

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

CCP (REF) 1/2016

COURT ON ITS OWN MOTION

..... Amicus Curiae

Through Mr. Gautam Narayan with Ms. Shruthi
Parasa, Advocate.

versus

ANIL DUREJA

..... Respondent

Through Mr. Naushad Ahmed Khan, ASC (Civil)
with Ms. Nancy Wadhwa, Advocate.
Respondent in person.

%

Date of Decision: 23rd December, 2016

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present reference of contempt has been received from the Court of Mr. Ajay Kumar Malik, Metropolitan Magistrate, Central, Tis Hazari Courts, Delhi in which the accused no. 1-Shamsha Begum had submitted that she had been arrested illegally during night hours in violation of Section 46(4) of Code of Criminal Procedure (for short "Cr.P.C.") as well as the binding directions issued by the Supreme Court in *D.K. Basu Vs. State of W.B., (1997) 1 SCC 416* and *Sheela Barse Vs. State of Maharashtra, (1983) 2 SCC 96 : AIR 1983 SC 378*.

2. The Metropolitan Magistrate while referring the matter has observed in his order dated 05th January, 2016 that the present matter is a fit case for indulgence by the High Court under the contempt jurisdiction. He has also in his order held that the reply filed by the SHO, Police Station, Sarai

Rohilla to the contempt petition is evasive and the records do not show that he had obtained any permission from any judicial magistrate/Duty Magistrate prior to arrest of accused no. 1-Shamsha Begum at 11:00 p.m.

3. The relevant facts of the present case are that on 26th March, 2015 one Mohd. Rizwan (child) aged about two years was kidnapped by some unknown persons while he was playing outside his Jhuggi No. 166 at Rakhi Market which is within the jurisdiction of PS Sarai Rohilla between 7:00 a.m. and 1:00 p.m.

4. On 27th March, 2015, Mohd. Parvez (child's father) submitted a complaint to PS Sarai Rohilla that his child was missing from the jhuggi and the same was recorded vide DD No. 39A attested by HC Rajeev Kumar. An FIR being FIR No. 333/2015 under Section 363 IPC was registered and the same was marked to IO/ Assistant Sub Inspector Nahar Singh.

5. During investigation of the case, accused no. 1-Shamsha Begum was arrested at 11:00 p.m. on 28th March, 2015 from House No. B-846, Madipur Colony, Delhi by IO Nahar Singh, PS Sarai Rohilla. In her disclosure statement, accused no. 1-Shamsha Begum disclosed that she had sold the child for a sum of Rs. 5000/- to Mohd. Aalim (accused no. 2). The child was recovered from the house of accused no. 2 and both the accused were arrested on 28th March, 2015 after sunset.

6. On the same date, Sub Inspector Smt. Nirmala, who was a part of the police party headed by Assistant Sub Inspector Nahar Singh, made a statement under Section 161 Cr.P.C. that she was present when the arrest was made and also that the permission of the Ilaka Magistrate was sought before making arrest of accused no. 1-Shamsha Begum. Constable Ajay Yadav, who was also a part of the police party headed by Assistant Sub Inspector Nahar Singh, stated under Section 161 Cr.P.C. that he was present

when the arrest was made and that the permission of the Ilaka Magistrate was sought prior to making the arrest of accused no. 1-Shamsha Begum.

7. On 29th March, 2015, the accused no. 1-Shamsha Begum was produced before Duty MM who remanded her to judicial custody for three days.

8. On 31st March, 2015, an application for conducting Test Identification Parade (TIP) was moved by the IO before the Court of Metropolitan Magistrate and the same was marked to Metropolitan Magistrate-02 (Central), Tis Hazari Courts. The TIP proceeding was conducted wherein the accused no. 1-Shamsha Begum refused to join the proceedings.

9. On 27th May, 2015, final report under Section 173 Cr.P.C. was filed. It was stated in the final report that the permission of Metropolitan Magistrate was taken prior to the arrest of accused no. 1-Shamsha Begum.

