

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.686 of 2016

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Rajiv Singh Son of Sri Rambadan Singh, resident of Village- Gopalpur, Police Station- Suryagarha, (Manik Pur), District- Lakhisarai.

.... Petitioner

Versus

1. The State of Bihar through the Director General of Police, Bihar, Patna.
2. The District Magistrate, Lakhisarai.
3. The Superintendent of Police Lakhisarai.
4. The Jail Superintendent of Lakhisarai.
5. The officer-in-Charge, Suryagarah, (Manikpur) Police Station, District- Lakhisarai.

.... Respondents

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Appearance :

For the Petitioner : Mr. Manish Kumar No.2, Advocate
Mr. Gajendra Kumar Singh, Advocate

For the Respondents : Mr. Anjani Kumar, AAG No.4
Mr. Ajay Kumar Thakur, Advocate, appearing as Amicus Curiae

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

C.A.V.

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 18-10-2016

With the help of this writ petition, made under Article 226 of the Constitution of India, the petitioner, who is one of the accused, arraigned at serial No. 3 in the First Information Report, leading to registration of Suryagarha (Manikpur) P.S. Case No. 28 of 2015, under Sections 302/328/323/498A/504 and 34 of the Indian Penal Code, registered with Police Station Suryagarha (Manikpur), on 12.02.2015, seeks issuance of a writ, in the nature of *habeas corpus*, commanding release of the accused-petitioner in the

police case aforementioned, which has arisen out of a Complaint Case No.534 of 2015, filed by one Nikku Devi, in the Court of Chief Judicial Magistrate, Lakhisarai, on 29.01.2015.

Background Facts

2. The material facts, leading to the present writ petition, may, in brief, are set out as under:

(i) In the First Information Report, which gave rise to the case at hand, the informant alleged that her husband, Prem Shankar Singh, was killed by her in-laws by forcefully administering poison. She stated that she got married to the deceased, i.e., Prem Shankar Singh, of village Gopalpur, in the year 2002.

(ii) The informant also alleged in the First Information Report that a few days after her marriage, her father-in-law, mother-in-law, both elder brothers of the deceased, and Smt. Kanchan Devi, sister-in-law (*gotni*), started harassing her by raising demand for *dowry*. It is alleged that the deceased did not like the behaviour of his family members, including his parents, brothers and sister-in-law and, therefore, whenever he expressed his disapproval of the conduct of his family members (accused persons) towards the informant, even the deceased husband was harassed, humiliated and misbehaved with by all the accused. On 12.07.2013, too, the informant had lodged a First Information Report with P.S. Manikpur Suryagarha giving rise to P.S. Case No. 112 of 2013

against her in-laws for harassing and torturing her by raising demands for dowry.

(iii) It is further alleged, in the First Information Report, that on 13.04.2014, the informant's husband took the informant to her paternal house, because the informant was pregnant and needed to be taken care of. The informant gave birth to a female child at her parental house. Because the informant had given birth to a female child, her in-laws refused to accept her back in her matrimonial house and she was humiliated for giving birth to a female child.

(iv) Defying the resistance of his family members, the husband of the informant, according to the First Information Report, went to the parental house of the informant and brought her back to her matrimonial house for celebration of *Durga Puja*.

(v) It is the case of the informant that all the accused humiliated and abused her for giving birth to a female child and told her to either bring two lakh rupees from her father for taking care of the female child or to return back to her paternal house.

(vi) The informant was told by her in-laws that she would not be allowed to stay in her matrimonial house until she brings two lakhs rupees. When the husband of the complainant intervened, he was mercilessly beaten up after being tied to a pillar in the house of one of their co-villager, namely, Padarath

Singh, by the accused. It was only after the informant cried and pleaded before them to spare her husband's life that the accused(s) left her husband tied to the pillar.

(vii) That on 22.01.2015, the deceased and the informant ran off to the parental house of the informant. On the next day, i.e., on 23.01.2015, all the accused went to the parental house of the informant and persuaded the informant and her deceased husband to return back to Gopalpur and promised that there would be no further harassment to either the informant or her husband. On the same day, i.e., 23.01.2015, both the informant and her husband, came back to their house at Gopalpur. However, in the evening, around 5 PM, on 23.01.2015, all the accused suddenly, grabbed the husband of the informant and started abusing and assaulting him and, thereafter, accused No. 4, Sanjeev Singh, along with two unknown persons, one of whom was a relative of a resident of village Gopalpur, forcefully administered water mixed with poison (sulphur) to the husband of the informant. It is, then, that the informant realized that the accused persons had brought the informant and her husband back with the intention to kill the husband as they felt betrayed and cheated by the husband of the informant for not towing to their design, rather, supporting and saving her from the torture and dowry demands from his family members.

(viii) When she gained consciousness and woke up,



she discovered that for the fear of police, her husband was taken to a local doctor in Suryagarha. However, her husband died on the way, when he was being taken to the doctor. The informant was beaten up and the accused also conspired to kill the informant. However, some residents of the village informed the police about the incident and upon learning that the police had been informed the accused persons on 25.01.2015 took the informant and left her on the road towards her parental village.

(ix) On the next date, i.e., 26.01.2015, the informant was taken to Begusarai, where she received treatment for injuries and, on 29.01.2015, a complaint, being Complaint Case No. 534 of 2015, was lodged with the Chief Judicial Magistrate, Lakhisarai, which, eventually, give rise to Suryagarha P.S. Case No.28 of 2015.

