedy decay or in a case where the property will get devalued if its disposal is not decided immediately, the owner/interested person will certainly get prejudiced by not informing the Magistrate about its seizure, but in a case where nature of the property is such that its delayed disposal will not affect its value, the non-adherence to the provisions contained in Section 102(3) of the Cr. P. C may not be fatal to the seizure of the property. Thus, in a case where the subject matter of the seizure is not going to be devalued or its delayed disposal would not result in prejudice to the owner/interested person, the provisions of Section 102(3) of the Cr. P. C would not be mandatory and non-adherence to the said provision would not render the seizure illegal.

10) Apart from the above, the provisions of the Criminal Procedure Code do not provide for consequences of non-adherence to the provisions of Section 102(3) of the Cr. P. C. From this, it can be inferred that the said provision is not mandatory in nature even though the word “shall” has been used in the provision.

11) The view taken by the High Courts of Delhi, Bombay and Madras is based upon the reasoning that the word "shall" appears in Section 102(3) of the Cr. P. C, meaning thereby that the intention of the Legislature was to make it mandatory and once this mandatory provision of reporting the matter relating to seizure to the Magistrate is not followed, the seizure itself becomes illegal. While rendering the view that the provisions of Section 102 (3) of the Cr. P. C are mandatory in nature and once the same are not adhered to, the seizure itself becomes illegal, the High Courts of Delhi, Bombay and Madras have not taken into consideration the aspects of the matter that have been discussed in the preceding paras.

12) The High Court of Punjab & Haryana in the case of **Narottam Singh Dhillon** (supra), has discussed in detail all aspects of the matter and observed as under:

> *"(10) Before proceedings further, it may be seen if the provisions of Section 102(3) Cr.P.C. can be said to be mandatory or directory in nature. It is well understood that non-observance of a mandatory condition is fatal to the validity of the action. However, non-observance would not matter if the condition is found to be merely directory. In other words, it is not every omission or defect which entails the drastic penalty of invalidity. As per Prof. Wade some conditions may be both mandatory and directory: mandatory as to substantial compliance, but directory as to precise compliance. Giving example in this regard, Prof. Wade observed that where a local authority was empowered to assess coast protection charges on landowners within six months but did so after twenty-three months, the delay was so excessive that there was total non-compliance with the condition, and the assessments were void; but had the excess been a few days only, they would probably have been valid. It was observed in* ***Re-Bowman*** *that the Court may readily*

find reasons for overlooking trivial or unimportant irregularities. It is a question of construction, to be settled by looking at the whole scheme and purpose of the Act and by weighing the importance of the condition, the prejudice to private rights, and the claims of the public interest. It was further observed that in any case, judges faced with these questions of construction may regard categories such as mandatory and directory as presenting `not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another'. Even it is possible for whole areas of statutory law to be treated as merely directory. Requirements which are less substantial, and more like matters of mere formality, may fall on either side of the line. In short, it will depend upon the provisions of the statute. Where the effect is penal scrupulous observance of statutory conditions can normally be required. The Hon'ble Supreme Court in the case of ***Nasiruddin and Ors. v. Sita Ram Agarwa****l, held that it is well-settled that the real intention of the legislation must be gathered from the language used. It may be true that the use of the 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 found out from the scheme of the Act. It is also equally well-settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character. Referring to Sutherland, Statutory Construction, 3rd edition, Vol.3 at p.107, the Hon'ble Supreme Court pointed out as under:*

> *Yet there is another aspect of the matter which cannot be lost sight of. It is a well-settled principle that if an 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 therefor are specified..... It is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p.109, it is pointed out that often the*

> *question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow noncompliance with the provision.*

At p.111 of the above noted edition, it is stated as follows:

> *As a corollary of the rule outlined above, the fact that no consequences of noncompliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive.*

(11) Applying the above-noted test to the contents of the provisions of Section 102(3) Cr.P.C., it can be seen that after laying down the requirement of reporting the seizure, the section further itself provides for exception in cases where the property seized is such that it cannot be conveniently transported to the court etc.... The consequences of non-reporting about the seized property have also not been provided under the section. In addition, the requirement of reporting in the manner, as stated, is on the part of a public functionary and in view of the law laid down by the Hon'ble Supreme Court, as noticed above, the same is required to be held to be directory unless the consequences thereof are specified. Since the consequences therefor have not been specified, it would be safe to say that requirement of Section 102(3) Cr.P.C. cannot be termed as mandatory but would be directory in nature."