10. On 2nd December, 2015, the accused was discharged under Section 370 IPC on the ground that there was no independent material to corroborate the disclosure statement. Consequently, the matter was remanded back to the Court of CMM for assigning it to a competent court for trial.

11. On 4th January, 2016, the accused no. 1-Shamsha Begum filed an application under Section 46(4) Cr.P.C. On 5th April, 2016, the order of reference was passed. The relevant portion of the said order is reproduced hereinbelow:-

“State Vs. Shamsha Begum & Ors.

FIR No. : 333/15

U/s : 363/365/34 IPC

PS : Sarai Rohilla

05.01.2016

*Present : Ld. APP for the State.
IO/ASI Nahar Singh in person.*

Sh. N.K. Saraswat, Ld. LAC on behalf of accused – Shamsha Begum.

Request received on behalf of SHO PS Sarai Rohilla that he is unable to appear before this court. It is the same request which is received in the matter taken up in the morning.

It is submitted by SHO PS Sarai Rohilla in his letter that he has approached the court of Hon'ble District & Sessions Judge (Central), Delhi with the prayer to transfer this case to some other court.

On the contrary, it is submitted on behalf of petitioner that the SHO PS Sarai Rohilla Sh. Anil Dureja along with other police inspector are still present in Court premises and taking soup in the central hall which is very much evident if the CCTV footage of relevant camera is preserved which shows their presence in the Tis Hazari Court premises but deliberate non-appearance in this court. It is further submitted that today there are no such orders received in this court nor the Defence Counsel has received any notice regarding same. It is further submitted that till date no orders has been received from any Appellate Court or superior court for stay of proceedings of present matter. It is further submitted that SHO PS Sarai Rohilla is guilty of contempt of the directions laid by Hon'ble Supreme Court of India and provisions of Cr. P.C. regarding custody of female in the night hours at police station so he is by all means trying to take away this matter from this court as this court has taken notice of this fact and has ordered to file reply to the contempt petition. It is further submitted that Insp. Anil Dureja/SHO PS Sarai Rohilla is guilty of offence of illegal detention of woman during night hours in the police station.

It is observed by this court that the reply filed under signature of SHO, PS Sarai Rohilla is very evasive and in no way relates to contentions made in contempt petition. Perusal of file also shows i.e. the charte sheet and all the documents annexed thereto, also shows that IO has not obtained the permission of any Judicial Magistrate/Duty MM to keep petitioner Shamsha Begum in police custody at PS Sarai Rohilla after her arrest on 28.03.2015 at 11:00 PM from House No. B-846, Madipur Colony, Delhi. The accused was produced on 29.03.2015 before Ld. Duty MM who remanded the accused for three days judicial custody in presence of Ld. APP for the State.

Copy of this order sheet be sent to concerned DCP, Joint C.P. and C.P., Delhi for such actions by SHO PS Sarai Rohilla.

As the matter relates to dignity and modesty of woman regarding which Hon'ble Supreme Court of India has already laid the guidelines in number of judgments, including the judgment of "Sheela Barse Vs. State of Maharashtra" 1983 AIR 378 and provisions laid in Cr. P.C. like Section 46(4). The SHO Concerned has also not uttered even single word in his reply regarding the contempt petition.

In view of the allegations in contempt petition, evasive reply filed by SHO PS Sarai Rohilla and material on record, the present matter is fit case for indulgence in the matter by Hon'ble High Court of Delhi.

The present matter be sent to Hon'ble High Court of Delhi through Ld. District & Sessions Judge (Central).

Ahlmad of the court is directed to immediately comply the orders and send the complete file in all respect to Hon'ble High Court of Delhi.

Apart from above, there are number of other matters in which Insp. Anil Dureja/SHO PS Sarai Rohilla has not complied with orders of the court and he is habitual of such kind of unwarranted official conduct.

Matter be re-listed on 07.01.2016."