(x) The petitioner, in the present application, is also an accused not only in Suryagarha (Manikpur) P.S. Case No. 257 of 2015, but also in Complaint Case No.84 of 2016. Learned counsel for the petitioner submits that by order, dated 26.05.2016, passed in Cr. Misc. No.23674 of 2016, the petitioner has already been granted bail by this Court, in Suryagarha (Manikpur) P.S. Case No. 257 of 2015.

(xi) What is of immense importance to note is that upon submission of *police report* stating to the effect that no material sustaining the accusations made against the accused-petitioner were found, a *notice* was issued by the learned Court



below to the informant, who had already, in the meanwhile, filed a protest petition, to have her say on the said *police report* and it is at this stage that the present writ petition has been filed seeking issuance of writ of *habeas corpus* in exercise of this Court's power, under Articles 226 and 227 of the Constitution of India, on the ground that upon submission of the *police report*, as indicated hereinbefore, since the learned trial Court has not taken *cognizance* of any offence, the petitioner's further remand in custody is bad in law.

(xii) It is in the background of above facts that the present writ petition has to be considered.

3. We have heard Mr. Manish Kumar No.2, learned Counsel appearing on behalf of the petitioner, and Mr. Anjani Kumar, learned Additional Advocate General No.4, appearing on behalf of the State-respondents. Heard also Mr. Ajay Kumar Thakur, learned counsel appearing as *Amicus Curiae*.

Submissions :

4. Learned counsel for the petitioner submits that in Suryagarha (Manikpur) P.S. Case No. 28 of 2015, out of which the present writ petition arises, the petitioner has been taken into custody on 04.02.2016. It is further stated that *police report*, under Section 173(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), has been filed by the Investigating officer before the Chief Judicial Magistrate, Lakhisarai, wherein the investigating officer is of the opinion



that no case was made out against the petitioner. Learned counsel for the petitioner submits that without taking *cognizance* of any offence on the basis of the *police report*, the learned Chief Judicial Magistrate, Lakhisarai, has remanded the petitioner to custody in Suryagarha (Manikpur) P.S. Case No. 28 of 2015. It is further submitted by the learned Counsel for the petitioner that the *police report* was filed on 31.03.2015 and, thereafter, until 04.02.2016, no action was taken by the learned Magistrate. It is the case of the petitioner that without taking *cognizance* of any offence on the basis of the *police report*, under Section 173(2) of the Code, which, otherwise, exonerated the accused, the order, remanding the petitioner into judicial custody, is illegal.

5. Learned counsel for the petitioner contends that once a *police report*, under Section 173(2), was filed, the learned Magistrate had no powers, under sub-Section (2) of Section 167 of the Code of Criminal Procedure, to remand the petitioner to judicial custody. This argument is based upon the presumption that once a *charge sheet*/the *police report* is filed before a Magistrate, the investigation concludes or is deemed to have been completed and, thereafter, the Magistrate cannot exercise jurisdiction, under Section 167(2) of the Code to remand an accused, such as the petitioner, to custody, unless *cognizance* of offence is taken on the basis of such *police report* and order of remand is made in exercise of power under

Section 309(2) of the Code.

6. Learned Counsel, appearing on behalf of the State, on the other hand, submits that the issue, arising in the present case, is as to whether an accused acquires, upon completion of investigation, indefeasible right to be released from custody if *cognizance* has not been taken by the Court on the basis of *police report* filed under Section 173(2) of the Code.

7. Learned Counsel for the respondent also submits that the power to remand is vested in the Court and that once the *cognizance* of offence has been taken by a Magistrate, the power to remand shifts to the provisions contained in Section 309 of the Code, but till *cognizance* is taken, the exercise of power to remand an accused, under Section 167(2) of the Code, remains available with the Magistrate.

8. The learned Counsel, appearing on behalf of the respondents, relies on the decision of the Supreme Court, in ***Minu Kumari Vs. State of Bihar***, reported in **(2006) 4 SCC 359**, and submitted that even when *police report* or a *final report* is filed stating that no offence has been made out, the Magistrate is empowered to ignore such conclusion of the Investigating Officer and can direct *further investigation* and/or take *cognizance* of offence if he finds that a *prima facie* case of commission of offences has been made out against any of the accused or any other person.



9. The learned Counsel, appearing on behalf of the respondents, further relied on the decision of the Rajasthan High Court, in ***Mahesh Chand Vs. State of Rajasthan***, reported in **1985 Cri LJ 301 (Raj.)**, and submitted that the illegality of an order, remanding the person, accused of a non-bailable offence, to custody under Section 167(2) or Section 309(2) of the Code does not *per se* entitle an accused to be released on bail.

10. Learned counsel for the respondents points out that in the present case, even though *final report* has been submitted stating that there was no offence made out against the petitioner, the learned Magistrate has, in the present case, issued notice to the informant and has, thus, invoked his power contained in the Code to verify whether it is an appropriate case, where no further proceeding or trial as to the death of the deceased husband of the complainant is required.

11. It is the case of the respondents that under the provisions of the Code, when read as a whole including the provisions contained in Section 167 of the Code, there is no prohibition and no time limit to complete the investigation of a case and it merely provides that if in a case, where the investigation cannot be completed within 24 hours, the Magistrate is empowered to remand the accused to custody. The learned Counsel submits that Section 167 of the Code does not limit the power of a Magistrate to direct further

investigation to discover the truth and bring culprits to justice.

