

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Extraordinary Jurisdiction)

S.B.: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P. (Crl.) No. 01 of 2018

NHPC Ltd. Rangit Power Station,
South Sikkim.

.... Petitioner

Represented By:

Shri Rajesh Kumar
(Manager Mechanical)
S/o Late Madan Prakash
Aged about 59 years,
R/o NHPC Rangit Power Station, South Sikkim
P.O. & P.S. Hingdum, East Sikkim.

versus

State of Sikkim,
Through,
The Public Prosecutor,
High Court of Sikkim,
East Sikkim.

.... Respondent

**Application under Article 226/227 of the Constitution of
India, 1950.**

Appearance:

Mr. A. K. Upadhyaya, Senior Advocate with Ms. Aruna Chettri, Ms. Hemlata Sharma and Mr. Sonam Palzor Lepcha, Advocates for the Petitioner-Corporation.

Mr. Karma Thinlay, Additional Public Prosecutor with Mr. S. K Chettri and Ms. Pollin Rai, Assistant Public Prosecutors for the State-Respondent.

Mr. Jigme P. Bhutia and Ms. Rajani Rizal, Advocates for the Complainant.

ORDER

(30.08.2018)

Bhaskar Raj Pradhan, J

1. The Petitioner is NHPC Limited, a Government of India Enterprise. The present Writ Petition seeks to assail the order dated 29.12.2017 passed by the learned Judicial Magistrate, First Class, East Sikkim (learned Judicial Magistrate) rejecting the application filed by the Petitioner Corporation for release of the vehicle seized by the Investigating Officer in connection with Sadar Police Station Case No. 51 of 2017 dated 04.03.2017 under Section 420/406/465/471/120B/381/411 of the Indian Penal Code, 1860 (IPC).

2. The First Information Report (FIR) dated 04.03.2017 was lodged by Phigu Tshering Bhutia and Sonam Palzor Bhutia (the Complainant). In the said FIR it was alleged that Phigu Tshering Bhutia had become acquainted with Sudish Kumar Yadav claiming to be the proprietor of M/s Naman Equipments Services, an authorised dealer of Escorts Construction Equipment Limited in West Bengal and Sikkim. It was alleged that Sudish Kumar Yadav induced the said Phigu Tshering Bhutia to buy Hydra-14 Crane bearing Chasis number 195B491621 and Engine number S433-A48180 (the said machine) with an assurance that he would engage it with some private company and pay him a sum of ₹50,000/- (Rupees fifty thousand) as monthly rental. It is stated that Phigu Tshering

Bhutia thereafter, requested his cousin Sonam Palzor Bhutia to apply for hypothecation loan from IndusInd Bank Limited. Sonam Palzor Bhutia then got the said machine financed from IndusInd Bank Limited and also received a tax invoice dated 09.08.2012 amounting to ₹15,30,000/- (Rupees fifteen lakhs thirty thousand) only in his name and the motor insurance cover note dated 09.08.2012 in favour of M/s Naman Equipments Services. Phigu Tshering Bhutia states in the FIR that after the down payment was made to the Indusind Bank Limited, the said machine was received by Sudish Kumar Yadav on 09.08.2012 as he assured that the said machine would be given on lease to some construction company/contractor/power projects and lured him. It was alleged that to win over his confidence, Sudish Kumar Yadav initially paid him a sum of ₹4 lakhs on 21.09.2012 as advance payment and thereafter a further sum of ₹13,17,000/- (Rupees thirteen lakhs seventeen thousand) which amounts to rental payment of 26 months till October, 2014. It is alleged that when Sudish Kumar Yadav stopped making payment after October, 2014 he requested him to pay the entire rental amount due and return the machine to which Sudish Kumar Yadav requested for time. It is further alleged that the EMIs to the Bank closed on 27.08.2015 after full and final payment was made by Sonam Palzor Bhutia. Various efforts to contact Sudish Kumar Yadav went in vain after which Phigu Tshering Bhutia made inquiries with Escorts

