HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

CRM(M) No. 161/2021
CrlM No. 537/2021

Reserved on: 01.06.2021
Pronounced on: 14.06.2021

Sheikh Mohammad Aslam & Anr.

...Petitioner(s)

Through: Mr Shuaj Ul Haq, Advocate.

vs

UT of JK th. Senior Superintendent of Police, Crime Branch.

...Respondent(s)

Through: Mr Mohsin Qadri, Senior Advocate with
Ms Jasia Ali, Advocate.

CORAM:

Hon'ble Mr Justice Ali Mohammad Magrey, Judge.

(JUDGMENT)

01. In the instant petition, the petitioners challenge to order of the learned Special Judge, Anti-Corruption, Kashmir, Srinagar, dated 14th of May, 2021, passed in the application titled Sheikh Mohammad Aslam & Anr vs UT of J&K through Superintendent of Police, Crime Branch, Srinagar, Kashmir, and seek its quashment with further direction to release the amount of Rs. 9.00 lakhs in favour of the petitioners. The petitioners seek release of the seized amount as also quashment of order impugned dated 14th of May, 2021, on the grounds detailed out as under:

a. That the order impugned dated 14-5-2021 is bad in law and has been passed by the Ld. court of Special Judge (Anti-Corruption) Srinagar in a most casual and mechanical manner. It is submitted that while passing the order impugned, the Ld. court of Special Judge (Anti-Corruption) Srinagar has not correctly appreciated the facts and circumstances attendant to

the case of the petitioners vis-à-vis the release of cash amount of Rs. 9.00 lakhs which was taken out from the possession of the petitioners and seized by the respondent during the search. It is submitted that in the order impugned dated 14-5-2021, the main ground for rejection of the prayer of the petitioners for seeking release of the cash amount has been based on the fact that the investigation of the case was at its initial stage and the release of the money at this stage would defeat very purport of the investigation. Besides, it has also been stated by the Ld. court of Special Judge (Anti-Corruption) Srinagar that the release of the money at this stage would hamper the investigation of the case. The application has been held to be premature as such came to be rejected by the Ld. court of Special Judge (Anti-Corruption) Srinagar. It is submitted that grounds taken by the Ld. court of Special Judge (Anti-Corruption) Srinagar for rejecting the application filed by the petitioners are unreasonable, unjust and unfounded as the Ld. court of Special Judge (Anti-Corruption) Srinagar has failed to return any finding with reference to the seizure of the money which was taken out from the possession of the petitioner No. 2. On one hand, the Ld. Trial court has stated that petitioner No. 1 has not been arrayed as accused in the FIR while as on the other hand, it has been stated that the name of the petitioner is also reflected in the case diary as an accused. Besides, the trial court has also stated that the petitioners are none other than the parents of the 'accused public servant' who was accused in the misappropriated money related to the case. In this regard, it is submitted that the son of the petitioners is not a public servant as is clearly reflected in the police report as well as objections filed by the respondent. However, the Ld. Trial court has wrongly held that the son of the petitioner (accused) was a public servant. On this count alone, the order impugned is bad in law as such deserves to be quashed at the very outset.

b. That the Ld. Court below has also failed to appreciate the averments made in the report filed by the respondent. It is submitted that from the bare perusal of the report which had been filed by the respondent police before the court below, it transpired that FIR No. 18/2021 pertains to execution of the

works by JKPCC in the year 2015. The allegation against the son of the petitioner namely Sheikh Zubair Aslam has been that in the year 2017, he worked as Peace Worker and an amount of Rs. 1,12,57,000/- had been paid to him and his father and uncle. The said amount was adjusted against the works found executed mostly on account of providing materials like Marbles/Granite and Iron etc. Out of the amount of Rs. 1,12,57000/- an amount of Rs. 11.00 lakhs is claimed to have been unrecovered amount and on the basis of this un-adjusted amount, favoritism and violation of rules and regulations has been alleged forming basis for roping the son of the petitioners in the FIR. It has been alleged that advance payment was made to the son of petitioners which was against the norms. In this regard, it is submitted that the allegations as alleged, even if taken to be true in its content and form, does not fall within the ambit of commission of offence by the son of the petitioners. The recovery of the amount if due from any private individual is not the job of Police but the job of the Civil Administration entailing civil action. The job of the police machinery is to investigate the commission of the offence and to see as to whether alleged act falls within the ambit of the provisions of the Penal code or not. In the instant case, the petitioners are not the accused and it has also nowhere been mentioned that the amount so recovered from the possession of the petitioners constituted any offence which is sine-quo –non for seizure of any property during investigation/trial. Thus the order impugned deserves to be quashed on this count alone.

