

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 1353 OF 2018

Tasneem Rizwan Siddiquee	}	Petitioner
versus		
The State of Maharashtra	}	
and Ors.	}	Respondents

Rizwan Merchant, Mr. Swapnil Wagh and
Mr. Akshay Bafna i/b. Mr. Shaikh Mohd.
Ibrahim for the petitioner.

Ms. Aruna Pai-APP with J. P. Yagnik-APP
for State.

Mr. Abhishek Trimukhe-Deputy
Commissioner of Police, Crime Branch,
Thane City present.

**CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.**

DATED :- MARCH 21, 2018

P.C. :-

1. By this writ petition under Article 226 of the Constitution of India, the petitioner seeks issuance of a writ of habeas corpus directing the respondents to produce her husband, as, according to the petitioner, he is detained illegally and unlawfully.

2. After the brief hearing on 20th March, 2018, we passed the following order:-

“1. Heard. The argument of Mr.Merchant, learned counsel appearing for the petitioner, is that this petition is maintainable in the form in which it is presented. This is a petition seeking issuance of Writ of Habeas Corpus to produce the husband of the petitioner, who is in detention.

2. The detention is termed as illegal by Mr.Merchant on the ground that Section 41-A of Code of Criminal Procedure, 1973 (`Cr.P.C.') inserted by Act No.5 of 2009 with effect from 1st November 2010 and latter on substituted by Act No.41 of 2010, contemplates notice of appearance before the police officer.

3. Since the petitioner asserts non-compliance with this provision, we deem it appropriate to reproduce it at this stage itself :

“41-A.- Notice of appearance before police officer.-

(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officers is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.”

4. Mr.Merchant would submit that once this notice is issued, then, in terms of sub-section (1), the police officer was satisfied that the arrest of the petitioner's husband is

not required and that the matter falls under the provisions of sub-section (1) of Section 41. He, therefore, was pleased to issue a notice directing the petitioner's husband to appear before him at such place as is specified in the notice.

5. The factual argument is that this notice is dated 16th March 2018 and it informs the husband of the petitioner to appear before the officer signing this notice on 17th March 2018. Mr.Merchant would submit that sub-section 2 of Section 41-A contemplates issuance of such notice but such phrase would have to be construed as "service or execution of notice", else sub-section 1 would be rendered otiose. Therefore, until the person fails to comply with the terms of notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by the competent Court in this behalf, unable to arrest him for the offence mentioned in the notice. If there was compliance with the notice by the petitioner's husband, then, no question arises, according to Mr.Merchant, of presentation of such petition, but it is the respondents' assertion that when they sought to serve this notice on the petitioner's husband, he refused. That is how the panchanama is drawn.

6. Since Mr.Merchant says and on the basis of the pleadings in the petition, that there was a panchanama drawn and a copy of which is at pages 41 and 42 of the paper book, we have carefully perused it. It is in Marathi.

7. The whole panchanama has been perused with the assistance of Mr.Yagnik, learned APP, who with all his persuasive ability, could not find any sentence therein to the effect that the petitioner's husband refused to accept this notice when it was served on him at his place of work/his office. In these circumstances and particularly when the notice at page 42 also contains below the signatures of panchas and the senior police inspector, the signature of the accused, then, whether it is a signature acknowledging the notice and it's receipt or is it asserting, as is now stated across the bar by Mr.Yagnik, his refusal. Once such a statement is absent in the panchanama, then, we prima facie find it very difficult to agree with Mr.Yagnik.

8. However, Mr.Yagnik prays for time to produce the contemporaneous record, which according to him, would indicate that the noticee/husband of the petitioner refused

to accept the notice referable to and styled as one under sub-section (1) of Section 41-A of Cr.P.C. On a query as to where is the original record or the contemporaneous record, the answer of Mr.Yagnik is that today in the on-going legislative assembly session, there is a query and which has to be answered by the concerned Minister and he requires the original documents so also officer's presence in the legislature secretariat. That is how the whole record has been taken to the legislative assembly secretariat. Mr.Yagnik, therefore, seeks time till tomorrow, which is 21st March 2018 at 11.00 a.m.. We post this matter tomorrow, 21st March 2018 at 11.00 a.m. only to enable Mr.Yagnik to produce such record and answer the queries of the Court; else, all the consequences in law shall follow.