12. With regard to the right of an accused to demand bail, as of right, the learned Counsel, for the respondent State, has submitted that once a *charge sheet* or *final report* is submitted, the right of an accused to be released on bail has to be decided only with reference to the facts and merits of the case and the principles governing grant of bail to an accused upon filing of *charge sheet*. Learned counsel further submits that once a *charge sheet* or *final report* is filed, the accused is not vested with any right, under Section 167(2) of the Code, to be mandatorily released on bail after the completion of the specified period of 60 or 90 days, as the case may be.

13. The principal issues, arising out of this writ petition, may be summarized as follows;

What are the courses open to a Magistrate on receipt of a police report, under Section 173 (2) (i) of the Code, disclosing a report, under Section 169 of the Code, popularly called 'police report'?

Closely and inseparably connected with the question, posed above, is the question :

Whether the accused has indefeasible right to be released from custody in the event a report, under Section 169 of the Code, i.e., a final report, is filed?

Courses open to a Magistrate on receipt of a final

report, under Section 169 of the Code, disclosing no incriminating material against the accused named by the first informant in the First Information Report :

14. In a case instituted by the police, when the investigation is conducted, it may culminate into a report under Section 169 of the Code, ordinarily, called a *final report*, or a report, under Section 170 of the Code, ordinarily, called a *charge sheet*. Be it a report under Section 169 or a report under Section 170, the report submitted to the Court shall be in the form and manner as provided in Section 173 of the Code and is termed *police report*.

15. It is Chapter-XII of the Code, which deals with information to the police and the power of the police to conduct investigation. Ordinarily, it is the First Information Report, which sets, in motion, the machinery of law.

16. Let us, therefore, consider, first, the provisions contained in Section 154 of the Code. Sub-Section (1) of Section 154 provides that every information relating to the commission of a cognizable offence, if given orally to an officer-in-charge of a Police Station, shall be reduced into writing by him or under his direction and be read over to the informant and every such information, whether given in writing or reduced into writing, shall be signed by the person giving it and sub-section (2) of Section 154 requires that a copy of such information shall be given, forthwith, free of cost, to the



informant. Sub-section (1) of Section 156 vests, in the officer-in-charge of every Police Station, the power to investigate any cognizable case without the order of a Magistrate and sub-section (3) of that Section authorizes the Magistrate, empowered under Section 190, to order an investigation as mentioned in sub-section (1) of that Section.

17. As regards the information given to an Officer-in-Charge of a Police Station of the commission of a non-cognizable offence, within the limits of such a Police Station, the duty of such an officer is to enter or cause to be entered the substance of the information in a book to be kept by such officer, in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate, but he cannot, in the light of Section 155 (2), investigate into such a case without the order of a Magistrate having the power to try such a case or commit the case for trial. When, however, a police officer receives an order from a Magistrate to investigate a non-cognizable case, his powers, according to Section 155 (3), to carry out investigation will be the same as in the case of a cognizable case.

18. Coupled with what is indicated hereinabove, one should also bear in mind that sub-section (1) of Section 157 lays down that if, from the information received or otherwise, an officer-in-charge of a Police Station has reason to suspect the commission of an offence, which he is empowered, under



Section 156, to investigate, he shall, forthwith, send a report of the same to a Magistrate empowered to take '*cognizance*' of such offence upon a *police report* and shall proceed to the spot to investigate the facts and circumstances of the case and, if necessary, to take measures for the discovery and arrest of the offender. But there are two provisos to this sub-section. Proviso (a) empowers the officer-in-charge not to investigate if the offence alleged is not of serious nature and proviso (b) states that if it appears to the officer-in-charge of a Police Station that there is no sufficient ground for entering on an investigation, he shall not investigate the case; but in such a case, sub-section (2) of Section 157 requires that the officer shall, forthwith, notify to the informant the fact that he will not investigate the case or cause it to be investigated.

19. Thus, in a given case, in the light of the proviso (a) and (b) to sub-section (1) of Section 157, the police officer has the option of not investigating a case if an information, as to the commission of any offence, is given against any person by name, provided that the case is not of a serious nature or if it appears to the Officer-in-Charge of the Police Station for reasons to be recorded by him that there is no sufficient ground for entering on an investigation into the case. Section 158 contemplates sending to the Magistrate a report, as envisaged in Section 157, through such superior police officer as the State Government may, by general or special order, appoint in that



behalf, and such superior police officer has the power to give such instruction as he thinks fit and such instruction shall also be transmitted to the Magistrate along with the report. Notwithstanding the fact that Section 157 empowers the police not to investigate a case, the Magistrate, on receiving the report as contemplated in Section 157 read with Section 158, has the power to direct investigation or, if he thinks fit, at once, proceed or depute any Magistrate subordinate to him to hold preliminary inquiry or, otherwise, to dispose of the case in the manner as provided in the Code.

20. What the officer-in-charge of a Police Station is required to do, on completion of the investigation, is set out in Section 173. Sub-section (2) (i) of Section 173 provides that as soon as an investigation is completed, the officer-in-charge of a Police Station shall forward to the Magistrate, empowered to take '*cognizance*' of the offence on a *police report*, a report, in the form prescribed by the State Government, setting out various particulars including whether, in the opinion of the officer, any offence appears to have been committed and if so, by whom.