c. That in the objections, it had been stated that Rs. 11.00 lakhs is unrecovered from the accused person namely Sheikh Zubair Aslam and the police was on the job of recovering the said amount. Here the question is whether the investigation of an offence is a substitute for a civil suit/civil action and the police has free hands to recover the money from personal saving of the old aged parents of the alleged accused.?. Although this question was raised and pleaded before the court below, but the Ld. Court below has returned any finding on this vital issue which vitiates the whole action of the respondent.

d. That since the cash amount of money which has been taken away from petitioners has not been found under any such circumstances which would create suspicion of commission of any offence by the petitioners, therefore, there was no reason or justification for the respondent to withheld the money which exclusively belonged to petitioners and under the present circumstances where whole world is shattered with Covid-19, was/is a means of survival for the petitioners who are in their old age.

e. That the petitioners although are the father and mother of Sheikh Zubair Aslam but under law, they cannot be held vicariously liable for the alleged criminal act of their son. The alleged criminal act of their son cannot be read against the petitioners who are peace loving citizens and tax payers and having completely separate business from their son. It is beaten position of law that no one can be punished for the offence of another.

f. That the Prevention of Corruption Act has been enacted to deal with the public servants' who receive gratification other than legal remuneration in respect of an official act and who by corrupt or illegal means or by abusing position obtain for himself or for any other person any pecuniary advantage or valuable thing, or such public servant who is found to be in possession or has at any time during the period of his office been in possession of property for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, yet there is no specific provision in the Act itself as to how or in what manner the said property can be dealt with by the Investigating Officer even if he comes to the conclusion that the assets in the possession of the public servant' is directly linked with the commission of the offence. It is therefore, the provisions of Section 102 of the Criminal Procedure Code if that confers power of seizing and/or prohibiting operation of bank account, the Investigating Officer can pass orders of seizing the bank account or issue prohibitory order to the banks not to allow the account holder to operate the account. Section 102 of the Code of Criminal Procedure is reproduced as under:

"SEC. 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-sec. (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, 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.]"

It is submitted that bare perusal of Ss. 1 of Section 102 indicates that the Police Officer has the power to seize any property which may be found under circumstances creating suspicion of the commission of any offence. The legislature having used the expression "any property" and "any offence" have made the applicability of the provisions wide enough to cover offences created under any Act. But the two pre-conditions have been imposed for applicability of Section 102(1) which are that it must be 'property' and secondly in respect of the said property there must have suspicion of commission of any offence. It is submitted that under Section 102 of the Criminal Procedure Code a police officer during the course of investigation can seize the property or prohibit the operation of bank account if such assets have direct links with the commission of the offence for which the police officer is investigating into.

g. That the Seizure and production in court of any property, including those regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence or any other property will have a two -fold effect. Production of the above property may be necessary as evidence of the commission of the crime. Seizure

may also have to be necessary in order to preserve the property, for the purpose of enabling the court, to pass suitable orders under Sec. 452 of the Criminal Procedure Code at the conclusion of the trial. This order would include destruction of the property, confiscation of the property or delivery of the property to any person claiming to be entitled to possession thereto.

h. That since the order impugned has not only caused great injustice to the petitioners, but is also a flagrant abuse of process of law as such the order impugned deserves to be quashed at the very outset.

i. That all the grounds taken by the petitioners in the application for seeking release of the amount before the Ld. Court below are also adopted as grounds in this petition as well.

02. It appears from the material on record that in First Information Report registered with the police station Crime Branch bearing FIR No. 18/2021 under sections 420, 468,120-B of RPC read with section 5 (2) of P.C. Act, the petitioners are admittedly not the accused, therefore, I need not to discuss the case of the prosecution because the issue involved in the instant petition is limited to seizure of the amount. It appears that during the course of investigation, the Investigating Officer in exercise of powers vested under law, has seized the amount and the petitioners being dissatisfied with such action on the part of the Investigating Officer, have filed the application seeking release of amount before the court of Special Judge, Anti-Corruption, Kashmir, Srinagar, which application stands rejected by the trial court on the ground that the investigation is still on and there is every apprehension;

i. That the release of the amount may defeat very purport of the investigation and the release of money at this stage would hamper the investigation of the case. The application has been held to be premature.

