

Court No. - 9

Case :- HABEAS CORPUS No. - 20538 of 2017

Petitioner :- Sudhakar Rastogi Thru. His Wife Smt. Manju Rastogi

Respondent :- State Of U.P. Thru. Prin. Secy. Home Deptt. Govt. Of Up
&Anr

Counsel for Petitioner :- Jitendra Singh, Vijay Pratap Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Arvind Kumar Tripathi, J.

Hon'ble Mrs. Rekha Dikshit, J.

Heard Shri Jyotindra Mishra, learned Senior Counsel assisted by Shri Jitendra Singh, learned counsel for the petitioner, Shri R.K.Dwivedi, learned A.G.A. on behalf of the State and perused the record.

The instant Habeas Corpus Petition has been preferred challenging the detention of the petitioner in compliance of the remand order and custody warrant issued under section 309 Cr.P.C. with prayer to issue writ in the nature of Habeas Corpus, directing and commanding the respondents no.2 to produce the detenu petitioner, before this Court and to release forthwith from the illegal custody and to pass any appropriate order.

Learned counsel for the petitioner submitted that the petitioner Sudhakar Rastogi was falsely implicated in Case Crime No.07/2017 under sections 419, 420, 467, 468, 471, 120B IPC section 12 Passport Act and section 7/13 P.C. Act, PS. ATS, Lucknow. He was arrested on 12.4.2017 at about 10:30 hours, produced before the Magistrate concerned on the same day and was remanded to the judicial custody on the same day. The investigation remains pending. Since the period of 90 days was expiring on 10.7.2017, hence the investigating officer submitted his report under section 173 Cr.P.C. on the date, before the Special Judge P.C. Act, Lucknow. Since the sanction for prosecution was not received and as such the Special Judge did not take cognizance on the police report and passed remand order under section 309 Cr.P.C. fixing 24.7.2017, hence the custody of the petitioner is illegal, and without jurisdiction as there was no provision to pass remand order under section 309 before cognizance. He submitted that the remand under section 309 Cr.P.C. has to be passed after cognizance and as such since the remand order and custody warrant is illegal and without jurisdiction and as such the direction be issued to the respondents authority concerned to release the petitioner forthwith from the judicial custody. He relied the judgment of Hon.Apex Court 2007 AIR

SCW 6112 **Dinesh Dalmia vs. C.B.I.**, 1997 SCC (Cri) 636 **C.B.I. v. Dawood Ibrahim Kaskar and others**, 1992 SCC (Cri) 554 **Central Bureau of Investigation, Special Investigation Cell-I, New Delhi vs. Anupam J.Kulkarni**, and (2009) 2 SCC (Cri) **Methabhai Pashabhai Patel and others vs. State of Gujrat**.

Mr. Mishra submitted that pre-cognizance remand is under Section 167 Cr.P.C. and post cognizance remand is under Section 309(2) Cr.P.C.

Learned A.G.A. vehemently opposed the aforesaid prayer and submitted that in the present case sanction has already been granted by the Government for prosecution regarding which the letter dated 30.8.2017 was issued with the sanction order to the S.S.P. and Anti Terrorism Squad ATS, Vinit Khand, Lucknow. Thereafter on the charge sheet already submitted by the investigating officer, cognizance was taken on 6.9.2012. So now the cognizance has already been taken by the court and on 6.9.2017 the order was passed to put up this case on the date already fixed. He further submitted that apart from that the remand order under section 309 Cr.P.C. can be issued by the trial judge not only during trial but also during inquiry as well, even if there was no cognizance, though the charge sheet was submitted and there was no sanction order, hence cognizance could not be taken. There is no other provision in Cr.P.C. to pass remand except under section 309 Cr.P.C. He again submitted that since now the cognizance has already been taken and as such that mistake has been rectified and detention has become legal, even if otherwise, there was invalid custody before 6.9.2017.

He relied the judgement by Full Bench of this Court in the case of **Bal Mukund Jaiswal vs. Superintendent, District Jail, Varanasi** and another, in H.C.W.P. No.9061 of 1994 1984, ALJ 375 FB H.C. Allahabad, **Surjeet Singh vs. State of U.P.** AIR 1971 SCC 62, **Talib vs. State of J & K.**, the reported judgement of the Full Bench of Five Judges of this Court, H.C. W.P. No.55446 of 2010 **Kripanand Pandey vs. Varishtha Adheekshak Kendriya Karagar & others.**, and decided on 16.9.2011 and H.C.W.P. No.236/1992 **Deepak som vs. Superintendent of District Jail Lucknow and others** decided on 7.9.2000 and 2013 vol.82 ACC 35 (SC) Three Judges Bench **Suresh Kumar Bhikamchand Jain vs. State of Maharashtra.**,

Considered the submissions of counsel for the parties.