9. This opportunity is granted to Mr.Yagnik only because the document at pages 41 and 42 denotes that not only the petitioner's husband was present at his office but he and his staff handed over the articles and details of his e-mail identity, mobile and related information. The panchanama records that preparation of the same had commenced at 20.10 hours and ended at 22.10 hours on 16th March 2018.

10. Stand over to 21st March 2018 at 11.00 a.m.

3. The issue was clearly crystallised in this order. The matter was placed today. The entire file was perused by us, including the entry in the police diary, the remand report and such other documents, but we made it clear to Ms. Pai learned APP appearing for the respondents that from this record, we do not see any compliance with the mandate of law. There was thus no justification provided and from the records as to how this police functionary proceeded and arrested the petitioner's husband when the petitioner's husband is supposed to have remained present before him on 17th March, 2018 at 11.00 a.m. pursuant

to a notice dated 16th March, 2018. When it was solemnly argued yesterday that there was no compliance with the notice and that is how the arrest took place, the only query raised today was that the authorities require the petitioner's husband to remain present on 17th March, 2018, but he has been arrested on 16th March, 2018 at 22.10 hours. The panchanama and related documents belie the contents of the notice and the alleged refusal on the part of the petitioner's husband. Once this was the position, then, the mandate of Article 21 is clearly flouted by this high handed action of the respondents.

4. A brief hearing today resulted in Ms. Pai seeking time to take instructions and after speaking to the Deputy Commissioner of Police. At her request, the matter was taken up at 1.00 p.m. and when it was called out, on instructions from the Deputy Commissioner of police, who is present in court, it is stated that the said Deputy Commissioner has no objection to the petitioner being released, if so directed by this court.

5. Once we have noted, in terms of our earlier order and even at today's hearing that he is not obliging this court by making any statement, then, he must admit that he has taken law in his hands and he would voluntarily proceed to release the petitioner's husband from custody. This was the expectation from this police

officer and if he had apologised genuinely and bonafide and sought time to release the petitioner's husband, we would not have directed any action to be taken against him. However, he remains adamant and persists that only if this court says that the petitioner's husband should be released, he would have no objection to such release. He would bring now to the court, the proceedings before the Magistrate and the contents of the remand report, which, according to him, permit him to detain the petitioner's husband in custody till 23rd March, 2018.

6. We do not think any assistance can be derived from the entries in the diary or the remand proceedings. We do not think that the order of the Magistrate remanding the petitioner's husband to police custody till 23rd March, 2018 can bind this court and if the true and correct facts had been brought to the notice of the concerned judicial officer, possibly, he would not have passed the order on the request of this police officer. Therefore, while we direct, after holding that the petitioner's husband was unlawfully detained, his release from the custody forthwith, we also direct the superior police officials, particularly the functionary in the Department of Home, Government of India to launch disciplinary proceedings and the petitioner and her husband may initiate or file civil suit and criminal prosecution

against this police officer for taking the law in his hands. Such prosecution shall continue uninfluenced by any proceedings that may be initiated against the petitioner's husband for having violated the law.

7. Needless to clarify that the petitioner's husband does not enjoy any immunity from prosecution if he is a criminal. The police officials can also proceed against him, but strictly in accordance with law. We have found that their action is not in accordance with law resulting in the petitioner's husband's illegal detention and that is why this intervention. We, therefore, do not pronounce upon the guilt or otherwise of the petitioner's husband or correctness of the charges levelled against him.

8. The husband of the petitioner shall be released from custody by 5.00 p.m. today.

9. With the aforesaid directions, the writ petition is disposed of.

(PRAKASH.D.NAIK, J.)

(S.C.DHARMADHIKARI, J.)