03. In the status report, the Respondent-Crime Branch has reiterated the stand taken before the trial court, discussing the progress of investigation and the result of releasing the amount, defeating the purpose of investigation and hampering the further progress but have admitted that the petitioners are not the accused in the case and are only relatives of the accused.

04. Heard learned counsel for the parties, considered the matter and perused the material available on record.

05. The petitioners herein are admittedly not the accused in the FIR and are father and mother of the accused from whose possession the amount of Rs. 9.00 lakhs stand seized by the Investigation Officer and continuation of the seizure by the Investigation Officer is defended on the ground that its release will defeat the purpose of investigation and will hamper further progress of the investigation.

06. Admittedly, 1800 notes of 500 denomination are seized and after seizure, no further investigation is required for that purpose. The investigation to the extent of seizure of amount is admitted by the petitioners from them, therefore, it is not understood as to how its utilization will defeat the purpose of investigation and hamper the further progress. Rather, it would deprive the petitioners from utilizing the money which is seized from their possession and in the event, there is any requirement of disposal of any property of the accused. Same is available from the property of their son, through that is not the question involved here.

07. The circumstances under which the Investigation Officer has the power to seize any property, are detailed out in section 102 of the Code of Criminal Procedure and a plain reading of sub-section (1) of Section 102 indicates that the Police Officer has the power to seize any property which may be found

under circumstances of any offence. The legislature having used the expression *"any property"* and *"any offence"* have made the applicability of the provisions wide enough to cover offences created under any Act. The availability of power of the circumstances available are detailed out in the judgments rendered by various High Courts and the Hon'ble Supreme Court of India, therefore, the law is no more *res integra* and has been interpreted in detail with the following observations:

"10. In the case of Paresha G. Shah, this Court observed as under;

> "Like any other property a bank account is freezable. Freezing the account is an act in investigation. Like any other act, it commands and behooves 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 adequate material is collected. It clothes the authoritywith the power to preserve a property suspected to have been usedin 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 beinggiven information about the said action, no accused, not even a thirdparty, can overreach the law under the umbrella of a sublime provision meant to protect the innocent and preserve his property. Itis also not necessary at all that a person must be told that his bank account, which is suspected of having been used in the commissionof 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.
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> In the aforesaid context, I may quote with profit a decision of the Supreme Court in the case of State of Maharashtra v. Tapas D. Neogy, MANU/SC/0582/1999: (1999)7 SCC 685. The issue beforethe Supreme Court was, whether a police officer investigating into an offence can issue prohibitory order in respect of a bank account ofthe accused in exercise of powers under Section 102 of the Code. The Supreme Court, after an exhaustive consideration of theprovisions of Section 102 of the Code, took the view that the bankaccount of an accused or of his relations could be said to be property within the meaning of sub-section (1) of Section 102 of the Code. I may quote with profit the following observations made by the Supreme Court, as contained in paras 5 to 12 of the judgment:
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> "5. Coming now to the provisions of Section 102 of the Code of Criminal Procedure, the said provisions are extracted herein below in extenso:
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> "Sec. 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 sec. (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, 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."