In the case of **Dinesh Dalmia**(Supra) in para 22 Hon.The Supreme Court observed that the power of a court to direct remand of an accused either in terms of sub (2) of Section 167 of the Code or sub-section (2) Of Section 309 thereof will depend on the stages of the trial. Whereas sub -section (2) of Section 167 of the Code would be attracted in a case where cognizance has not been taken, sub-section(2) of section 309 of the Code would be attracted after cognizance has been taken. So according to counsel for the petitioner since the cognizance has not been taken, hence the section 309(2) would not be attracted. However, in the present case the order was passed under section 309(2) Cr.P.C.

In the case of **Dawood Ibrahim Kaskar and others**, it was observed by Hon.Supreme Court, "We are, therefore, of the opinion that the words 'accused if in custody' appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who was subsequently in course of further investigation. So far as the accused in the first category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he comes under the second category will be governed by Section 167 Cr.P.C. so long as further investigation continues. That necessarily means that in respect of the latter the Court which had taken cognizance may exercise its power to detain him in police custody, subject to the fulfillment of the requirements and the limitation of Section 167 Cr.P.C."

In the fact of that case there was further investigation, hence in respect of such accused custody warrant was to be passed and issued under the provision of Section 167 Cr.P.C., either for police custody or for judicial custody. Hence that is not applicable in the present case.

In the case of **Anupam J.Kulkarni**(supra) in para-9 it was observed by Hon. The Apex Court "Section 309 Cr.P.C. comes into operation after taking cognizance and not during the period of investigation and the remand under this provision can only be to judicial custody and there cannot be any controversy about the same." Hence in that case matter regarding consideration was with regard to Police custody, when cognizance was taken, police custody cannot be given and even during

investigation when there is remand under section 167 Cr.P.C. then only within first fifteen days police remand can be passed for police custody. However if investigation remains, incomplete even after expiry of 60 or 90 days as the case may be, the accused shall be released on bail.

In the case of **Methabhai Pashabhai Patel** (supra) in para 17 it was observed by Hon.Supreme Court that once the charge sheet is filed and cognizance of the offence is taken, court cannot exercise its power of remand of an accused under section 167(2) Cr.P.C. then it can be exercise in terms of section 309(2) Cr.P.C. Hence in the present case, as well as in the case of **Dinesh Dalmia**, the controversy involved in the present case was not one of the issue raised and decided that if the cognizance was not taken by the court due to want of the 'sanction' then the remand order can be passed under section 309 Cr.P.C. or under which provision, and if passed, then it would be illegal and in view that the custody would also be illegal.

In the case of **Suresh Kumar Bhikamchand Jain** (supra) the charge sheet as well as supplementary charge sheet were filed within 90 days of the petitioner's arrest and remand to police custody. However, cognizance was not taken by the Special Court on account of failure of the prosecution to obtain 'sanction' to prosecute the accused under the provisions of the P.C. Act. Hence the question was whether such failure would amount to non compliance of the provisions of section 167(2) Cr.P.C. and detenue would be entitled to be released on bail. It was further observed "Merely because sanction had not been obtained to prosecute the accused and to proceed to stage of section 309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail as envisaged in section 167 Cr.P.C. The scheme of the Cr.P.C. is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some Court. During period of investigation the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under section 167(2) Cr.P.C. the Magistrate is vested with authority to remand the accused to custody, both police custody and/or judicial custody, for 15 days at a time in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years even death sentence. In the present case, accused was not produced before the Magistrate rather the

case was triable by the Special Judge, Prevention of Corruption Act, hence the remand order was issued before cognizance and after cognizance, during investigation, before cognizance and after cognizance by the Special Judge, Prevention of Corruption Act.

In case of **Suresh Kumar Bhikamchand Jain, State of Maharashtra**, 2013 (82) ACC 35 though the cognizance was not taken for want of sanction but the prayer to be released on bail was refused by Hon. The Apex Court and petition was dismissed. However in that case prayer of bail was considered in view of the provision of section 167 Cr.P.C. on treating the same as non filing of the charge sheet since the cognizance was not taken.

In the present case sanction has already been granted and it is undisputed that now the cognizance has also been taken by the court concerned.