21. What is, now, of utmost importance to note is that Clause (ii) of sub-section (2) of Section 173 states that the officer shall also communicate, in such manner as may be prescribed by the State Government, to the person, if any, by whom the information relating to the commission of the offence



was, first, given as to what action had been taken by him. Sub-section (1) of Section 190, then, proceeds to enact that any Magistrate of the First Class and any Magistrate of the Second Class, specially empowered in this behalf under sub-section (2) of Section 190, may take '*cognizance*' of any offence: (a) upon receiving a 'complaint' of facts, which constitute such offence, or (b) upon a '*police report*' of such facts, or (c) upon 'information' received from any person, other than a police officer, or upon his 'own knowledge', that such offence has been committed. We are concerned, in this case, only with clause (b), because the question, we are examining here, is whether a Magistrate is bound to issue notice to the first informant or to the injured or to any relative of the deceased, when the Magistrate is considering a *police report* submitted under Section 173 (2) if the *police report* sends up only one or some of the accused, named by the first informant and not all the accused named in the First Information Report.

22. The Supreme Court, in ***Bhagwant Singh Vs. Commr. of Police***, reported in **(1985) 2 SCC 537**, has pointed out that when an informant lodges first information report with the officer-in-charge of a police station, he does not fade away with the lodging of the first information report; rather, he is very much concerned with what action is initiated by the officer-in-charge of the police station on the basis of the first information report lodged by him. No sooner he lodges the



first information report, a copy thereof has to be supplied to him, free of cost, under sub-section (2) of Section 154. If, notwithstanding the first information report, the officer-in-charge of a police station decides not to investigate the case on the ground that there is no sufficient ground for entering on an investigation, he is required, under sub-section (2) of Section 157, to notify to the informant the fact that he is not going to investigate the case or cause it to be investigated. This apart, the officer-in-charge of a police station is obligated, under sub-section (2) (ii) of Section 173, to communicate to the informant as to what the investigation, conducted by the police, has revealed. Furthermore, the officer-in-charge of the police station is also required to supply to the informant a copy of the *police report*, which he has forwarded to the Magistrate under Section 173 (2) (i).

23. The question, therefore, is as to why action, taken by the officer-in-charge of a police station, on the first information report, is required to be communicated to the informant along with the report, which is forwarded to the Magistrate under sub-section (2) (i) of Section 173. The reason is obvious and the reason, as pointed out in ***Bhagwant Singh*** (supra), is that the informant, who sets the machinery of investigation into motion by filing the first information report, must know what is the result of the investigation initiated on the basis of the first information report, which he had lodged.



The informant, having taken the initiative of lodging the first information report with a view to initiating investigation by the police for the purpose of ascertaining whether any offence has been committed and, if so, by whom, he is vitally interested in the result of the investigation and, hence, the law requires that the action taken by the officer-in-charge of a police station, on the first information report should be communicated to the informant. This apart, even the report, forwarded by such an officer to the Magistrate under sub-section (2) (i) of Section 173, should also be supplied to the informant.

24. Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate, under sub-section (2) (i) of Section 173, comes up for consideration by the Magistrate, one of the two different situations may, as pointed out in ***Bhagwant Singh*** (supra), arise. The report may conclude that an offence appears to have been committed by a particular person or persons and, in such a case, the Magistrate may do one of three things: (i) he may accept the report and take '*cognizance*' of the offence and issue process or (ii) he may disagree with the report and drop the proceeding or (iii) he may direct *further investigation* under sub-section (3) of Section 156 and require the police to submit a further report. The report, submitted under Section 173 (2) (i), may, on the other hand, state that, in the opinion of the police, no offence appears to have been committed and where such a report has



been made, the Magistrate, according to the Supreme Court, in ***Bhagwant Singh*** (supra), has, once again, the option to adopt one of three courses: (i) he may accept the report and drop the proceeding or (ii) he may disagree with the report and, taking the view that there is sufficient ground for proceeding further, take "*cognizance*" of the offence and issue process or (iii) he may direct *further investigation* to be made by the police under sub-section (3) of Section 156.

25. Where, in either of the two situations, indicated above, the Magistrate decides to take "*cognizance*" of the offence and issue process, the informant is not prejudicially affected nor can the injured or, in case of death, any relative of the deceased really feel aggrieved, because *cognizance* of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, but there is no sufficient ground for proceeding against others, mentioned in the first information report, the informant, as noted in ***Bhagwant Singh*** (supra), would certainly be prejudiced, because the first information report, lodged by him, would have failed its purpose, wholly or in part. Moreover, when the interest of the informant, in prompt and effective action being taken on the First Information Report lodged by him, is clearly



recognized by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and sub-section (2) (ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes '*cognizance*' of the offence and issues process against all those, who may have been named by him in the first information report, because that would be culmination of the information lodged by him.

26. There can, therefore, be no doubt, as held in ***Bhagwant Singh*** (supra), that when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2) (i) of Section 173, the Magistrate is not inclined to take '*cognizance*' of the offence and issue process against all or some of the accused named in the FIR, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take '*cognizance*' of the offence and issue process against the accused named in the *police report*.