6. A plain reading of sub-section (1) of Section 102 indicates that the Police Officer has the power to seize any property which may be found under circumstances creating suspicion of the commission of any offence. The legislature having used the expression "any property" and "any offence" have made the applicability of the provisions wide enough to cover offences created under any Act. But the two preconditions for applicability of Section 102(1) are that it must be 'property' and secondly, in respect of the said property there must have suspicion of commission of any offence. In this view of the matter the two further questions that arise for consideration are whether the bank account of an accused or of his relation can be said to be 'property' within the meaning of sub-section (1) of Section 102 of the Cr.P.C. and secondly, whether circumstances exist, creating suspicion of commission of any offence in relation to the same. Different High Courts in the country have takendivergent views in this regard. In the case of Ms. Swaran Sabharwal v. Commissioner of Police, reported in MANU/ DE/0066/1990: 1988 Criminal Law Journal (Vol. 94)241, a Division Bench of Delhi High Court examined thequestion whether bank account can be held to be 'property' within the meaning of Section 102 of the Cr.P.C. In the said case, proceeds realized by sale of official secrets were deposited by the accused in his wife's account. The Court in that case came to hold that it is not quite sure whether monies deposited in a bank account can be seized by means of a prohibitory order under the provisions of Section 102but even assuming that a bank account is a 'property' within the meaning of Section 102 of the Code of Criminal Procedure, the further consideration must be satisfiednamely the property has been found under circumstances which create the suspicion of the commission of an offence. But in that case it is not the discovery of the property that has created suspicion of commission of an offence but on the other hand the discovery of the bank account is a sequel to the discovery of commission of offence inasmuch as thepolice suspected that some of the proceeds realized by thesale of the official secrets have been passed on to the bank account of the wife of the accused. Therefore, the Court was of the opinion that the provisions of Section 102 cannot be invoked. In the case of M/s. Purbanchal Road Service, Gauhati v. The State, reported in MANU/GH/0058/1990: 1991 Criminal Law Journal (Vol. 97) 2798, a learned Single Judge of the Gauhati High Court examined the provisions of Section 102 of the Criminal Procedure Code and the validity of an order by a Police Officer, prohibiting the bank from paying amount to the accused from his account. The learned Judge

came to the conclusion that word 'seize' used in Section 102 Cr.P.C. means actual taking possession in pursuance of a legal process and, therefore, in exercise ofthe said power, a bank cannot be prohibited not to pay any amount out of the account of the accused to the accused nor can the accused be prohibited from taking away any propertyfrom the locker, as such an order would not be a 'seizure' within the meaning of Section 102 of the Criminal Procedure Code. The learned Single Judge agreed with the view taken by Allahabad High Court in the case of Textile Traders Syndicate Ltd., Bulandshahr v. The State of U.P. MANU /UP/0099/1960: AIR 1960 Allahabad 405 (Vol. 47). In the Allahabad Case on which Gauhati High Court relied upon (MANU/UP/0099/1960 : AIR 1960 Allahabad 405), what wasdecided by the Court is, once money passes on from the accused to some other person or to the bank, money itselfbecomes unidentifiable and, therefore, there cannot be any question of seizure of the same by the Police Officer.

7. In the case of M/s. Malnad Construction Co. Shimoga and Ors. v. State of Karnataka and Ors., MANU/ KA/0076/1993 : 1994 Criminal Law Journal(Vol. 100) 645, a learned Single Judge of Karnataka High Court examined the provisions of Section 102 of the Criminal Procedure Code and relying upon the Gauhati High Court's decision, referred to supra, came to hold that the 'seizure' in Section 102 would mean taking actual physical possession of the property and such a prohibitory order to the banker of the accused not to operate the account is not contemplated under the Code and consequently, the police has no power to issue such order. Thus, the High Courts of Karnataka, Allahabad, Gauhati and Delhi have taken the view that the provisions of Section 102of the Criminal Procedure Code cannot be invoked by the Police Officer in course of investigation to issue any prohibitory order to the banker or the accused from operating the bank account.

8. In P.K. Parmar and ors. v. Union of India and anr., MANU/DE/0423/1992: 1992 Criminal Law Journal 2499 (Vol. 98), a learned Single Judge of Delhi High Court considered the power of police officer under Section 102 of the Criminal Procedure Code, in connection with the fraudulent acquisition of properties and opening of fictitious bank accounts and withdrawal of huge amounts as subsidy from Government by producing bogus documents by the accused. The learned Judge took note of the earlier decision of Delhi High Court in Ms. Swaran Sabharwal v Commissioner of Police MANU/DE/0066/1990: 1988 Criminal Law Journal 240 (Vol. 94), and analyzed the provisions of Section 102 of the Criminal Procedure Code and the facts of the case were as under. It was revealed that during investigation the prosecution came to know that without actually manufacturing phosphate and fertilizers, the accused withdrew as much as Rs. 3.39 crores as subsidy from the Govt. of India by producing bogus documents. The Court ultimately came to the conclusion that the recovery of assets in the bank links prima facie with the commission of various offences with which they have been charged by the

CBI and, therefore, the police officer could issue directions to various banks/financial institutions freezing the accounts of the accused. The learned Judge in the aforesaid case has really considered the amount of money which the accused is alleged to have swindled by producing bogus documents which prompted him to hold that the power under Section 102 Cr.P.C. can be exercised.

