

JPP

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

WRIT PETITION NO. 1801 OF 2018

Ashok Chandrej Singh,
Age 59 years, Occu : Business
Residing at 1804, Crimson Tower,
Lokhandwala Township, Akurli Road,
Kandivali (Eas), Mumbai.
At present Arthur Road Jail. ... Petitioner.

V/s.

1. CBI-EOW - 11th floor,
CBI Building Bandra Kurla
Complex, Mumbai.
2. State of Maharashtra. ... Respondents.

Dr. Nilesh Pawaskar a/w. Shyamrishi Pathak and Atal B. Dubey for
the Petitioner.

Mr. Ankur Pahade h/f. Shishir Hiray for the C.B.I.

Ms. M.H. Mhatre, APP for the State.

***CORAM : S.C. Dharmadhikari and
Smt. Bharati H. Dangre, JJ.***

19 June, 2018.

Oral Judgment (Per S.c. Dharmadhikari, J.) :-

By this Writ Petition under Article 226 of the

Constitution of India, the Petitioner states that the order dated 5 January 2018, passed by the Additional Chief Metropolitan Magistrate, 3rd Court, Esplanade, Mumbai be quashed and set aside.

2. Primarily, the Petitioner seeks issuance of Writ of Habeas Corpus or appropriate Writ and direction directing the police machinery to set him at liberty forthwith.

3. We had heard extensive arguments on this Petition on more than one occasion. The arguments were canvassed before the Vacation, but since the composition of the bench changed post summer vacation, the Petition was argued afresh by Mr. Nilesh Pawaskar, the learned Counsel appearing for the Petitioner. He not only relied on the annexures to the Petition, but sought to meet the contents in the affidavit-in-reply by presenting a rejoinder affidavit and in that rejoinder affidavit, the Petitioner's Counsel was fair enough to annexe a copy of what is popularly known as a challan/charge-sheet but identified with legal terminology employed in Section 173 of the Code of Criminal Procedure. Thus, a report of the investigation was laid in the Court and the only argument therefore which was remaining for consideration and duly canvassed by Mr. Pawaskar was that this was not done within the prescribed time limit. Hence, the order remanding the Petitioner – accused thereafter results in the Petitioner's illegal and unconstitutional detention enabling this Court to issue Writ of Habeas Corpus.

4. For appreciating the arguments of both sides, we would have to know a few facts. Prior to that we proceed to grant Rule. The Respondents waive service. By consent of both sides and since extensive arguments were heard, we pass final orders in this Petition.

5. It is undisputed that the Petitioner is named as Accused No.1 in FIR No. RC0682017E0014 dated 31.08.2017, registered by the First Respondent, for short Investigating Machinery. The offences alleged are punishable under Section 120-B r/w. Section 420, 465, 467, 468 & 471 of the Indian Penal Code.

6. We need not refer to the prosecution case for the consideration of legal arguments.

7. The Petitioner does not dispute that before the investigations were concluded and apprehending the arrest, the Petitioner presented pre-arrest bail application in the Competent Court and he was protected by certain interim orders. On that interim protection coming to an end, but during the course of investigation, the Petitioner was arrested by the Investigating Machinery and produced before the Court of the Additional Chief Metropolitan Magistrate, at Esplanade, Mumbai. He was produced on 12th October 2017 and the learned Additional Chief Metropolitan Magistrate remanded him to Police Custody on 16th October 2017.

On 16th October 2017 the Petitioner was remanded to judicial custody. On various occasions thereafter the remand to judicial custody was extended. The Petitioner is relying upon the legal position that he could have been remanded to custody only till 9th January 2018. That is the date on which the period of 90 days stipulated by Section 167(2) of the Code of Criminal Procedure would come to an end. However, on 8th January 2018 an application bearing No.24 of 2018 was preferred by the Investigating Machinery before the Special Judge, Greater Mumbai wherein all the remand papers were requested to be taken on file. That was because the charge-sheet contained an addition and a reference to an offence under the Prevention of Corruption Act, 1988. The Petitioner therefore states that he was unaware of the addition of such a charge. In paragraph 6 of the Writ Petition the Petitioner has set out the factual position as under :-

“6. That the CBI presented charge-sheet before the Sessions Department on 9th January, 2018 in which the matter was never placed before the Ld. Special Judge, 47th Court, Greater Bombay, who exercised jurisdiction over CBI, EOW matter, by way of assignment by Principal Judge. Furthermore, the EOW has failed to adopt the procedure contemplated in Cr.P.C. for filing of Charge-sheet and the committal of case. That the matter was first placed before the Ld. Judge in CR 47 on 19/01/2018, during the pendency of the Bail Application. It is pertinent to note that from 9th January, till 19th January, 2018 there has been no valid order of remand and Accused is languishing behind bar. The

Accused was never communicated about addition of Charge under Prevention of Corruption Act, transfer of matter from Court of Ld. Magistrate to the Court of Ld. Special Judge and development regarding filing of Charge-sheet.”