27. To put it a little differently, but explicitly, the position of law is thus: If, in a given case, the FIR names more than one person as accused and the police submits *charge sheet* only against one or some of them, the Magistrate is duty bound to give a notice to the informant before accepting such a report of exoneration of those persons, who were named as accused, in the FIR, by the informant, but the '*police report*'



indicates no material having been found against them. Independent of the objection raised by an informant, the Magistrate has the duty to apply his mind to the facts of every given case and determine whether or not a '*final report*' or '*charge sheet*' or a partly *final report*, which exonerates some of the accused, shall or shall not be accepted in its entirety.

28. Situated thus, it becomes abundantly clear that if the Magistrate, upon hearing the informant, decides to accept the '*final report*', it is necessary that the Magistrate records the reasons, in writing, so that the correctness of the reasons, for taking such a decision, can, if necessary, be examined by the superior court.

29. The question, which we, now, confront is: *whether the petitioner has acquired any indefeasible right to be released from custody upon filing of a final report in terms of Section 169 of the Code?*

30. It is not in dispute that the power of a Magistrate to detain an accused in custody during investigation lies in Section 167 of the Code and after he has taken *cognizance* of the offence, the power to detain lies in Section 309(2) of the Code. It is pertinent to observe that the scope of Section 167(2) of the Code is vastly different and distinct from the scope of Section 309(2) of the Code. Section 167(2) of the Code empowers a Magistrate to remand an accused until the time the Court either takes *cognizance* or declines to take

cognizance of any offence, and it is only when the Court takes *cognizance* that further remand, if made, has to be pursuant to the power of the Magistrate under Section 309(2) of the Code.

31. The case of **Suresh Kumar Bhikamchand Jain v. State of Maharashtra**, reported in **(2013) 3 SCC 77**), clearly lays down the law to the effect that a Magistrate is empowered to remand an accused to judicial custody under Section 167(2) of the Code in the facts and circumstances, which is also the issue raised in the present case.

32. So far as issue of powers of a Magistrate to remand an accused and interpretation of Section 167(2) of the Code are concerned, the facts of the case of **Suresh Kumar Bhikamchand Jain** (supra) were, to some extent and in certain aspects, same as in the present case, because in the case of **Suresh Kumar Bhikamchand Jain** (supra), despite the fact that a *charge sheet* had been submitted, the Magistrate did not take *cognizance* and yet remanded the accused to custody. The argument, advanced, on behalf of the petitioner, **Suresh Kumar Bhikamchand Jain** (supra), was that upon submission of *charge sheet*, the Magistrate could not have remanded the accused to custody without taking *cognizance* and because sanction was being awaited by the Magistrate, the accused was entitled, as of right, to be released on bail.

33. The question, therefore, arose if the remand of the accused, on submission of *charge sheet* without taking

cognizance, is sustainable in law. This factual background becomes evident from the observations made, at paragraph 16, in **Suresh Kumar Bhikamchand Jain** (supra), which read as follows:--

".....it would be evident that both the charge sheet as also the supplementary charge sheet were filed within 90 days from the date of the petitioner's arrest and remand to police custody. **It is true that cognizance was not taken by Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but does such failure amount to non-compliance with the provisions of Section 167(2) Criminal Procedure Code is the question with which we are confronted.**"

(Emphasis is added)

34. In other words, the Magistrate's power to remand an accused under Section 167(2) of the Code of Criminal Procedure without taking *cognizance* was the question in controversy in **Suresh Kumar Bhikamchand Jain** (supra) in the factual background, which is similar to the facts of the case at hand. This position becomes transparent on reading the observations made, at paragraph 2 also, in **Suresh Kumar Bhikamchand Jain** (supra), which run as follows:--

"One of such issues concerns the



*power of the Magistrate to pass orders of remand even beyond the period envisaged under Section 167(2) of the Code of Criminal Procedure. **In the instant case, despite charge sheet having been filed, no cognizance has been taken on the basis thereof. The learned Magistrate has, however, continued to pass remand orders, without apparently having proceeded to the stage contemplated under Section 309 of the Code of Criminal Procedure.***

(Emphasis is added)

35. Considering the fact that *charge sheet* had been filed, in **Suresh Kumar Bhikamchand Jain** (supra), within the time stipulated by Section 167(2) of the Code of Criminal Procedure, but because sanction to prosecute the accused was not obtained, no *cognizance* was taken. The question, which, therefore, arose, if we may repeat, was whether the Magistrate, without taking *cognizance*, could have remanded the accused or, rather, continued to have remanded the accused by taking recourse to Section 167(2) of the Code of Criminal Procedure. That this was the legal issue is apparent from the observations made, at paragraph 4, in **Suresh Kumar Bhikamchand Jain** (supra), which read as follows:--

*"What has been stressed upon on behalf of the petitioner is that, **although, charge sheet had been filed within the***

time stipulated under Section 167(2) of the Code of Criminal Procedure, sanction to prosecute the petitioner had not been obtained, as a result whereof, no cognizance was taken of the offence. Notwithstanding the above, remand orders continued to be made and the petitioner remained in magisterial custody."

(Emphasis is supplied)

36. It was contended, on behalf of the petitioner, in **Suresh Kumar Bhikamchand Jain** (supra), that since the statutory period of 90 days, envisaged by Section 167(2) of the Code of Criminal Procedure, had lapsed, though the *charge sheet* had been submitted before the statutory period of 90 days had elapsed, the petitioner could not have been remanded to custody by the Magistrate, who is yet to take *cognizance*, but cannot take *cognizance* for want of sanction.