9. In Bharath Overseas Bank v. Min Publication MANU/ TN/0478/1988 : 1988 Madras Law Weekly (Crl.) 106, a learned Single Judge of the Madras High Court consideredthe same question and came to the conclusion that the expression 'property' would include the money in the bankaccount of the accused and there cannot be any fetter on the powers of the police officer in issuing prohibitory orders from operating the bank account of the accused when the police officer reaches the conclusion that the amount in thebank is the outcome of commission of offence by the accused. The Court considered the fact as to how in modern days, commission of white-collar crimes and bank frauds are very much on the increase and banking facilities have been extended to the remotest rural areas and, therefore the expression 'property' may not be interpreted in a manner so as to exclude the money in a bank which in turn would have the effect of placing legal hurdles, in the process ofinvestigation into the crimes. According to the learned Judge, such literal interpretation of the expression 'property' could not have been the intent of the framers of the Criminal Procedure Code. In paragraph 11 of the said judgment, the learned Judge referred to the object behind investing thepolice with powers of seizure. It will be appropriate to extract the same in extenso:

"It would now be useful to refer to the object behind investing the police with powers of seizure. Seizure and production in court of any property, including those regarding which an offence appears to have been committed or which appears to have been used for the commission ofany offence or any other property will have a two-fold effect. Production of the above property may be necessary as evidence of the commission of the crime. Seizure may also have to be necessary, in order to preserve the property, for the purpose of enabling the Court, to pass suitable ordersunder S. 452 of the Criminal Procedure Code at the conclusion of the trial. This order would include destruction of the property, confiscation of the property or delivery of the property to any person claiming to be entitled to possession thereto. It cannot be contended that the concept of restitution of property to the victim of a crime, is totallyalien to the Criminal Procedure Code. No doubt, the primary object of prosecution is punitive. However, Criminal Procedure Code, does contain several provisions, which seek to reimburse or compensate victims of crime, or bring about restoration of property or its restitution. As S. 452, Cr.P.C. itself indicates, one of the modes of disposing of property at the conclusion of the trial, is ordering their return to the person entitled to possession thereto. Even interim custodyof property under Ss. 451 and 457, Cr.P.C., recognizes the rights of the person entitled to

the possession of the properties. An innocent purchaser for value is sought to be re-imbursed by S. 453, Cr.P.C. Restoration of immovable property under certain circumstances, is dealt with under S. 456, Cr.P.C. Even, monetary compensation to victims of crime or any bona fide purchaser of property, is provided for under S. 357, Cr.P.C. Wherein when a Court while convicting the accused imposes fine, the whole or any partof the fine, if recovered, may be ordered to paid as compensation to any person, for any lose or injury, caused by the offence or to any bona fide purchaser of any property,after the property is restored to the possession of the personentitled thereto. This twofold object of investing the police with the powers of seizure, have to be borne in mind, while setting this legal issue."

10. This Judgment of the learned Single Judge of the Madras High Court was followed in a later decision in the case of Bharat Overseas Bank Ltd. v. Mrs. Prema Ramalingam, MANU/TN/0835/1990: 1991 Madras Law Weekly (Criminal) 353, wherein the learned Judge agreeing with Padmini Jesudurai, J in Bharat Overseas Bank's case came to hold that money in bank account is 'property' within the meaning of Section 102 of the Criminal Procedure Code, which could be seized by prohibiting order. In the aforesaid case, the learned Judge has also noticed the fact that the Judgment of Padmini Jesudurai, J., in 1988 LW(Crl.)106, was upheld by the Division Bench subsequently.

11. In the case of Dr. Gurcharan Singh v. The State of Punjab, MANU/PH/0364/1978:1978(80) Punjab Law Reporter, 514, a Division Bench of the Punjab & Haryana High Court differing with the view taken by the Allahabad High Court in MANU/UP/0099/1960: AIR 1960 Allahabad 405, came to hold that the bank account would be 'property' and as such would be capable of being seized under Section 102 of the Code of Criminal Procedure.

