

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

WRIT PETITION NO.2411 OF 2018

Mr.Hitesh Garg ...Petitioner
V/s.
Department of Revenue Intelligence & Anr. ...Respondents

Mr.Dinesh Tiwari i/b Dinesh Tiwari & Associates for the Petitioner.

Mrs.A.A. Mane, APP for Respondent-State.

**CORAM : S.C. DHARMADHIKARI &
SMT.BHARATI H. DANGRE, JJ.**

DATE : 19th JUNE 2018

P.C.:

1. By this petition under Article 226 of the Constitution of India an order passed by the Learned Additional Session Judge and Special Judge for NDPS Cases, District-Thane has been impugned.

2. A copy of this order is at page 32 of the paper book.

3. Mr.Tiwari, learned counsel appearing for the petitioner submits that the petitioner has been proceeded against for being involved in an offence punishable under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'NDPS Act'). A copy of the remand application is annexed as annexure-A to this petition and it is urged that

the circumstances in which the arrest was effected and the petitioner was to be produced before the Special Judge are elaborately set out therein.

4. Mr.Tiwari would submit that for the purpose of the present petition that aspect and particularly on merits, is not relevant. His argument is that on 29th May 2018 the petitioner was produced before the Sessions Court. The Sessions Judge before whom the petitioner was produced granted Judicial custody. That judicial custody was till 11th June 2018.

5. Subsequently, the petitioner made inquiries and realized that the learned Additional Sessions Judge who remanded him to judicial custody was not a notified Judge. Only judge who can pass such orders is a judge presiding over a Special Court set up in terms of Section 36 of the NDPS Act. The petitioner having realized that he was produced before a Judge having no jurisdiction, can legitimately complain that he has been detained in custody illegally, and by a writ of habeas corpus this Court can then command and direct the respondent to effect his release.

6. Mr.Tiwari would submit that the subsequent act of the respondents in producing the petitioner before the Competent Court, namely, the Presiding Officer of the Court within the meaning of Section 36 of the NDPS Act, 1985 would not authorize or regularize his initial

detention as that was done by a Court without jurisdiction.

7. In all fairness, Mr.Tiwari brought to our notice a judgment and order passed by Division Bench of this Court sitting at Goa. One of us (Shri.S.C. Dharmadhikari, J.) was presiding over this Bench. In the judgment delivered in the two Criminal Applications :-

*“CRIMINAL APPLICATION (BAIL) NO.71/2011 WITH
CRIMINAL MISC. APPLICATION NO. 218 OF 2011
AND
CRIMINAL APPLICATION (BAIL) NO. 72 OF 2011
WITH
CRIMINAL MISC. APPLICATION NO. 219 OF 2011
CRIMINAL APPLICATION (BAIL) NO.71/2011 WITH
CRIMINAL MISC. APPLICATION NO. 218 OF 2011*

*Mr. Felix Ohimain Evborokhai,
Age 44 years, Nigerian
national, R/o. H. No.232,
Zorvaddo, Near St. Anthony's
Hospital, Chapora, Bardez, Goa
presently in Judicial Custody,
Sada, Vasco, Goa.*

..... Applicant

Versus

*1. State of Goa,
Through Officer-in-Charge,
ANC Police Station,
Panaji, Goa.*

*2. Public Prosecutor,
High Court, Panaji, Goa.*

..... Respondents

*CRIMINAL APPLICATION (BAIL) NO. 72 OF 2011
WITH
CRIMINAL MISC. APPLICATION NO. 219 OF 2011*

*Ms. Lalliansangi,
Age 48 years, Indian national,*

*R/o. H.No.232, Zorvaddo,
Near St. Anthony's Hospital,
Chapora, Bardez, Goa.
Presently in Judicial Custody,
Sada, Vasco, Goa. Applicant*

Versus

*1. State of Goa,
Through Officer-In-Charge
ANC Police Station,
Panaji, Goa.*

*2. Public Prosecutor,
High Court,
Panaji, Goa.*

..... Respondents”

Decided on 19/03/2012

Precisely this issue was considered. It was answered against the detinue/petitioner and in favour of the State.

8. The premise on which this Court proceeded was that a writ of habeas corpus can be issued provided the detention of the person concerned is by the police. If, detention is pursuant to a judicial act or order then such a writ would not lie and that very important distinction has to be borne in mind. If the initial act of remanding the person to custody is pursuant to judicial order then the concerned person can assail and challenge the Judicial order and also raise the issue of lack of jurisdiction. However, if the initial direction to remand the person concerned/accused to custody is issued by a Court without jurisdiction but subsequently that person is produced before the Competent Court and the Judge continues that detention, then, the defect is an irregularity but not illegality going to the root of the matter.

9. In view of the pronouncement by this Court we do not see how we can entertain this petition. It is not disputed that the petitioner was subsequently produced before the Competent Court and was dealt with by that Court. All the more therefore we are not inclined to grant any relief in this petition. It is dismissed.

(SMT.BHARATI H. DANGRE, J.)

(S.C. DHARMADHIKARI,J.)