37. The further submission, made on behalf of the petitioner, in **Suresh Kumar Bhikamchand Jain** (supra), was that as far as Section 309(2) of the Code of Criminal Procedure is concerned, the same would be applicable only after *cognizance* stood taken and since *cognizance* had not been taken, trial could not have been said to have commenced and the petitioner was, therefore, entitled to be released on bail, forthwith, on the basis of the indefeasible right acquired by the

petitioner on the failure of the investigating authority to obtain sanction. That these were the submissions made, on behalf of the petitioner, in **Suresh Kumar Bhikamchand Jain** (supra), are clear from a reading of paragraph 7, which we reproduce below:--

"Mr. Lalit also submitted that Section 309 Criminal Procedure Code, which also deals with remand of the accused under certain circumstances, does not apply to the allegations relating to the provisions of the PC Act, inasmuch as, there is no committal proceeding contemplated in the proceeding before the learned Special Judge. However, as far as Section 309 Criminal Procedure Code is concerned, Mr. Lalit submitted that the same would be applicable only after cognizance of the offence had been taken or upon the commencement of the trial before the Special Court. **In the absence of cognizance being taken by the Special Court, it could not be said that the trial had commenced and, therefore, further detention of the petitioner was wholly illegal and not authorized in law and he was, therefore, entitled to be released on bail forthwith on the basis of the "indefeasible right" acquired by him on the failure of the investigating authorities to obtain sanction for prosecuting the petitioner."**

(Emphasis is supplied)

38. The question, therefore, which fell for consideration, in **Suresh Kumar Bhikamchand Jain** (supra), was, in the words of Supreme Court, at paragraph 13, thus, *"the right of a Magistrate or the trial court to pass orders of remand in terms of Section 167(2) of the Code of Criminal Procedure beyond the period prescribed therein.*

39. Having taken note of the provisions embodied in Section 167 of the Code, as a whole, *vis-à-vis* Section 309(2) of the Code, the Supreme Court, in **Suresh Kumar Bhikahmchand Jain** (supra), delineated the distinction between Section 167(2), on the one hand, and Section 309(2) of the Code, on the other, observing that grant of sanction is, nowhere, contemplated under Section 167 of the Code of Criminal Procedure. What Section 167(2) of the Code contemplates is, the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation, and, thereafter, upon taking of *cognizance*, indicates that the legislature intended investigation of certain crimes to be completed within 60 days and offences, punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities,

the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of *charge sheet* having been filed, the court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as, the ones referred to hereinbefore.

40. Referring to the cases of ***Natabar Parida vs State of Orissa***, reported in **(1975) 2 SCC 220**, and ***Sanjay Dutt vs State***, reported in **(1994) 5 SCC 410** the Supreme Court, in ***Suresh Kumar Bhikamchand Jain*** (supra), observed that these cases do not detract from the position that once a *charge sheet* is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise.

41. It is further observed, in ***Suresh Kumar Bhikamchand Jain*** (supra), that the Magistrate, exercising powers, under Section 167(2) of the Code, to remand an accused to custody, is not concerned with the fact whether or not *cognizance* of the offence has been taken. The right, which may have accrued to the petitioner, had *charge sheet* not been filed, is not attracted to the facts of the case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Criminal Procedure Code, it cannot be said that the accused is entitled to grant of statutory bail as envisaged in Section 167 Criminal Procedure Code. The



scheme in Criminal Procedure Code is such that once the investigation stage is completed, the court proceeds to the next stage, which is taking of *cognizance* and trial. An accused has to remain in custody of some court. During the 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) Criminal Procedure Code, 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, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days, where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the *charge sheet* within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as *cognizance* is taken by the Court trying the offence, when the said court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 of Code. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.

42. Finally, the Supreme Court, in ***Suresh Kumar Bhikamchand Jain*** (supra), observed and concluded as under:-

"Having regard to the above, we have no hesitation in holding that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, **the accused was not entitled to grant of statutory bail since the charge sheet had been filed well within the period contemplated under Section 167(2)(a) (ii) Criminal Procedure Code.** Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge sheet. The two are on separate footings. In that view of the matter, the special leave petition deserves to be and is hereby dismissed."

(Emphasis is added)

43. Closely following the decision in **Suresh Kumar Bhikamchand Jain** (supra), one must consider, in the context of the issues, which have been raised in the present petition, the decision of the Supreme Court, in **Central Bureau of Investigation vs. Rathin Dandapat, (2016) 1 SCC 507**), wherein the Court has considered the scope and ambit of Section 167 of the Code and powers of a magistrate to remand an accused for investigation. The issue before the Supreme Court was "whether no remand in police custody can be given to the investigating agency in respect of the absconding accused who is arrested only after filing of the charge sheet"?

44. The Supreme Court, relying on the judgment of a three Judge bench, in **CBI v. Dawood Ibrahim Kaskar and others**, reported in **(2000) 10 SCC 438**, held, in unequivocal terms, in **Rathin Dandapat** (supra), as follows:-

*"...the High Court is not justified...in upholding refusal of remand in police custody by the Magistrate, on the ground that accused stood in custody after his arrest under Section 309 CrPC. We have already noted above the principle of law laid down by the three judge bench of this Court in State v. Dawood Ibrahim Kaskar (supra) that **police remand can be sought under Section 167(2) CrPC in respect of an accused arrested at the stage of further investigation, if the interrogation is needed by the investigating agency.** This Court has further clarified in said case that **expression 'accused if in custody' in Section 309(2) CrPC does not include the accused who is arrested on further investigation before supplementary charge sheet is filed.**"*

(Emphasis is added)

45. What emerges from the decision, in **Rathin Dandapat** (supra), is that police remand can be sought under Section 167(2) of the Code in respect of an accused arrested even at the stage of further investigation.