Private Limited, Kolkatta after which he came to know that as per their records the said machine had been sold to the Petitioner Corporation in the year 2013 itself and registered in its name. It is alleged that Phigu Tshering Bhutia personally visited the Petitioner's office and made inquiries and got confirmation through documents that the Petitioner Corporation had bought the said machine from Sudish Kumar Yadav in the year 2013. It is stated that both Phigu Tshering Bhutia and Sonam Palzor Bhutia were unaware of these facts. Phigu Tshering Bhutia further alleges that in the month of February, 2017 he visited the IndusInd Bank Limited and inquired as to how they had issued the "*No Objection Certificate*" for the sale of the said machine which was still under hypothecation in the year 2013. He complains that the officials were unable to provide any satisfactory reply and therefore he doubted that the officials of IndusInd Bank Limited and Sudish Kumar Yadav were hand in glove in the illegal transaction. It is further alleged that the officials of the Petitioner Corporation has by dishonest means bought the stolen property without any clearance from lawful authorities. On the aforesaid allegations FIR was registered against Sudish Kumar Yadav *alias* Sudish Yadav, officials of IndusInd Bank Limited, Gangtok and official of NHPC Limited.

3. The Petitioner Corporation claims that it is the absolute owner of the machine which was seized on 15.09.2017 by the

Investigating Officer. The Petitioner Corporation therefore, filed an application for release of the said machine on 20.09.2017 which was rejected by the impugned order dated 25.09.2017.

4. The learned Judicial Magistrate while rejecting the said application of the Petitioner Corporation has held that there was dispute regarding ownership of the said machine which has not yet been determined. The learned Judicial Magistrate was also of the view that in spite of knowledge that there was another claimant of the said machine the Petitioner Corporation did not make them a party to enable them to file any objection. The learned Judicial Magistrate opined that if the said machine is released without first determining to whom the said machine actually belongs, there is every possibility that huge commotion and unrest may be created between the two parties claiming ownership. To ensure that the machine does not get rusted or become defunct the Investigation Officer was directed to take steps to start and run the said machine for its upkeep and maintenance and keep necessary records.

5. The Petitioner Corporation has preferred the present petition under Article 226/227 of the Constitution of India for setting aside the impugned order dated 29.12.2017 passed by the learned Judicial Magistrate and for further direction upon the Respondent to release this machine to the petitioner.

6. The State-Respondent has filed its counter-affidavit. It is pleaded that Phigu Tshering Bhutia lodged the complaint on 04.03.2017 which was registered at the Sadar Police Station as an First Information Report (F.I.R.). During the investigation tax invoice and bank statement were seized from the complainant. On 02.05.2017 the original documents of the said machine were received from the Petitioner Corporation. On 14.09.2017 the said machine was seized. On 21.09.2017 a release petition was filed by the Petitioner Corporation which was objected to by the Investigating Officer and therefore, the said machine was not released. On 23.09.2017 a release petition was preferred by the complainant which was objected to by the Investigating Officer and therefore the, said petition was also rejected. The State-Respondent thus, submits that the ownership of the machine not yet determined, the machine cannot be released.

7. This Court on 22.05.2018 directed issuance of notice upon one of the Complainant-Sonam Palzor Bhutia as the State-Respondent would submit that he was the one who claimed to have purchased the said machine, pursuant to which he is represented by Mr. Jigme P. Bhutia, learned Counsel.

8. On 18.07.2018 the learned Counsel for the respective parties as well as the Complainant were heard in part. The

Complaint was granted liberty to file any document they seek to rely upon.