12. On 3rd November, 2016, this Court appointed Mr. Gautam Narayan, Advocate as Amicus Curiae.

13. Mr. Gautam Narayan, learned Amicus Curiae points out that Section 46(4) Cr.P.C. has been the subject matter of judicial interpretation by the High Courts of Bombay, Delhi and Rajasthan. He submits that though Delhi and Rajasthan High Courts have held that exigency of situation will have to be taken into account before it can be held that the arrest of a woman after sunset is in contravention of Section 46(4) Cr.P.C., yet the Bombay High Court has held that Section 60-A Cr.P.C. binds a police officer to follow the procedure prescribed under the Cr.P.C. before arrest is effected and as a consequence no person can be arrested in breach of Section 46(4) Cr.P.C.

14. The relevant portions of the judgments referred to by learned Amicus Curiae are reproduced hereinbelow:-

a) ***Rakesh Chand Vs. State (NCT of Delhi), 2015 SCC OnLine Del 14193 :-***

"16. Though there is a statutory requirement of obtaining written permission from a Judicial Magistrate in case a woman is to be arrested between sunset and sunrise but it cannot be said that under no circumstance can such requirement be waived. The exigencies of the situation have to be taken into account. There

could be a lapse on the part of the arresting officer in that regard but, even then, before any action is taken against him legally or departmentally, he is required to be given a notice for the same and is further required to be heard. The aforesaid principles of fair play and action, be it civil or criminal action, can never be waived, forgotten or disregarded.”

b) ***Smt. Sadhna Upmanyu Vs. Station House Officer ACB & others.,***
2016 SCC OnLine Raj 6502:-

“8. On consideration of submissions made on behalf of the respective parties and the material made available on record as well as the relevant legal provisions and the case law, I do not find any substance in the petition and it is liable to be dismissed for the following reasons:-

Although, sub-section (4) of Section 46 Cr.P.C. provides that no woman shall be arrested after sun set and before sun rise except in exceptional circumstances and where the police officer effecting arrest after sun set and before sun rise claims existence of some exceptional circumstances, he must obtain the prior permission of the Judicial Magistrate or Special Court within whose local jurisdiction the offence has been committed or the arrest is to be made but it cannot be said that under no circumstances can such requirement be waived. The exigencies of the situation have to be taken into account before it is held that arrest of the woman has been made in contravention of this provision. In a case it may happen that offence itself is committed after sun set and before sun rise and after undertaking some preliminary investigation involvement of a woman is found in the offence and her immediate arrest is required to be made and practically it is not possible to obtain the prior permission of the concerned Magistrate, in my opinion in such a situation the arrest of the woman accused cannot be said to be in contravention of the requirement of this provision and it does not amount violation of fundamental right conferred upon such woman under Article 21 of the Constitution of India. It is well settled legal position that personal liberty of a person

can be curbed by procedure established by law and Code of Criminal Procedure is one of such procedural law.”

c) **Mrs. Bharati S. Khandhar Vs. Shri. Maruti Govind Jadhav, 2012**

SCC OnLine Bom 1901:-

“14. In paragraph 6 of the affidavit of Mr. Ghuge, P.I., it is stated that the Petitioner was taken to the Police Station before sunset, i.e. at 5:45 p.m., and, therefore, it cannot be said that the arrest of the Petitioner was after sunset. If this contention is to be accepted, in that case, action of Respondent No. 1 to take the Petitioner to the Police Station and further to ask her to sit in the Police Station by Mr. Ghuge, P.I., is without following any procedure of arrest. Therefore, on the aforesaid admitted facts, it is abundantly clear that, without having a copy of the non-bailable warrant with PSI Jadhav, he has taken the Petitioner in custody and she was taken to the concerned Police Station. She was asked to sit there till 8:45 p.m. till her arrest by PI Ghuge. There is no manner of doubt that, the acts of the Respondent No. 1 and PI Ghuge are totally in violation of relevant provisions of the Code. It is admitted position that, no prior permission of the Judicial Magistrate, First Class, was asked for and without following the Mandate of subsection (4) of Section 46 of the Code, the Petitioner was arrested at 8:45 p.m. The case in hand is not only a classic example of violation of provisions of sub-section (4) of Section 46 of the Code, but initial action of the Respondent No. 1 to take the Petitioner to the Police Station at 5:30 p.m., without having even a non-bailable warrant with him and without following any procedure, as contemplated under the Code, was totally in disregard to the law laid down by the Supreme Court in D.K. Basu's case (supra). The provisions of Section 60A of the Code reads thus:-

“60A. Arrest to be made strictly according to the Code - No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest.”