12. Having considered the divergent views taken by different High Courts with regard to the power of seizure under Section 102 of the Code of Criminal Procedure, and whether the bank account can be held to be 'property' within the meaning of said Section 102(1), we see no justification togive any narrow interpretation to the provisions of the Criminal Procedure Code. It is well known that corruption in public offices has become so rampant that it has become difficult to cope up with the same. Then again the time consumed by the Courts in concluding the trials is anotherfactor which should be borne in mind in interpreting the provisions of Section 102 of the Criminal Procedure Code and the underlying object engrafted therein, inasmuch as if there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the outcome of the illegalgratification, could be withdrawn by the accused and the Courts would be powerless to get the said money which has any direct link with the commission of the offence committed by the accused as a public officer. We are, therefore, persuaded to take the view that the bank account of the accused or any of his relation is 'property' within the meaning of Section 102 of the Criminal

Procedure Code anda police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into. The contrary view expressed by Karnataka, Gauhati and Allahabad High Courts, does not represent the correct law. It may also be seen that under the Prevention of Corruption Act, 1988, in the matter of imposition of fine under sub-section (2) of Section 13, the legislatures have provided that the Courts in fixing the amount of fine shall take into consideration the amount or the value of the property, which the accused person has obtained by committing the offence or where the conviction is for an offence referred to in clause (e) of sub-section(1)of Section 13, the pecuniary resources or property for which the accused person is unable to account satisfactorily. The interpretation given by us in respect of the power of seizure under Section 102 of the Criminal Procedure Code is in accordance with the intention of the legislature engrafted in Section 16 of the Prevention of Corruption Act referred to above. In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court of Bombay committed error in holding that the police officer could not have seized the bank account or could not have issued any direction to the bank officer, prohibiting the account of the accused from being operated upon. Though we have laid down the law, but so far as the present case is concerned,the order impugned has already been given effect to and the accused has been operating upon his account, and so, we do not interfere with the same. At this stage, it deserves to be noted that the Supreme Court considered a Division Bench decision of the Delhi High Court in the case of Swaran Sabharwal v. Commissioner of Police, MANU/ DE/0066/1990: 1988 Cri.L.J. 241 (Del). The Division Bench of the Delhi High Court took the view that the suspicion of an offence did not arise on account of discovery of the property (bank account). There were no circumstances attendant upon the bank account or its operation that had led the officer to suspect that some offence had been committed somewhere. The discovery of the bank account was a sequel to the discovery of the commission of the offence. The police suspected that some of the proceeds realized by the sale of official secrets had been passed on to the petitioner by herhusband. The Division Bench of the Delhi High Court finally concluded that it was not sufficient to attract 102 of the Code as it could not be said that the bank account had been traced or discovered in circumstances which had made the police aware of the commission of an offence."

11. In the Division Bench decision of the Delhi High Court in the case of Ms.Swaran Sabharwal (supra), the Court observed as under;

> "6. We are not able to accept this argument. In the first place, weare not quite sure whether monies deposited in a bank account can be "seized" by means of a prohibitory order as has been done in the present case under the provision of section 102. But assuming that abank account is "property" within the meaning of the section, it should be property "found under circumstances which create the

> suspicion of the commission of an offence", to justify under section 102. In other words, it applies where a police officer comes across certain property in circumstances which create in his mind a suspicion that an offence has been committed. Thus in the cases cited by counsel, action under section 102 was upheld where a public servant was found in possession of moneys in his bank account far in excess of his known source of income, when a person was found in possession of a large quantity of small coins for sale in contravention of the defense of India Rules, where a trader was found to have stored a large number of bags of rice in contravention of rules and orders and where a person was found standing on a public road with a bag containing several bundles of the currency notes. The position here is different. Here, it is not the discovery of the property that has created the suspicion of an offence. There are no circumstances attended upon the bank account or its operation that have held the officer to suspect that some offence has been committed somewhere. The discovery of the bank account hear is a sequel to the discovery of the commission of the offence. The police suspect that some of the proceeds realized by the sale of official secrets have been passed on to the petitioner by her husband. This, we think, is not sufficient to attract section 102 as it cannot be said that the bank account has been traced or discovered in circumstances which have made the police aware on the commission of an offence.

7. We may further point out that no justification seems to exist for "seizing" the amounts in the bank account. All that the respondents seem to want to establish from the bank account is that some funds were transferred by the petitioner's husband to her. This can be proved at any time by comparison of the two account and since the entries in the accounts are always available, no purpose seems to be served by restarting the operation of the bank account. Since, as we point out below, it is not the case of the moneys in the bank constitute "case property", i.e., the property involved in the commission of the crimes with which Ram Swarup is charged, theseizure of the monies by the issue of a prohibitory order cannot be upheld.