9. On 20.07.2018 the Complainant filed a reply affidavit stating that the said machine was purchase by the Complainant with the financial assistance of IndusInd Bank Limited. Since it was purchased with financial assistance there was a hypothecation endorsement in the insurance policy of the said machine. The loan was duly repaid by the Complainant on 21.05.2016 and no objection certification obtained from the IndusInd Bank Limited. It is stated that the Complainant never sold the said machine nor gave consent to sell the said machine and therefore the Petitioner Corporation claim is baseless. It is submitted that unless the actual owner conveys title in favour of the subsequent owner no title in respect of the subject matter is created. It is also claimed that the Complainant has paid for the insurance policy of the machine till date. It is submitted that the learned Judicial Magistrate having exercised her original jurisdiction under the Code of Criminal Procedure, 1973 (Cr.P.C.) and passed a judicial order by exercising her judicial mind the writ petition was not maintainable. The Complainant would also submits that since there are rival claims about the ownership of the machine which is required to be properly adjudicated by a competent Civil Court after considering all the material on record and after adducing all the evidence the Writ Court should not interfere. In support of the

factual submissions made the Complainant has filed the following documents:

- 1) Copy of the FIR lodged by the Complainant.
- 2) Copy of the tax invoice dated 09.08.2012 for an amount of ₹15,30,000.00 and the delivery order of IndusInd Bank Limited to M/s Naman Equipment Services authorising it to deliver Hydra 14 (Escorts make) vehicle/chassis/ equipment in favour of the complainant under hypothecation and loan agreement.
- 3) Copy of statement of loan account of the Complainant in IndusInd Bank Limited and No Due Certificate dated 02.03.2017 issued by the IndusInd Bank Limited in favour of the complainant.
- 4) Copies of insurance policies.

10. I.A. No. 01 of 2018 filed by the Petitioner Corporation which has been allowed by this Court vide order dated 30.08.2018 seeks to rely upon the following documents:

- 1) Copy of the supply order made by the Petitioner Corporation upon M/s Naman Equipment Services, dated 11.02.2013 for purchase of the Hydra Crane- (Escorts make) with terms and conditions and schedule of quantity and prices.

- 2) The Petitioner Corporation's Inspection Report of inspection of the machine.
- 3) Tax invoice of M/s Naman Equipment Services dated 16.03.2013 for an amount of ₹15,19,800.00/- (Rupees fifteen lakhs nineteen thousand eight hundred) for the said machine along with the Petitioner Corporation internal records of release of payments.
- 4) Extract of the register maintained by the Holder of Trade Certificate i.e. M/s Naman Equipment Services dated 16.03.2013.

11. I. A. No.02 of 2018 filed by the Petitioner Corporation which was also allowed vide order dated 30.08.2018 sought to rely upon another tax invoice dated 16.03.2013 with the correct engine number as against purported tax invoice with the incorrect engine number filed earlier.

12. I.A. No. 03 of 2018 filed by the Petitioner Corporation has been allowed by this Court vide order dated 14.08.2018. The application places the copies of statement of accounts of the Petitioner Corporation maintained with the State Bank of India showing details of payment made to M/s Naman Equipment Services with regard to the purchase of the machine. It is stated that the Petitioner Corporation paid ₹13,67,820.00 + ₹46,000.00 + ₹1,51,979.00 = ₹15,65,799 (Rupees fifteen lakhs sixty five thousand seven hundred ninety nine) to M/s Naman

Equipment Services. The said payments were made on or before 02.03.2013.

13. I.A. No. 04 of 2018 was filed by the State-Respondent which was also allowed by this Court vide order dated 14.08.2018. The said application places on record statement under Section 161 Cr.P.C. recorded of Sudish Kumar Yadav as well as document seized from him i.e.:

- 1) One cancellation order of Hydra 14 Crane dated 28.09.2012 purportedly signed by the Complainant addressed to M/s Naman Equipment Services stating that due to cancellation of work order with the Department he no longer requires the machine and therefore request cancellation of the said order of the machine and refund of the amount of payment made through IndosInd Bank Limited to enable him to close his loan account with the said bank.
- 2) One Debit note dated 03.10.2012 under the signature of the authorised signatory of M/s Naman Equipment Services for Escorts Hydra 14 Crane machine of ₹15,30,000.00 (Rupees fifteen lakhs thirty thousand) issued against tax invoice No.NES/ESCORTS/SLG/12-13/12 dated 09.08.2012 for the machine with an endorsement on it "*received for Sonam Palzor Bhutia 03.10.2012*" with a signature under the endorsement.