46. In **Jeewan Kumar Raut v. CBI**, reported in **(2009) 7 SCC 526**, too, the Supreme Court, while interpreting Section 167(2), in the context of the Transplantation of Human Organs Act, 1994, has held, in clear terms, that only because the court itself took time in taking *cognizance* of the offence, i.e., after the expiry of the period of 90 days, the same would not mean that any new right would be created in favour of the appellants thereby.

47. From what has been laid down in **Suresh Kumar Bhikamchand Jain** (supra), **Rathin Dandapat** (supra) and **Jeewan Kumar Raut** (supra), it becomes abundantly clear that on submission of *police report*, the Magistrate is empowered to remand an accused to custody by virtue of powers vested in him under Section 167(2) of the Code and it is only when he takes *cognizance* that the stage of Section 309(2) of the Code is reached and till then, the remand of the accused can be legally continued by taking resort to the provisions embodied in Section 167(2) of the Code. And even after a Magistrate has taken *cognizance*, an accused can still be remanded to custody, police or judicial, in exercise of the Magistrate's power under Section 167(2) of the Code if the case falls for *further investigation*. [See: **Dawood Ibrahim Kaskar's case** (supra), and **Rathin Dandapat's case** (supra)]. Mere delay, on the part of the Magistrate in taking *cognizance* of an offence, on the basis of a *police report*, would

not vest in the accused an indefeasible right to be released unconditionally or on bail. [See: **Jeevan Kumar Raut's** case (supra)]

48. In short, on submission of *final report*, a Magistrate is not denuded of its power to remand an accused to custody by virtue of his power under Section 167(2) of the Code. However, once *cognizance* is taken, the remand, if any, would be pursuant to the Court's power under Section 309(2) of the Code unless a case falls for *further investigation*. [See **Rathin Dandapat's case** (supra)]. Only for the reason of delay in taking *cognizance*, on the submission of a *final report*, an accused cannot claim his release unconditionally or on bail if a hearing on the question of acceptance of final report is pending on issuance of requisite notice to the first informant. [See **Jeevan Kumar Raut's** case (supra)].

49. So far as the present case is concerned, even though *cognizance* had not been taken by the Magistrate on receipt of the *police report*, it is equally true that all of the courses, open to the Magistrate, as pointed out hereinbefore, were yet to be exhausted inasmuch as hearing of the informant, on the objection raised to the proposed acceptance of *final report*, is not yet complete.

50. In **Sanjay Bhagat's** case (supra), which Mr. Manish Kumar No.2, learned Counsel, relies upon, the Division Bench of this Court, contrary to the present case, did not have



to deal with a situation, wherein a *final report* had been filed, but the Magistrate had not taken *cognizance*; rather, the Magistrate, in the present case, has issued notice to the informant and is presently conducting an enquiry, under the mechanism provided in the Code, to determine if *cognizance* of any offence(s) needed to be taken notwithstanding the fact that a *final report*, exonerating the accused-petitioner, has been filed and the accused, named in the First Information Report, have not been sent up for trial [See law laid down in ***Bhagwant Singh's case*** (supra)]. It is also pertinent to note that in ***Sanjay Bhagat*** (supra), the Division Bench of this Court did not have the opportunity to consider the decisions of the Supreme Court in ***Jeevan Kumar Raut*** (supra), ***Suresh Kumar Bhikhamchand Jain*** (supra) and ***Rathin Dandapat*** (supra).

51. Even in ***Pawan Kumar Jaiswal*** (supra) and ***S.K. Lal*** (supra), the Court had not been dealing with the situations, which we are to deal with in the present case.

52. In the present case, because of the fact that a notice, in the light of the law discussed in ***Bhagwant Singh's case*** (supra), was required to be sent — and was, indeed, sent — to the informant on the ground that a *final report*, under Section 169 of the Code, was submitted against the accused-writ petitioner. Consequently, cognizance has not yet been taken and the first informant is yet to be heard on the question

of acceptance of *final report*. This Court, in **Pawan Kumar Jaiswal** (supra) and **S.K. Lal** (supra), did not also have the occasion to take into consideration the decisions in **Suresh Kumar Bhikhamchand Jain** (supra), **Jeevan Kumar Raut** (supra) and **Rathin Dandapat's case** (supra).

53. Reverting to the facts of the present case, it is of paramount importance to note, if we may reiterate, that even though *cognizance* has not been taken by the Magistrate on receipt of the *police report*, filed in the form of *final report*, it is equally true that all courses, open to the Magistrate, as pointed out hereinbefore, are yet to exhausted. In other words, even though a *final report* has been submitted by the Investigating Agency disclosing no commission of offence against the petitioner, this, by no stretch of imagination, would mean that the entire proceeding, commencing from the stage of lodging of the First Information Report and subsequent investigation, has come to its logical conclusion. As pointed out hereinbefore, there are several other factors, which will have to be considered before it can be said that the proceeding, which was borne out of the First Information Report, has come to an end, whereafter no further action, on the same cause of action, can be agitated.