8. It is stated that the Petitioner's application for bail was rejected on 22 January 2018 by the Special Judge.

9. The Petitioner says that the order dated 5 January 2018 remanding the Petitioner to Judicial Custody till 19 January 2018 not only violates the mandate of Section 167(2) of Code of Criminal Procedure, but Article 21 and 22 of the Constitution of India. Thus, this is a period beyond the statutory limit and during which the Petitioner remained in custody. This period, therefore, is a period of unlawful detention. In such circumstances, a Writ of Habeas Corpus can be issued by this Court.

10. Mr. Nilesh Pawaskar, learned Counsel appearing for the Petitioner contended before us that the Code of Criminal Procedure mandates that the Petitioner should be produced before the Competent Court and what Mr. Pawaskar relies upon is the procedure when investigation cannot be completed in 24 hours. He would submit that by sub-Section (1) of Section 167 the obligation and duty is to produce the person within the period of 24 hours but if that cannot be complied with and there are grounds for believing

that the accusation and information is well founded, the Officer incharge of the Police Station or the Police Officer making the investigation, shall forthwith transmit to the nearest Judicial Magistrate, a copy of the entries in the diary hereinafter prescribed, relating to the case and shall at the same time forward the accused to such Magistrate. Thus, this is a case of a person under arrest and detained in custody but in whose case the investigation cannot be completed within the period of 24 hours fixed by Section 57 of the Code of Criminal Procedure.

11. Then Mr. Pawaskar brought to our notice Section 167(2) of the Code of Criminal Procedure to urge that the proviso thereto is clear. In the present case the first proviso titled as clause (a)(i) applies and that stipulates a total period of 90 days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. In the submission of Mr. Pawaskar, in the instant case, that period came to an end on 9th January 2018. Hence, by the order of 5th January 2018 the accused – Petitioner could not have been remanded to custody till 19th January 2018. This order of the learned Judge is ex-facie without jurisdiction, illegal and unconstitutional as well.

12. It is claimed that though the prosecution/Investigating Machinery may say that it has complied with the mandate of law in the sense that it completed the investigations and laid the charge-sheet in the competent court and that was before the stipulated period of 90 days, but relying upon the statement in the rejoinder affidavit of the Petitioner and the annexures thereto, Mr. Pawaskar would submit that the law postulates laying for what is called a report. If the report is of investigation and on completion thereof, the format in which it has to be filed is known to the Investigating Machinery. If it does not follow the prescribed format and purports to file something in the Trial Court, that cannot be termed as a charge-sheet. Mr. Pawaskar would submit that in the rejoinder affidavit, the Petitioner specifically refers to the order passed by this Court in this Petition on 3rd May 2018, pursuant to which the affidavit-in-rejoinder was filed and taken on record. He would submit that the Respondents filed an affidavit-in-reply purporting to justify a tendering of the charge-sheet in the registry of the Sessions Court and claimed that it is duly filed. However, that was not filed in the ordinary and regular course of business of the Court. Just dropping some packet or set of documents in the registry of Trial Court would not suffice. That would not be compliance with the requirement of filing a report on completion of investigation envisaged by Section 173 of the Code of Criminal Procedure.

13. It is stated that in the affidavit-in-reply the first Respondent has stated that a challan was filed in prescribed format alongwith the other papers, which include statements of the witnesses, panchnama, documentary evidence, office order, on 9th January 2018 but they were given in the Court. The statements made in this affidavit are false. It is clear that the photocopy of the documents were filed and inspection taken on record of the Trial Court revealed that there are several objections which have been raised and which are summarized and are annexed as Annexure 'A' to the affidavit-in-rejoinder. For these reasons, it is submitted that this Writ Petition be allowed. Reliance is placed on a judgment in the case of *Matchumari China Venkatareddy and Ors. v/s. State of Andhra Pradesh* reported in *1994 Cri.L.J. 257* which has been rendered by a learned Single Judge.