- 3) M/s Naman Equipment Services Communication dated 04.10.2012 to the Branch Manager IndosInd Bank Limited informing that vide invoice dated 09.08.2012 one Sonam Palzor Bhutia had booked one Hydra 14 Crane but in spite of repeated follow up he did not take over the machine and ultimately a letter dated 28.09.2012 was received from him requesting to cancel the said order and refund the amount to liquidate the loan.

14. I.A. No. 05 of 2018 filed by the State-Respondent was also allowed by this Court vide order dated 14.08.2018 by which the following documents were brought on record:

- 1) Order dated 23.09.2017 and 25.09.2017 passed by the learned Judicial Magistrate, East Sikkim on an application filed by the Complainant for release of the machine. The order dated 25.09.2017 declines the application for release of the said machine filed by the Complainant on the ground that the said machine is being claimed by two persons.
- 2) Axis Bank statement of account of the Complainant Shri Phigu Tshering Bhutia reflecting the various payments received from Sudish Kumar Yadav.

15. Heard Mr. A. K. Upadhyaya, learned Senior Advocate for the Petitioner Corporation, Mr. Karma Thinlay, Additional

Public Prosecutor for the State-Respondent and Mr. Jigmi P. Bhutia, learned Advocate for the Complainant.

16. Section 451 Cr.P.C. provides:

“451. Order for custody and disposal of property pending trial in certain cases.- *When any property is produced before any Criminal Court during an 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, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.*

Explanation.- For the purposes of this section, "property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.”

17. Evidently Section 451 Cr.P.C. provides for an order for “*proper custody and disposal of property*” pending trial and not determination of title after a civil trial. The Criminal Court only provides for “*proper custody*” having regard to the nature of such property. The entrustment of the property to rival claimants does not amount to adjudication of any competing rights of the claimants. Section 451 Cr.P.C. provides for interim custody of the property produced before the Court during the trial. An order passed under this provision is temporary and intended to protect the property pending the trial. The person who is entrusted with the property even if he be the actual owner acts as a representative of the Court.

18. In re: **Sunderbhai Ambalal Desai v. State of Gujarat with C.M.**

Mudaliar v. State of Gujarat¹ the Supreme Court would hold:

“7. In our view, the powers under Section 451 CrPC should be exercised expeditiously and judiciously. It would serve various purposes, namely:

1. owner of the article would not suffer because of its remaining unused or by its misappropriation;

2. court or the police would not be required to keep the article in safe custody;

3. if the proper panchnama before handing over possession of the article is prepared, that can be used in evidence instead of its production before the court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and

4. this jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

8. *The question of proper custody of the seized article is raised in a number of matters. In Basavva Kom Dyamangouda Patil v. State of Mysore [(1977) 4 SCC 358 : 1977 SCC (Cri) 598] this Court dealt with a case where the seized articles were not available for being returned to the complainant. In that case, the recovered ornaments were kept in a trunk in the police station and later it was found missing, the question was with regard to payment of those articles. In that context, the Court observed as under: (SCC p. 361, para 4)*

“4. The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police it ought not to be retained in the custody of the court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the court or should be in its custody. The object of the Code seems to be that any

¹ (2002) 10 SCC 283

property which is in the control of the court either directly or indirectly should be disposed of by the court and a just and proper order should be passed by the court regarding its disposal. In a criminal case, the police always acts under the direct control of the court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the court exercises an overall control on the actions of the police officers in every case where it has taken cognizance.”