8. Again, even if the provisions of section 102 are held applicable, the respondents have not followed the requirements of the section. Reading that provision, by adapting in to the case of seizure of a bank account, the police officer should have done two things: heshould have informed the concerned magistrate forthwith regarding the prohibitory order. He should have also given notice of the seizure to the petitioner and followed her to operate the bank account subject to her executing a bond undertaking to produce the amounts in court as and when required or to hold them subject to such orders as the court may make regarding the disposal of the same. This was not done. Even a copy of the prohibitory orders was not given to the petitioner. The police did not seek the directions of the Magistratetrying the offence. Not only that, when the petitioner herself approached the Magistrate who was trying

the petitioner's husband under the official Secrets Act, her request to be allowed to operate the account was opposed by the police contending that the bank account was not "case property" and that the petitioner's remedies lay elsewhere than in the court of the Magistrate. The Magistrate accepted the plea of the police and dismissed the application of the petitioner and directed to seek remedy elsewhere before the appropriate authority. The petitioner having lost before the Magistrate, had no other recourse except to file a writ petition praying for the setting aside of the prohibitory order."

12. It may not be out of place to state that the Division Bench decision of the Delhi High Court referred to above has been considered in the case of Paresha G. Shah (supra) and distinguished. The case of Paresha G. Shah (supra) arose from the proceedings under the Prevention of Money Laundering Act.

13. In B. Ranganathan (supra), a learned Single Judge of the Madras High Court took the view that a case of disproportionate wealth could only be proved from the entries effected in the books of accounts so as to trace the past bank dealings of the accused and of his near relatives during the check period, but not freezing the accounts unless the Investigating Officer is of the view that by permitting the accused or his relatives to continue to operate the accounts, damage would be caused to the entries.

16. In B. Ranganathan (supra), the court held as under;

"12. From the import of the Section 13 of the said Act barely dissected, it is clear that Section 13(2) is the penal Section for the commission of an offence under Section 13(1)(e) which offers an opportunity for the public servant to satisfactorily account for either the pecuniary resources or property disproportionate to his known sources of income thereby meaning that in these types of cases of acquisition or being in possession of disproportionate wealth to the known sources of income, the cases could only be registered on reasonable suspicion and could be proved subject to the opportunity for the accused to satisfactorily account for the same and therefore prima facie no case could be made out by the prosecution bluntlyeither on registering a case or even during the course of investigation since according to the warranting ingredients of the Section, the accused cannot be preliminarily held to have committed the offence as it could be in other cases arising out of the IPC or the other criminal acts or even from out of the Prevention of Corruption Act itself. Therefore, the framers of law have been careful enough to impose a pre-condition or a subjective clause to the effect that the commission of the offence by the accused could only be complete, provided on a fair and reasonable opportunity being afforded to the public servant in spite of which if he fails to satisfactorily account for the pecuniary resources after the case has been put up by the prosecution but not on a case being registered on suspicion. Therefore, on a case registered on reasonable suspicion of the accused being in possession of property disproportionate to his known sources of income, the pecuniary resources of which he cannot satisfactorily

> account for, it is not correct to conclude thateither the commission of offence is complete as it is in most of the other cases or could it be said that the Investigating Officer shall have all such freedom as he would have in other cases in the exercise of such powers pending investigation."

08. The basis made by the prosecution for seizure of the amount has reference to the recoverable amount from the accused son to the tune of Rs. 11.00 lakhs. The question is whether any recoverable amount from the accused son in a criminal investigation can be recovered from his old aged parents by seizing the amount on search from their bedroom. This question was put to the prosecution and from their stand, they could not support the seizure of recoverable amount from the accused son, from his parents, on the strength of any provision of law. The respondent has also not justified the seizure with adherence to the procedure as the order of search made by the Special Judge, Anti-Corruption, does not make any reference to the seizure of the amount from old aged parents, therefore, the seizure is without authority. The petitioners are father and mother of Sheikh Zubair Aslam, who is not a public servant as submitted by the prosecution in the status report and on default, the amount is being recovered from his parents by making search of their bedroom. The Hon'ble Supreme Court has framed the guidelines with regard to powers of the court in dealing with cases falling under section 451 of CrPC. With regard to valuable articles and currency notes, the Hon'ble Supreme Court has held as under:

