

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 04.09.2017*

+ W.P.(CRL) 2466/2017

RAJIV JAIN Petitioner

Through Mr.Vijay Agarwal, Adv. with
Mr.Mudit Jain, Mr.Neeraj Kr. Jha and
Ms.Barkha Rastogi, Advs.

versus

STATE & ANR Respondents

Through Ms.Kamna Vohra, ASC for
State.

Mr.Amit Mahajan, CGSC with Mr.Kunal
Dutt, Adv. for UOI.

+ W.P.(CRL) 2484/2017

SANJAY JAIN Petitioner

Through Mr.Vijay Agarwal, Adv. with
Mr.Mudit Jain, Mr.Neeraj Kr. Jha and
Ms.Barkha Rastogi, Advs.

versus

STATE & ANR Respondents

Through Mr.Amit Mahajan, CGSC with
Mr.Kunal Dutt, Adv. for UOI.

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (Oral)

1. It is trite that the Special Judge under Prevention of Money Laundering Act, 2002 (in short “PMLA”)/Magistrate is not a wing of the Police but is part of the judicial set up of the country. The order has to be passed by a Judicial Magistrate acting in a judicial capacity. It is therefore, his duty to see that the custody is the right custody and the order has to be passed with the ultimate object of securing justice. He has to act independently to determine the nature of the custody. He can change nature of custody from time to time. However, he cannot order police custody beyond the period of fifteen days.
2. It is also settled position of law under Section 167 (2) of the Code of Criminal Procedure, 1973 (in short “Cr.P.C.”) that the Magistrate/Special Judge under PMLA can **in the first instance** authorise the detention of the accused in custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the while. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa. This position in law settled by the **Division Bench** of **this Court** long back in the case of **State (Delhi Admn.) v. Dharam Pal, (1982) 21 DLT 50**, was approved by the **Hon’ble Supreme Court** in **Central Bureau of Investigation, Special Investigation Cell-I,**

New Delhi, v. Anupam J. Kulkarni, (1992) 3 SCC 141, while interpreting Section 167 (2) of the Cr.P.C.

3. Raising these questions both the petitioners have impugned the order dated 28th August, 2017 while invoking the writ jurisdiction of this Court under Article 226/227 of the Constitution of India for issuance of writ of mandamus to set aside the order dated 28th August, 2017 passed by the Court of learned ASJ, Patiala House Court, New Delhi, in relation to ECIR/DLZO/01/2015/AD (VM) dated 12th February, 2015 registered by the Enforcement Directorate, under Section 3 and 4 of the PMLA, whereby the petitioners were remanded to another spell of ED/Police custody for 10 days.
4. Earlier both the petitioners were produced before the learned Special Judge on 22nd August, 2017 when they were remanded to ED custody for three days. They were again produced before the learned Special Judge on 25th August, 2017 and were remanded to judicial custody for three days. By impugned order dated 28th August, 2017, learned Special Judge remanded them for ten days which is obviously beyond fifteen days of their custody.
5. Opening his arguments, Mr. Vijay Agarwal, the learned counsel for the petitioners, states that he has challenged the impugned order dated 28th August, 2017 on several grounds but for the purpose of disposal of this petition, he only presses the ground of

exercising of the power by the learned Special Judge to extend the remand beyond fifteen days.

6. Here, it is relevant to advert to Section 167(2) of the Cr.P.C. which reads as under:

“167. Procedure when investigation cannot be completed in twenty four hours—(1)

(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) 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;

(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 in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(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.

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.

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 or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a women under eighteen years of age, the detention shall be authorised to be in

the custody of a remand home or recognised social institution.”

7. Section 167 (2) came up for interpretation before a Division Bench of this Court in **State (Delhi Admn.) v. Dharam Pal (supra)**. It was held that the entire object of section 167 is to facilitate investigation and not detention without trial. The language used in the Section allows the Magistrate from time to time to pass an order placing the accused in such custody as he deems fit. Under Section 167(2) of the Cr.P.C., the Magistrate has power to alter the nature of the custody from judicial custody to police custody and *vice-versa* during the first period of fifteen days mentioned in Section 167(2) of the Cr.P.C. **After the expiry of first period of fifteen days, the accused can only be kept in judicial custody or any other custody ordered by the Magistrate but certainly not in police custody.**
8. While referring a judgment of the Single Bench of this Court in **State v. Mehar Chand, (1969) 5 DLT 179**, the Division Bench held that the only object of restricting the power of the police to detain the accused in their custody for a total period of fifteen days is to prevent the use of third degree methods by them. The Division Bench while agreeing to the view of Hardy, J., observed as under:

“We completely agree with Hardy, J., in coming to the conclusion that the Magistrate has to find out whether there is a good case for grant of

police custody. **There is no sign in the Section that the nature of the custody cannot be altered. In fact, experience would show that investigation would be hampered and made more difficult if the nature of the custody was not capable of alteration in the first 15 days.** It might be necessary to send the accused to a hospital for examination, or to produce him before a Magistrate for recording a confession. In such cases, a useful precaution to take is to send the accused to judicial custody so that the confession might be free and without pressure. Another example is provided on the facts of this case for enabling an identification parade to be held in the jail. Another possibility is that the police may not require the prisoner immediately for lack of material which might be forthcoming later. In such a case the period of police custody might be shortened by remanding the prisoner to judicial custody while the police is collecting the necessary material for further investigation. There can be many examples of this type dependent on the circumstances of the case.”