Counsel for the petitioner further contended that no fresh remand order was passed and according to learned A.G.A. the period of remand was in operation upto 30.9.2017 and as such fresh remand order was not passed after taking cognizance. The order was to be passed by the Special Judge, Prevention of Corruption Act before cognizance and after cognizance.

In case of **Talib Hussain** (supra), Hon. The Supreme Court in para 6 held "It is sufficient to point out that in Habeas corpus proceeding the Court has to consider the legality of the detention on the date of hearing. If on the date of hearing it cannot be said that the aggrieved party has been wrongfully deprived of his personal liberty and his detention is contrary to law, a writ of habeas corpus cannot issue."

Section 167, 209 and 309 Cr.P.C. are quoted herein below:

167. Procedure when investigation cannot be completed in twenty four hours.

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well- founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from

time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a) ¹ the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

1. subs. by Act 45 of 1978, s, 13, for paragraph (a) (w, e, f, 18- 12- 1978).

2. Ins. by act 10 of 1990, s. 2 (w. e. f 19- 2- 1990)

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police. ¹ Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;]. ² Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.]

(2A) ¹ Notwithstanding anything contained in sub- section (1) or sub- section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub- inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub- section,

209. Commitment of case to Court of Session when offence is triable exclusively by it. When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) ¹ commit, after complying with the provisions of section 207 or section

208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;]

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

309. Power to postpone or adjourn proceedings.

(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody: Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time: Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing: ¹ Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.] Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand. Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.

From a perusal of the provision of section 309 sub section (1) In every enquiry or trial the proceeding should continue from day to day unless the court finds adjournment of the same necessary and under sub-section 2 of 309 Cr.P.C., if the court, after taking cognizance of an offence or commencement of the trial finds it necessary or advisable to postpone the commencement of, or adjourn or any enquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same or adjourn on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused, if in custody. As far as custody is concerned, custody included the illegal custody and if further custody has been legalised by a fresh valid order, then merely on the ground that before the date of hearing custody was illegal, the detenue would not be entitled for release.

After the charge-sheet is submitted it found that the case is triable by the Court of Sessions. The case has to be committed to the court of Sessions and accused in custody may be remanded to the judicial custody till conclusion of the trial. That provision is not applicable because in the present case only Special Judge (Prevention of Corruption Act) has power to take cognizance and pass the remand order.

In the present case the matter is triable by Special Judge, Prevention of Corruption Act, hence only section 167 and 309 Cr.P.C. are applicable. There is no provision after submission of the charge-sheet except to pass remand order under Section 309 Cr.P.C. Since there was no sanction for prosecution from the Government and in such circumstances there was no option or provision before the trial court but to pass remand order under section 309(2) Cr.P.C. for further custody. Apart from that subsequently even the sanction has been granted for prosecution and cognizance has been taken, hence merely on the ground that though charge sheet was submitted but since no cognizance was taken the custody will not be illegal. The power under section 309 Cr.P.C. was to be exercised. As per arguments of the counsel for the petitioner the power under section 309 Cr.P.C. has to be exercised only post cognizance and the petitioner was entitled to be released forthwith is not acceptable in view of the fact and provision.

In the case of **Surjeet Singh**, it was held by Full Bench of this Court "the word 'custody' under section 309 Cr.P.C., "in our opinion, therefore, means physical imprisonment as distinct from being on bail. Even if the accused is in imprisonment after his arrest in a criminal case without an order or warrant of remand by a competent court, he is in custody as distinct from being on bail. The word 'custody' therefore embraces both legal imprisonment as well as illegal imprisonment. It was further held "court is, therefore competent to remand an accused under section 309(2) Cr.P.C. even if he is in illegal imprisonment. It can thus rectify its mistake and transform illegal imprisonment into legal imprisonment." It was held that the word 'custody' in Section 309(2) Cr.P.C. means both legal and illegal.

In the case of Kripanand, considering the Full Bench judgement of this court, the argument that since initial custody was illegal hence petitioner was entitled to be released was not accepted since subsequently he was in legal custody.

In view of the above discussion it is clear that there was no option before the Magistrate, in the fact and circumstances of the case but to pass an order invoking the power section 309 Cr.P.C., because if petitioner/accused was not released on bail then he has to be sent to judicial custody.

In view of remand order under section 309 Cr.P.C, and subsequently even the cognizance was taken after sanction and as such in the view of the above, the present custody is legal hence the present Habeas Corpus Petition being devoid of merit is liable to be dismissed.

Accordingly, this Habeas Corpus petition is hereby dismissed.

Order Date :- 12.9.2017

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