14. On the other hand, Mr. Hire appearing for Respondent No.1 submits that in compliance with the statement made and recorded by this Court on 10th May 2018, the affidavit-in-reply has been filed and that reflects the correct position. As stated in that affidavit, the charge-sheet is filed in the Competent Court. Once that is filed in the Court, then it is evident that this Writ Petition will not lie. In any event Mr. Hire submits that there is a basic fallacy in the argument of Mr. Pawaskar and that the Writ of Habeas Corpus can be issued provided the Petitioner has been detained illegally, but in this case, the detention is pursuant to the order of remand passed

by a Competent Court. The order of remand does not suffer from any legal infirmity nor the vice of unconstitutionality and therefore, there is no warrant to decide any wider question, particularly on the manner in which a charge-sheet or a report of investigation should be filed in the competent Criminal Court. Mr. Pawaskar may bring to this Court's notice certain procedural aspects, but if the non-compliance of that by a Court, then the remedy which has been resorted by the Petitioner is not available. In the circumstances, the argument is that the Petition be dismissed.

15. After hearing both sides and perusing with their assistance, the Writ Petition, annexures thereto and the affidavit-in-reply so also the rejoinder, we find that the learned Advocate appearing for the first Respondent is right in his contention.

16. Mr. Pawaskar has submitted and by relying on the judgment of a learned Single Judge of the Andhra Pradesh High Court in the matter of *Matchumari China Venkatareddy and Ors. v/s. State of Andhra Pradesh* reported in *1994 Cri.L.J. 257* that dropping certain papers or documents and terming them as report or challan or charge-sheet would not suffice. The learned Single Judge, according to Mr. Pawaskar, has categorically held that such a procedure is unknown to the Code of Criminal Procedure, 1973. The document has to be complete or if a charge-sheet is filed

unaccompanied by a material papers, then, it is incomplete and filing of the same cannot be said to be compliance with the law.

17. These observations have been made by the learned Single Judge in the context of deciding two bail applications. In that case the bail was sought on the ground that the proviso to Section 167(2) of the Code of Criminal Procedure is violated. The Petitioners before the learned Single Judge of the Andhra Pradesh High Court argued that from the date of their remand, more than 90 days expired and as such their detention became illegal and as they are ready to furnish surety, the Court of Magistrate was bound to release them on bail. The Additional Public Prosecutor appearing for the State on the other hand argued that the charge-sheet was submitted within the stipulated time of 90 days and as there was some deficiency, the same was returned by the Court after perusal of the charge-sheet and that as such, the requirement of Section 167(2) of the Code of Criminal Procedure was met perfectly and there is no ground for enlargement of the Petitioners on bail.

18. It is this aspect of the matter which has been considered at length in this judgment and after referring to the provisions particularly, the provisions commencing from Section 154 of Code of Criminal Procedure to Section 209, the learned Single Judge decided as to what the word 'taking cognizance' means. Sections 154, 157,

167, 173, 190 and other Sections of the Code of Criminal Procedure were referred in the context. It is no doubt true that the right to life and liberty is the most cherished and precious of the freedoms or rights. One cannot, therefore, interfere with this constitutional guarantee.

19. In the case before the learned Single Judge the facts were indeed gross. The whole procedure that was followed, according to the learned Single Judge, is unknown to law. In paragraph 10 of the order and after emphasizing the legal principles, the learned Single Judge found that when the Petitioners were remanded to judicial custody on 30th September 1992 and the period of 90 days expired on 28th December 1992, the Petitioner in Criminal Petition No. 559 of 1993 was remanded to judicial custody on 29th October 1992 and the period of 90 days expired on 26th January 1993. The application was filed by the accused to release them on bail since the period of 90 days expired and there is no police report before the Court and the Magistrate has failed to take cognizance of the cases. However, the bail application was rejected on the ground that the Station House Officer filed the charge-sheet already within 90 days on 28th December 1992 and that the same was returned to comply the objections, however, the learned Single Judge of the Andhra Pradesh drew an inference from this development that there was no police report on record and even on the own showing of the prosecution, it

failed to file a report conforming to the requirements of Section 173(2) and Section 173(5) and as such the same was returned. The learned Single Judge then made a very pertinent observation and about compliance with the requirements which are stipulated by sub-section (1) of Section 173.