The aforesaid provision clearly binds the Police Officers to follow the procedure prescribed under the Code before arrest is effected.

The Police Officer by no stretch of imagination can arrest any person in breach of provisions of the Code.”

15. Mr. Gautam Narayan states that plea of violation of Section 46(4) Cr.P.C. does not appear to have been raised at any point before the Metropolitan Magistrate, i.e., from the date of initial production on 29th March, 2015 to any time prior to filing of the application under Section 46(4) Cr.P.C. on 4th January, 2016.

16. Learned Amicus Curiae also states that upon a perusal of the record, it is evident that the mandate of Section 46(4) Cr.P.C. has been complied with in the present case. In support of his contention, he relies upon the statements of Constable Ajay, Sub Inspector Smt. Nirmala and the charge-sheet. According to him, the documents on record reveal that permission of the *Illaka* Magistrate had been obtained prior to causing the arrest of accused no. 1-Shamsha Begum.

17. Mr. Gautam Narayan further states that the present petition which has been registered on the basis of a reference made by learned Metropolitan Magistrate is not maintainable inasmuch as in a case involving an allegation regarding commission of a civil contempt, in the National Capital Territory of Delhi, no power has been conferred on the subordinate courts to make a reference to this Court. In support of his submission, he relies upon the contempt of court rules framed by Andhra Pradesh High Court, Bombay High Court, Calcutta High Court, Gauhati High Court, Gujarat High Court, Himachal Pradesh High Court, Mysore High Court, Madhya Pradesh High Court, Madras High Court, High Court of Bombay at Nagpur and Orissa High Court.

18. Mr. Naushad Ahmed Khan, learned additional standing counsel appearing for respondent submits that since in the present case the grievance

with regard to violation of Section 46(4) Cr.P.C. had not been made on the date when the accused no. 1-Shamsha Begum was produced before the Metropolitan Magistrate and/or in the first bail application, the said plea could not have been entertained by the trial court. In support of his submission, he relies upon Supreme Court judgment in ***Rajkumari and Another Vs. SHO NOIDA and Others, (2003) 11 SCC 500*** wherein it has been held as under:-

“13. Regarding the plea taken by Petitioner 1 that the directions issued by this Court in Joginder Kumar (1994) 4 SCC 260 and D.K. Basu (1997) 1 SCC 416 had been violated, it may be stated at the very outset that admittedly, Petitioner 1 was produced in the Court of Magistrate concerned on that very day i.e. on 16-8-1997. She applied for bail in both the cases and in the bail applications, the pleas taken by her were: (i) that she had been falsely implicated in the case; (ii) that she had no criminal background; (iii) that there is no public witness of the crime in question; (iv) that she is a lady and belongs to a respectable family; (v) that she is prepared to furnish adequate surety; and (vi) that there is no apprehension of tampering with prosecution witnesses from her side. She did not state anything nor did she make any grievance before the Magistrate concerned regarding non-compliance with the directions issued in the aforesaid two cases, though her bail application was drafted and filed by a lawyer. If the plea taken now in the writ petitions was correct, in normal course grievance regarding the same should have been made on that very day when she was produced before the Magistrate especially when the legal aid and advice of a counsel was available to her.”

19. Having heard learned counsel for parties, this Court is of the opinion that just because this Court has not framed Contempt of Court Rules does not mean that the subordinate judiciary does not have the jurisdiction or the power to forward cases of civil contempt to the High Court. As Section 10 of the Contempt of Courts Act, 1971 gives power to the High Court to punish for contempt of subordinate courts, the cases of civil contempt can

surely be brought to the notice of the High Court by the subordinate judiciary. However, this Court is of the opinion that the Courts subordinate to the High Court cannot reach the conclusion that a matter is fit for indulgence by the High Court as a Civil Contempt. If the subordinate judiciary is of the view that a case of Civil Contempt is made out, it can bring the said fact to the notice of the Registrar General of this Court, who shall place the same before the Hon'ble Chief Justice on the administrative side. Thereafter, the Chief Justice on the administrative side may either himself/herself or by nominating another Judge must satisfy itself that a prima facie case of Civil Contempt is made out. Only thereafter, the petition should be registered as a Civil Contempt.