> *"11. With regard to valuable articles, such as, golden or silver ornaments or articles studded with precious stones, it is submitted that it is of no use to keep such articles in police custody for years till the trial is over. In our view, this submission requires to be accepted. In such cases, the Magistrate should pass appropriate orders as contemplated under section 451 CrPC at the earliest.*
>
> *12. For this Purpose, the 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 CrPC. 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 CrPC to impose any other appropriate condition.*

14. In case, where such articles are not handed over either too the complainant or to the person from whom such articles are seized or to its claimant, then the court may direct that such articles be kept in bank lockers. Similarly, if articles are required to be kept in police custody, it would be open to the SHO after preparing proper panchnama to keep such articles in a bank locker. In any case, articles should be produced before the Magistrate within a week of their seizure. If required, the court may direct that such articles be handed back to the investigating officer for further investigation and identification. However, in no set of circumstances, the investigating officer should keep such articles in custody for a longer period for the purposes of investigation and identification. For currency notes, similar procedure can be followed.

However, the Ld. Trial court while dealing with the application of the petitioners has wrongly appreciated the above law propounded by the Hon'ble Supreme Court in the above judgment.

8. In the case titled ***Wellworth Software Pvt. Ltd Vs CBI/ACB Bengaluru decided on 4th of March 2001****, the High court of Karnataka at Bengaluru has ordered the release of cash amount of Rs. 4798000/-. Para-9 of the judgment of the High Court of Karnataka is reproduced as under: -*

> *"Having regard to the documents produced by the petitioners, explaining the source of the funds, seized from their possession, it has to be held that the petitioners are the rightful owners of the seized amount and are legally entitled for the interim custody of the seized cash. Even otherwise, the*

> *interim release of the seized property does not preclude the respondent from investigating into the source of the said funds of the public servant. Petitioners are not accused of abetting the offence by the public servant. In the said circumstances, there is no justification to retain the cash belonging to the petitioners. The Hon'ble Supreme Court in the case of Sunderbhai Ambalal Desai Vs State of Gujarat with C.M Mudaliar Vs State of Gujarat reported in (2002) 10 Supreme Court Cases 283, has laid down the guidelines for release of the properties seized during investigation. In this regard, the coordinate bench of this court in identical situation in Crl. RP. No. 636/2018 dated 30-8-2018 has allowed the petition."*
>
> *9. That Section-102 of the Criminal Procedure code deals with the power of police officer to seize certain property while as section 451 of the Cr.P.C deals with the power of the court to order for custody or disposal of the property pending trial.*

09. The Court is conscious of the fact that the investigation is under process, therefore, as opined at the outset, it is proper not to discuss the merit of investigation lest that may cause any prejudice to the investigating agency. Therefore, the Court is only restricting its finding to the validity of the order impugned and the seizure of the amount.

10. On the strength of the pleadings as discussed above and the reference of law, it is manifestly clear that no further purpose can be achieved by retaining the seized amount by the prosecution and to the understanding of the Court, the purpose is solved after taking the details of the denominations of the seized amount and the claim made by the petitioners as owner of the property.

11. In the fact circumstances of the case, the Court has arrived to the conclusion that the case has merit, therefore, the petition deserves to be allowed.

12. In the above background, the petition is allowed and the order impugned passed by Special Judge, Anti-Corruption, Kashmir, Srinagar, on 14th of May, 2021, in the application titled Sheikh Mohammad Aslam & Anr vs UT of J&K through Superintendent of Police, Crime Branch, Srinagar, Kashmir, is set-aside with direction to the Investigating Officer to release the seized amount of Rs. 9.00 lakhs in favour of the petitioners, on their identification by the appearing counsel. The amount shall be released after taking proper security in the shape of undertaking from the petitioners to the satisfaction of Registrar Judicial of this Court to the extent of making available the amount in case the trial court directs for the same at the time of disposal of the case, however, the prosecution shall retain the details of the seized amount for purpose of finalizing the investigation and using the same before the Trial Court.

12. Disposed of alongwith connected CrlM(s).

(Ali Mohammad Magrey)
Judge

SRINAGAR:
14.06.2021
"Hamid"

i. Whether order is speaking? Yes/No.
ii. Whether order is reportable? Yes/No.

Pronounced today on 14th of June, 2021, in terms of Rule 138 (3) of Jammu and Kashmir High Court Rules, 1999.

(Sanjeev Kumar)
Judge