(Emphasis supplied)

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15. *Learned Senior Counsel Mr Dholakia, appearing for the State of Gujarat further submitted that at present in the police station premises, a number of vehicles are kept unattended and vehicles become junk day by day. It is his contention that appropriate directions should be given to the Magistrates who are dealing with such questions to hand over such vehicles to their owners or to the person from whom the said vehicles are seized by taking appropriate bond and guarantee for the return of the said vehicles if required by the court at any point of time.*

16. *However, the learned counsel appearing for the petitioners submitted that this question of handing over the vehicle to the person from whom it is seized or to its true owner is always a matter of litigation and a lot of arguments are advanced by the persons concerned.*

17. *In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.*

18. *In case where the vehicle is not claimed by the accused, owner, or the insurance company or by a third person, then such vehicle may be ordered to be auctioned by the court. If the said vehicle is insured with the insurance company then the insurance company be informed by the court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take possession, the vehicles may be sold as per the direction of the court. The court would pass such order within a period of six months from the date of production of the said vehicle before the court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared.”*

[Emphasis supplied]

19. In re: **Ashok Kumar v. State of Bihar & Ors.**² the Supreme Court would direct:

“2. We do not think it necessary to keep the vehicle in the compound of the court indefinitely for a very long time till the final disposal of this case. It is more advisable to entrust it to the registered owner on behalf of the court under certain conditions. We, therefore, direct the court in whose custody the vehicle is presently kept to release the same to the appellant on the following conditions:

1. He shall execute a bond in a sum of Rs 1,00,000 (one lakh) with two solvent sureties to the satisfaction of the Chief Judicial Magistrate, Muzaffarpur.

2. He must satisfy the court that he is the registered owner of the vehicle.

3. He shall not allow his son Deepak Singh to use the vehicle until disposal of the prosecution case against him. He shall file an undertaking in court to that effect.

4. He shall produce the vehicle either before the court or before such other authorities as the court may direct.

5. He will not transfer the vehicle to anybody else nor possession of the same be parted with until disposal of the case.”

[Emphasis supplied]

20. In re: **Rajendra Prasad v. State of Bihar & Anr.**³ the Supreme Court would direct:

“2. We are not deciding the question as to the title of the vehicle in dispute nor the correctness of the rival versions regarding the transactions relating to the vehicle. We do not want the vehicle to remain in the compound of the police station exposed to heat and cold because the automobile is likely to be lost to all in such situation. To avert this situation, we are inclined to entrust it temporarily to the appellant who is the ostensible name-holder in the registration certificate. The custody of the vehicle with the appellant will be on behalf of the court and this arrangement is only till the stage when the court passes the order regarding disposal of the property on conclusion of the trial. We direct the trial court to release the vehicle to the appellant on the following conditions:

“(a) The appellant will produce the original registration certificate (as issued by the Transport Office. If it is a ‘duplicate’

² (2001) 9 SCC 718

³ (2001) 10 SCC 88

he must obtain a certificate from RTO that duplicate was issued from the office).

(b) The appellant shall execute a bond in a sum of Rs 2 lakhs with two solvent sureties that he will produce the vehicle back in court whenever required by the court.”

[Emphasis supplied]

21. In re: ***Shyamal Kumar Ghosal v. State of Sikkim***⁴ this Court would hold:

“It is settled position that in a proceeding under Section 451, Cr.P.C. custody of property ought to be given to the person from whom it had been seized or in whose name it stands registered.”