54. It is an admitted position that in the present case, the Magistrate has not exhausted the process of hearing the informant and passing necessary order(s) as to whether *cognizance* ought or ought not to be taken inasmuch as a notice



has been issued to the informant to have her say on the *final report*, which claims to have not found material against any of the accused named in the First Information Report. Inseverely connected which this aspect of the case is the fact that a protest petition has been filed in the case at hand alleging, in effect, improper or unfair investigation by the police.

55. The conclusion, reached above, can be tested from yet another angle based on the doctrine of *implied power*.

56. In the case of ***Sakiri Vasu v. State of U.P.***, reported in **(2008) 2 SCC 409**, the Supreme Court held that it is well settled that when a power is given to an authority to do something, it includes such incidental or implied powers, which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus, where an Act confers jurisdiction, it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution.

57. The reason for the rule, popularly known as the doctrine of *implied power*, is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his *Statutory Construction* (3rd Edn., p. 267):

"... If these details could not be

inserted by implication, the drafting of legislation would be an interminable process and the legislative intent would likely be defeated by a most insignificant omission."

58. In ascertaining a necessary implication, the court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein. [see **Sakiri Vasu** (supra)].

59. An express grant of statutory powers carries with it, by necessary implication, the authority to use all reasonable means to make such grant effective. Thus, in **ITO v. M.K. Mohammad Kunhi, (AIR 1969 SC 430)**, the Supreme Court held that the Income Tax Appellate Tribunal has implied powers to grant stay, although no such power has been expressly granted to it by the Income Tax Act.

60. In **Savitri v. Govind Singh Rawat**, reported in **(1985) 4 SCC 337**, the Supreme Court held that the power conferred on the Magistrate, under Section 125 Criminal Procedure Code to grant maintenance to the wife, implies the power to grant *interim maintenance* during the pendency of the proceeding; otherwise, she may starve during this period. This position of law, on granting of *interim maintenance*, was enunciated before Section 125 of the Code of Criminal Procedure was given the present shape making *interim maintenance* explicitly a statutory right.



61. There is one more aspect of the matter, which hits the maintainability of the case. The petitioner has, admittedly, been in custody pursuant to the orders passed by the Court. The challenge, in this writ petition, has been made, primarily, on the ground of the jurisdiction of the Magistrate to pass remand orders after filing of *police report*, in the form of *final report*, but before taking *cognizance*. Thus. the issuance of a writ of *habeas corpus* has been sought for against judicial orders of remand.

62. One needs to bear in mind that as against an order of judicial remand, no writ of *habeus corpus* can be issued. In the present case, the orders are judicial orders. In the case of ***Saurabh Kumar v. Jailor, Koneila Jail***, reported in **(2014) 13 SCC 436**, the Supreme Court, having found that the accused was involved in a criminal case for which he had been arrested, produced before the Magistrate and remanded to judicial custody, held that the only question of concern is whether the petitioner can be said to be in unlawful custody. The Supreme Court, in ***Saurabh Kumar*** (supra), answered the question in the negative and held that since the custody is pursuant to the order of remand made by the Court, a writ of *habeas corpus* is, in the circumstances, totally misplaced.

63. The offences, which the accused person is alleged to have committed in the present case, are serious in nature. No doubt, on merits of the case, the right of the accused to be



granted bail is available to him; but the mere fact that a *final report*, under Section 169 of the Code, has been filed would not *ipso facto* entitle the present accused-petitioner to claim an indefeasible right of bail or to be released from custody unconditionally. The power to detain the accused till the Magistrate conducts inquiry as to whether *cognizance* of offence needs to be taken or not against the accused named in the First Information Report by the informant, who had not been sent up for trial by the investigating officer, has to be read into the provisions of Section 167 of the Code by applying the doctrine of *implied powers* or else, such an enquiry, as in the present case, would be illegal rendering Section 167 of the Code *otiose*.

64. Therefore, we hold that the learned Chief Judicial Magistrate, Lakhisarai, was competent to remand the accused to custody after the expiry of 90 days, even though a *final report*, under Section 169 of the Code, was filed, inasmuch as the learned Chief Judicial Magistrate, in light of **Bagwant Singh** (supra), is holding an enquiry by according an opportunity of hearing to the first informant, against the *final report* so as to enable him to take a decision, whether the *final report* needs to be accepted or *further investigations* is required to be ordered or *cognizance* needs to be straight away taken. As a corollary, it can be safely concluded that no indefeasible right has accrued to the accused-petitioner to demand his release on bail or otherwise, when the learned Chief Judicial

Magistrate, Lakhisarai, has not taken *cognizance*, because the enquiry is, in the light of the discussion held above, still pending.

65. Because of what has been discussed and pointed out above, we are clearly of the view that the writ petition, in the face of the facts of the present case and the law relevant thereto, is untenable and needs to be, therefore, dismissed.

66. While, accordingly, dismissing this writ petition, we make it clear that it shall remain open to the accused-petitioner to apply for regular bail if the situation so warrants.

(I. A. Ansari, CJ)

Chakradhari Sharan Singh, J : I agree.

(Chakradhari Sharan Singh, J)

Pawan/-

AFR/NAFR	A.F.R.
CAV DATE	18.08.2016
Uploading Date	20.10.2016
Transmission Date	20.10.2016