9. The Apex Court in **Central Bureau of Investigation, Special Investigation Cell-I, New Delhi, v. Anupam J. Kulkarni (supra)** while upholding the view of the Division Bench of this Court held that Section 167(2) is clear in its terms. The Magistrate under this section can authorise the detention of the accused in such custody as he thinks fit but it should not exceed fifteen days in the whole. Therefore the custody initially should not exceed fifteen days in the whole. The custody can be police custody or judicial as the Magistrate thinks fit. The words “such

custody” and “for a term not exceeding fifteen days in the whole” are very significant. It is also well-settled now that the period of fifteen days starts running as soon as the accused is produced before the Magistrate.

10. It would be appropriate to refer paras 8 and 13 of the said judgment which read as under:

“8. Having regard to the words “in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole” occurring in Sub-section (2) of Section 167 now the question is whether it can be construed that the police custody, if any, should be within this period of first fifteen days and not later or alternatively in a case if such remand had not been obtained or the number of days of police custody in the first fifteen days are less whether the police can ask subsequently for police custody for full period of fifteen days not availed earlier or for the remaining days during the rest of the periods of ninety days or sixty days covered by the proviso. **The decisions mentioned above do not deal with this question precisely except the judgment of the Delhi High Court in Dharam Pal's case. Taking the plain language into consideration particularly the words otherwise than in the custody of the police beyond the period of fifteen days" in the proviso it has to be held that the custody after the expiry of the first fifteen days can only be judicial custody during the rest of the periods of ninety days or sixty days and that police custody if found necessary can be ordered only during the first period of fifteen days.**

To this extent the view taken in Dharam Pal's case is correct.”

“13. Whenever any person is arrested under Section 57 Cr. PC he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial Magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. **The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e., either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa.** If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate alongwith the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period of investigation - can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences

either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier - case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody.”

11. Admittedly, both the petitioners were arrested by the ED on 22nd August, 2017. On the same day they were produced before the learned Special Judge under PMLA who remanded them for three days ED custody. They were again produced before learned Special Judge on 25th August, 2017 and they were remanded to judicial custody for three days. They were again produced on 28th August, 2017 before learned ASJ and the ED requested for

14 days custody for both the petitioners and the learned ASJ without applying his mind to the relevant provision of Section 167 (2) of Cr.P.C. and the law laid down by the Division Bench of this Court in **State (Delhi Admn.) v. Dharam Pal** (*supra*) and by the Apex Court in **Central Bureau of Investigation, Special Investigation Cell-I, New Delhi, v. Anupam J. Kulkarni**, (*supra*), and despite the objection taken by learned counsel for the accused/petitioners granted 10 days ED police custody of both the petitioners to the investigation officer for completion of the investigation in the case.

12. Today, when the matter was taken up in the first call in the pre-lunch session, learned Central Government Standing Counsel, on instructions, submitted that custody of both the petitioners is no more required and today ED intends to produce the petitioners before the learned Special Judge under PMLA.
13. The matter was kept pending and is again taken up in the post lunch session. Learned Central Government Standing Counsel submits that both the petitioners were produced today before the learned Special Judge under PMLA and they have been remanded to the judicial custody. He submits that the impugned order remanding the petitioners cannot be termed *per se* illegal though the detention would have become illegal beyond fifteen days from the date when they were first produced before the learned Special Judge. He further submits that the impugned

order dated 28th August, 2017 remanding the petitioners stands merged with the latest order passed today by which they were sent to judicial custody.

14. Per contra, the learned counsel for the petitioners submits that the impugned order of the learned ASJ dated 28th August, 2017 is apparently illegal and should be set aside in view of settled position in law in **State (Delhi Admn.) v. Dharam Pal (supra)** and **Central Bureau of Investigation, Special Investigation Cell-I, New Delhi, v. Anupam J. Kulkarni (supra)**.
15. Admittedly, since both the petitioners were produced before the learned Special Judge under PMLA for first time on 22nd August, 2017, the total period of custody/remand could not have been allowed beyond 5th September, 2017 when they would be completing fifteen days in custody. Learned ASJ could not have given the police/ED remand for more than fifteen days after the petitioners were produced on 22nd August, 2017. Therefore, the impugned order of the learned Special Judge dated 28th August, 2017, being *per se* illegal, perverse and whimsical, is set aside to the extent of remanding the accused persons beyond period of fifteen days as mandated by Section 167(2) of the Cr.P.C. The Judicial Officers/MM/Special Judges while dealing with the request for remand should be very precise, meticulous and cautious. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e., either police or

judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa. The Judicial Officer shall ensure that from the first day of his production before him, the accused cannot be sent to police custody after completion of fifteen days. After the expiry of first period of fifteen days, the accused can only be kept in judicial custody but certainly not in police custody. The Judicial Officer is not a post office or mouthpiece of the prosecution and should act in a judicial manner and ensure compliance of Section 167(2) Cr.P.C. and law laid down by **Hon'ble Supreme Court of India in Central Bureau of Investigation, Special Investigation Cell-I, New Delhi, v. Anupam J. Kulkarni (supra)** and **this Court in State (Delhi Admn.) v. Dharam Pal (supra)** in its letter and spirit. The purity of justice must be maintained at all cost. It is not out of place to mention that the Public Prosecutor is the officer of the court and not the persecutor. He is supposed to assist the court in proper perspective. Before forwarding application for extension of remand by 14 days, he should have meticulously examined it to ensure that no violation of Section 167(2) of Cr.P.C. takes place. It is noted that the total period of custody with the police cannot exceed 15 days and at the time of making an application for extension of remand by 14 days, the accused had already been in custody for 6 days meaning thereby that he could not have

been sent to police custody for more than 9 days. There was thus no occasion for seeking ED remand for 14 days.

16. Copy of this order be circulated to all the judicial officers for their guidance. Learned District & Sessions Judges are requested to sensitize the judicial officers posted under their jurisdiction.

SEPTEMBER 04, 2017/jitender

VINOD GOEL, J.