20. There is one glaring aspect that we are not dealing and that is we are not deciding or dealing with a bail application. We are not deciding a case where a default bail is sought by an accused. All this and what the learned Single Judge has found as relevant is when the Court is deciding an application seeking bail on the ground that the police machinery has failed to abide by the requirement set out in Section 167(2) and particularly, the proviso thereof. We are considering a case where the Petitioner says that he is an accused. He has been booked by the first Respondent. He was put under arrest. He was produced within the time stipulated by Article 22 of the Constitution of India before a Court and the Magistrate remanded him from time to time. During the course of investigations and post arrest the prosecution invoked and applied the provisions of the Prevention of Corruption Act, 1988 and hence the case was made over to the Special Judge according to the prosecution. Thereupon, the Petitioner was produced before the Court of Special Judge trying the Prevention of Corruption Act cases and he passed an order of remand. That order of remand allegedly

extends the Petitioner's custody beyond 90 days and the learned Judge failed to apply his mind on an important facet of the matter and that is that the charge-sheet was not filed or laid within the period of 90 days stipulated by law. The prosecution maintained that it has not violated this legal requirement for it says that the charge-sheet in prescribed format within the period of 90 days was filed as on 9th January 2018 in the registry of the Hon'ble Sessions Court, Mumbai as per laid down procedure. The challan in prescribed format alongwith related papers which includes statement of witnesses, panchnama, documentary evidence, office order were given in Court. That the entire bunch of papers runs in thousands of pages that said challan in prescribed format contains all necessary details.

21. It is stated that at the time of filing of the charge-sheet alongwith all the documents and statement of witnesses were submitted and there was an endorsement made after which the photocopies were sought by the concerned registry staff. That is how the photocopies were taken from the original and submitted in the registry.

22. The Petitioner faults this exercise and terms it as no compliance with law and in the rejoinder affidavit claims that the said statement is false, the statement is false because there was no

charge-sheet laid at all. Reliance is placed on Annexure 'A' to the affidavit-in-rejoinder.

23. A careful perusal of Annexure 'A' would indicate that, that is a copy of the proceedings applied by the Petitioner on 25th April 2018. It was ready on 2nd May 2018 and delivered to the Petitioner on 2nd May 2018. That is a certified copy of the documents viz. Roznama of 19th January 2018 and the office objections dated 19th January 2018. The Roznama at page 220 of the paper-book reads as under :-

“ Perused charge-sheet. Prosecution has made out prima-facie case for the offence PUS 120B r/w. Section 406, 409, 420, 465, 467, 468 and 471 of IPC and 13(2) r/w. 13(1)(d) of P.C. Act.

Issue process for said offence.

Issue summons returnable on 24.01.2018.

Accused Nos.1 and 2 are in JC.

Issue production warrant to Arthur Road Jail in regard to Accused no.1 and Accused No.2.

Adj. 24.01.2018.”

24. Then, at page 221 the office objections are endorsed. In the objection no.1 it is specifically stated that the Investigating Officer has not produced any document and statement of witnesses in the above said charge-sheet. Therefore, charge-sheet has been numbered as per oral directions of the learned Judge on 11th January 2018. Then the Investigating Officer has produced documents of charge-sheet on 16th January 2018. The endorsement says that the

charge-sheet checking finished on 19th January 2018. Then there are certain objections viz. entire charge-sheet having double page numbers, page number of document is not mentioned correctly in the index, etc. After that, at the foot of page 221, there is an endorsement that these objections which were recorded in the records are now removed and complied with on 24th January 2018.

25. We are not therefore deciding as to what is the correct and prescribed procedure. We are only deciding whether the Petitioner's detention or rather continued detention beyond the statutory period by the police machinery is illegal or the Petitioner has not been released from the custody despite the mandate of the law being clear.

26. This is a case where the Petitioner was indeed produced before the Court of Special Judge and he was remanded to custody vide order of that Court passed by the Special Judge. The order of the Special Judge records as to how there is a charge-sheet filed and which we have reproduced above. The record indicates as to how the learned Judge indeed took it on record and then remanded the Petitioner to the custody. The order of the Special Judge therefore cannot be scrutinized by us and we are not concerned with this aspect of the matter. The Petitioner is free to adopt appropriate proceedings to question this action of the investigating machinery.