20. Upon a perusal of the present paper book, this Court finds that at this stage of the proceeding the Metropolitan Magistrate could not have concluded that Section 46(4) Cr.P.C. had been violated inasmuch as the matter is pending adjudication and it is the case of the respondents in the statements and charge-sheet filed prior in time that the permission of *illaka* Magistrate had been obtained to arrest accused no. 1-Shamsha Begum. In fact, the observations in the impugned reference order amount to prejudging one of the crucial issues to be determined during the course of the trial.

21. It is pertinent to mention that upon perusal of the trial court record, this Court finds that neither any contempt petition was filed by the applicant/accused no. 1-Shamsha Begum nor any reply was filed to the contempt petition by the SHO, Police Station Sarai Rohilla. Consequently, the reference to an alleged contempt petition as well as its reply by the Metropolitan Magistrate in the reference order are clearly erroneous.

22. The judgments of **D.K. Basu** (supra) and **Sheela Barse** (supra) are clearly inapplicable to the facts of the present case as they do not deal with the violation of Section 46(4) Cr.P.C.

23. This Court finds merit in the submission of learned counsel for respondent as well as the Amicus Curiae that a plea of violation of Section 46(4) Cr.P.C. had not been advanced either at the time of remand or in the first six bail applications filed by accused No.1 Shamsa Begum. The said plea is clearly an after-thought in accordance with the judgment in **Rajkumari and Another** (supra).

24. In any event, violation of Section 46(4) Cr.P.C. may make the respondents amenable to disciplinary proceedings and/or liable to pay compensation or for accused's immediate release but not for civil contempt as defined under Section 2(b) of the Contempt of Courts Act, 1971.

25. This Court also finds that the petition under Section 156(3) Cr.P.C. filed by the accused-Shamsa Begum for registration of FIR on the grounds of violation of Section 46(4) Cr.P.C. has already been dismissed vide order dated 26th April, 2016 and the said order has attained finality. The relevant portion of the said order reads as under:-

“Detailed argument were heard. On appreciating the record, I have reached a conclusion that no case is made out for issuing directions for registration of FIR. There is inordinate delay in filing the present complaint. The alleged incident is of 28.03.2015 but surprisingly, complainant did not lodge any complaint till 19.01.2016 when the present application was filed before the concerned court. During the intervening period, complainant did not approach any authority to lodge complaint against the police officials. The fact that complainant is an accused in FIR No. 333/2015 and she was arrested by the police on 28.03.2015, was not disclosed in the complaint. In fact, the date of alleged incident is the date when the accused was arrested in the FIR. It is apparent

that the complaint has been filed with the sole motive of pressurizing police. The complainant was arrested during the course of investigation by the police officials under the colour of their duty and subsequently, the kidnapped child was recovered at her instance. Neither requisite affidavit has been filed alongwith the complaint nor the sanction for prosecuting the police officials has been obtained. The directions given by the Apex Court in 'Priyanka Srivastava Vs. State of UP' (Criminal Appeal No. 781 of 2012, decided on 19.03.2015) have not been complied with. There is no merit in the application which appears to be an afterthought. Continuing the present proceedings would amount to an abuse of process of law. Any attempt by an individual to use the process of law to achieve ulterior motive should be put to rest at the earliest. The application is dismissed.

File be consigned to Record Room.

*(Sudhanshu Kaushik)
ACMM-01 (Central)/THC/Delhi
26.04.2016"*

26. Consequently, no case of contempt is made out. Before parting with the matter, this Court would like to place its appreciation on record for the services rendered by Mr. Narayan, Amicus Curiae.

27. In view of the aforesaid, the present contempt reference is closed and notices issued are discharged.

MANMOHAN, J

DECEMBER 23, 2016

KA