13) Again, in **Amit Singh's** case (supra), a Division Bench of Allahabad High Court, while differing with the view that the provisions contained in sub-section (3) of Section 102 of the Cr. P. C are mandatory in nature, observed as under:

> *"(16) The consequences of non-reporting about the seized property have not been provided under the section. In addition, the requirement of reporting in the manner, as stated, is on the part of a public functionary and in view of the law laid down by the Hon'ble Supreme Court, as noticed above, the same is required to be held to be directory unless the consequences thereof are*

specified. Since the consequences have not been specified, it would be safe to hold that requirement of Section 102(3) Cr.P.C. cannot be termed as mandatory but would be directory in nature.

(17) The Scheme for disposal of property under the Code is provided under Chapter XXXIV of the Cr.P.C. Section 451 provides that when any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial. Section 452 provides the order for disposal of property at conclusion of trial. Section 457 (1) provides that 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. 9 Sub-section (2) provides that 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.

(18) In view of above scheme of the Code the purpose of information given to the Magistrate regarding seizure of property by the Police Officer is merely to facilitate its disposal in accordance with law during pendency of trial or subsequent thereto. Therefore non reporting of the seizure forthwith, as provided under Section 102(3) Cr.P.C., shall not ipsofacto render the seizure illegal particularly as no period is specified and it's consequences have not been provided. Therefore when on an application moved by the petitioner, the same has been informed, the petitioner may move the

concerned Magistrate for the custody of the property i.e. unfreezing of the account of the petitioner, which may be dealt with in accordance with law and on it's own merit.

(19) The Delhi High Court, in the case of Ms.Swaran Sabharwal Versus Commissioner of Police (Supra), quashed the prohibitory order on the ground that the moneys in the bank does not constitute "case property". In the case of Dr. Shashikant D. Karnik Versus The State of Maharashtra (Supra), the Bombay High Court allowed the petition on the ground that all the three requirements of Section 102 Cr.P.C. have not been complied. It appears that in this case a direction was issued not to permit operation of the bank accounts of petitioner therein and his family without seizure therefore the court was of the view that there cannot be an interim order and thereafter it's continuation. The authorities had also failed to ascertain, by the time it was decided, as to whether there was any connection of it with the alleged crime. The court has only mentioned that sub-section (3) of Section 102 lays down a mandate without any 10 finding as to whether it is mandatory or directory. The Court without any provision has also observed that there is a fourth requirement of law that notice is required to be given before stopping the operation of the account. In the absence of any specific stipulation in the statute or necessary consequence flowing from the scheme contained in the Act, we are not inclined to subscribe to such a view.

(20) In the present case we have considered the issue in detail and are of the view that sub-Section (3) of Section 102 Cr.P.C. is directory in nature and once the court has been informed of freezing of bank account on an application moved by the petitioner, the requirement of statute stands fulfilled. Deprivation of property (freezing of bank account) otherwise being as per law, the argument that Article 300-A of Constitution is violated cannot be accepted……"

14) From the foregoing enunciation of the law, it is clear that once the consequences of non-adherence to the provisions of law are not given in the Statute, it is to be inferred that the said Statute is

directory in nature. It is also clear that if no prejudice is caused to the owner of a property by non-reporting of seizure to the concerned Magistrate, it cannot be a case of illegality but such an omission may only be an irregularity. Th seizure of bank account, having regard to the nature of property involved, on account of its non-reporting to the concerned Magistrate, therefore, would not render its seizure illegal.

15) In the instant case, the petitioner has immediately, after the seizure, approached the Special Judge seeking defreezing of his bank account and, as such, it is not a case where because of non-reporting of the seizure to the Magistrate, the petitioner was deprived of her right to approach the Magistrate for seeking disposal of the property in her favour. Thus, the seizure of the bank account of the petitioner, in the facts and circumstances of the case, cannot be termed as illegal.

16) For the foregoing reasons, I do not find any ground to interfere with the impugned order passed by the learned Special Judge. The petition lacks merit and is dismissed accordingly.

17) A copy of this order be sent to learned Special Judge for information.

(SANJAY DHAR)
JUDGE

Srinagar,
23.12.2022
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***