27. Once an important distinction has been made and in law and throughout by the Hon'ble Supreme Court that when the Writ of Habeas Corpus is claimed and is sought to be issued, the Court is principally concerned with the action of the police machinery in illegally detaining a person and interfering with his liberty. If the concerned person has not been produced before the Court at all or his remand has not been sought at all after the initial production, then, keeping him in custody can be called in question on the ground that the constitutional guarantee of life and liberty is violated. There is a distinction however, when the action of a Court of law is sought to be challenged by alleging that to be not in accordance with the prescribed procedure or the legal framework. That is an issue of distinct legal remedy and the Petitioner can resort on the same. We are not concerned here therefore with the Court taking on record the papers/documents and terming all of them as a charge-sheet. The filing of the charge-sheet by the prosecution as claimed and taking that on the record by the Court below thus is being harped upon, to challenge the detention. The ground as raised in the Petition and as elaborated in the Affidavit-in-Rejoinder with the aid of Annexure 'A' thereto is thus impugning the detention pursuant to an action and direction of the Court. However, police machinery has nowhere been accused of violating the constitutional mandate and has not been further accused of detaining the Petitioner

in custody contrary to the said mandate. That distinction has been explained in detail in a judgment of the Hon'ble Supreme Court in the case of ***Pragya Singh Thakur v/s. State of Maharashtra reported in 2011(10) SCC 445.***

28. It is in that context that we must decide as to whether the present petition can be entertained and allowed. In the judgment of the Division Bench at Goa to which one of us was a member (S.C. Dharmadhikari, J.), in ***Criminal Application (Bail) No. 71 of 2011 with Criminal Misc. Application No. 218 of 2011 (Mr. Felix Ohimain Evborokhai v/s. State of Goa and Anr.)*** and ***Criminal Application (Bail) No. 72 of 2011 with Criminal Misc. Application No. 219 of 2011 (Ms. Lalliansangi v/s. State of Goa & Anr.)***, while resolving a conflict between divergent opinions in the Single Bench orders of this Court, the above situation has been elaborately discussed. During the course of discussion and following ***Pragya Singh Thakur*** (supra) this is what the Division Bench held in para 38 as under :-

“38. In ***Pragya Singh Thakur*** (supra), the Hon'ble Supreme Court held that every detention cannot be held to be illegal. In para 63, this is what is held.

“63. The decisions relied upon by the learned counsel for the appellant do not support

the plea that in every case where there is violation of Article 22(2) of the Constitution, an accused has to be set at liberty and released on bail. Whereas, an accused may be entitled to be set at liberty if it is shown that the accused at that point of time is in illegal detention by the police, such a right is not available after the Magistrate remands the accused to custody. Right under Article 22(2) is available only against illegal detention by the police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order.”

Therefore, it is clear that every detention in custody or arrest is not necessarily illegal and even where there is a violation of Article 22(2) of the Constitution of India, it is not as if in every case, the accused has to be set at liberty and released on bail. The Supreme Court has clarified that whereas an accused may be entitled to be set at liberty if it is shown that the accused at that point of time is in illegal detention by the police, such a right is not available after the Magistrate remands the accused to custody. Right under Article 22(2) is available only against illegal detention by the police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order. Article 22 which grants protection against arrest and detention in certain cases envisages under sub-article (2) that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond that period without any authority of a Magistrate. The detention with regard to the right of bail in the context

of Article 22(2) by the Hon'ble Supreme Court is thus of great significance. If that article does not operate against a judicial order and bail cannot be granted if the detention is pursuant to a judicial order, then, by providing for release of a person on bail on account of a judicial order, which is vitiated by a patent illegality or irregularity, cannot be read in. Thus, the authorization of the detention by a Magistrate or a Court of Law may be erroneous or illegal. However, that exercise will have to be challenged by way of appropriate proceedings before a superior Court. If the same is not challenged, it cannot be made a foundation or basis for seeking release on bail in every case and particularly the seriousness of the offences alleged and the punishment provided for them in law. If, as a general rule, it is laid down that an authorization of the detention in custody by a Court of Law, be it a Magistrate or a Sessions Judge, if found to be vitiated by illegality, must result in release of the detained person on bail, that would, with great respect, amount to reading something in the law, which is admittedly not provided. That would wipe out the distinction made by law in the Right to Bail of a person detained in custody for defaults by the Police/Prosecution and the power vested in a Court of law to either grant or refuse it. This underlying and fundamental distinction cannot be ignored by us. If we brush it aside, it would mean we confer a right of bail to every accused, including those proceeded under the NDPS Act or other stringent laws even if the law is silent on this crucial point. The result would be that there will be a collateral attack on an order of remand passed by a Court, in every application for bail. Such attack may be mounted anytime and at any stage.”

29. Thus, the above distinction being of vital importance and this not being a situation dealt with by the learned Single Judge

of the Andhra Pradesh High Court, we are unable to accept the argument of the Petitioner.

30. As a result of the above discussion, the Writ Petition fails. It is dismissed. Rule is discharged.

(Smt. Bharati H. Dangre, J.) (S.C.Dharmadhikari, J.)