22. The rejection of the release petition admittedly preferred by the Complainant has not been challenged. It is common ground that the machine was seized from the possession of the Petitioner Corporation. On the submission of Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor this Court vide order dated 22.05.2018 permitted the Petitioner Corporation to visit the Hingdam Police Station occasionally and maintain the machine under supervision of the authorities of the police station and to maintain proper records thereof. It is quite evident that the Investigating Officer is not in a position to maintain the machine and keep it safe from wear and tear. The pendency of the investigation may not be a ground to fulfil the mandate of Section 451 Cr.P.C. Failure to determine the

⁴ 2013 Cr.L.J. 628

ownership of the machine has led to the learned Judicial Magistrate declining the release petition filed by the Petitioner Corporation as well as the Complainant. Failure of the Petitioner Corporation to make the Complainant a party should not have deterred the learned Judicial Magistrate to issue summons upon the Complainant and hear him for the just determination of the case. The machine is not a small item which can be safely kept in a bank for safe custody. If the machine is not regularly started, used and maintained the machine may become useless before the determination of the present investigation. Admittedly neither the Complainant nor the Petitioner Corporation has approached any Court for adjudication upon the title of the machine. Both insist that the machine belongs to them. The Registration Certificate if any of the machine has not been produced by anyone. However, the Complainant has admitted that he came to learn that the machine has been registered in the name of the Petitioner Corporation. In spite of summons being issued to the Complainant who is represented by Mr. Jigmi P. Bhutia, learned Counsel no steps were taken to challenge the rejection of the release petition. The Complainant in fact would submit that he had no objection to the release of the machine to the Petitioner Corporation if it assured that the said machine would not be used by them. The very purpose of release of the machine would be lost if such a condition is imposed. The

object of Section 451 Cr.P.C. appears to be that where the property which is the subject matter of the offence alleged is seized by the police it ought not to be retained in the custody of the Court or of the police for anytime longer than what is absolutely necessary. Damage due to failure to maintain it or keep it properly during investigation can lead to loss of valuable property. This Court is neither deciding the question as to the title of the machine in dispute nor the correctness of the rival versions regarding the transactions relating to the sale and purchase of the machine. This Court does not want the machine to remain in the compound of the Hingdam Police Station exposed to the vagaries of nature. To avert this situation this Court is inclined to entrust it temporarily to the Petitioner Corporation who is the ostensible purchaser of the machine, who had been in possession of the machine till it was seized by the Investigating Officer and is desirous of its custody. The Complainant on the other hand never had actual possession of the machine. The custody of the machine with the Petitioner Corporation will be on behalf of the Court and this arrangement is only till the stage when the Court passes the order regarding disposal of the machine on conclusion of the trial.

23. In the peculiar facts and circumstances this Court deems it appropriate to release the machine to the Petitioner Corporation on certain specific conditions. This Court directs

the learned Judicial Magistrate to release the machine to the Petitioner Corporation on the following conditions:

- a) The Petitioner Corporation shall execute a bond of ₹7,50,000.000/- (Rupees seven lakhs fifty thousand) only with two solvent sureties of the like amount to the satisfaction of the learned Judicial Magistrate.
- b) The Petitioner shall produce the machine before the Investigating Officer during the period of investigation and before the Court during the trial if any as required by law or by specific orders of the Court.
- c) The Petitioner Corporation shall maintain the machine and not transfer its possession or ownership to any third party until disposal of the case.
- d) The Investigating Officer shall prepare a “*panchnama*” as well as keep photographic evidence of the machine before handing over possession of the machine to the Petitioner Corporation and if necessary evidence may also be recorded by the Court describing the nature of the machine in detail.

24. The Complainant and the Petitioner Corporation are at liberty to approach the Civil Court or any Court of appropriate jurisdiction as advised to decide upon the title of the said machine if the law permits. Until its determination or the determination by the Court regarding the disposal of the machine whichever is earlier the Petitioner Corporation shall keep the custody of the machine on behalf of the Court. The passing of this order shall not entitle the Petitioner Corporation to claim a better title than what it may have in fact and this order shall not be read against the Complainant while determining title of the machine.

25. The Writ Petition is disposed of on the aforesaid terms. No order as to costs.

26. Certified copy of this order shall be forwarded to the Court of the learned Judicial Magistrate, First Class, East Sikkim, at Gangtok forthwith for compliance.

(Bhaskar Raj Pradhan)
Judge
30.08.2018

Approved for reporting: yes.
Internet: yes.