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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(CRL) 2559/2018

GAUTAM NAVLAKHA

..... Petitioner

Through: Ms. Nitya Ramakrishnan, Advocate
with Ms. Warisha Farasat,
Mr. Ashwath Sitaraman & Mr. Saad
Uzzaman, Advocates.

versus

STATE (NCT OF DELHI) & ORS

..... Respondents

Through: Mr. Rahul Mehra, Standing Counsel
(Crl.) with Mr. Chaitanya Gosain &
Mr. Tushar Sannu, Advocates for the
State of Delhi.
Mr. Vinay Navare and Dr. Ravindra
Chingale, Advocates for State of
Maharashtra.
ACP K.G. Tyagi, Sp.Cell.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL

ORDER

01.10.2018

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Dr. S. Muralidhar, J.:

1. The background facts and the orders passed in this petition until 29th August 2018 have already been set out by this Court in a detailed order dated 29th August 2018 which reads as under:

“1. The Petitioner has approached this Court seeking the issuance of a writ of *habeas corpus* for his release from illegal

custody and questioning the legality of his arrest by the Maharashtra Police (Respondent No.3) on 28th August 2018 pursuant to FIR No.4/2018 registered at Police Station (PS) Vishrambagh, Pune.

2. This petition was mentioned before the Chief Justice of this Court yesterday, i.e. 28th August 2018, at 2:15 pm and was assigned to this Court, which is the Roster Bench dealing with *habeas corpus* petitions, and was taken up at around 2:20 pm yesterday.

3. In para 2 of the petition, it is stated that originally the officials of Respondent No.3 came to the Petitioner's house at Nehru Enclave, New Delhi but since the search warrant was not shown, they were not permitted to enter. Later, they came back with the warrant and search of the house was undertaken. Para 4 of the Petition states that the Petitioner was shown a copy of FIR No.4/2018 regarding a cultural program held on 31st December 2017. It is further averred in para 4 that the said FIR did not contain the Petitioner's name. The Petitioner claims that "he was not even present at the meeting". The petition notes that offences under the provisions of the Unlawful Activities (Prevention) Act 1967 ('UAPA'), particularly under Sections 30 and 18, have been added to the FIR which was originally under Sections 153A, 505, and 117 read with Section 34 IPC.

4. When the matter was taken up at 2:25 pm yesterday, Mr. Rahul Mehra, learned Standing Counsel (Criminal) for the State of NCT of Delhi appeared. The Court then passed the following order at around 2:45 pm:

"1. The petition complains of the Petitioner and his companion Sehba Husain being restrained in his house by the Maharashtra Police pursuant to FIR No. 4/2018, registered at P.S. Vishrambagh, Pune.

2. Notice. Mr. Rahul Mehra, who appears and accepts notice and informs that he will take some instructions.

3. The Court is informed by Ms. Nitya Ramakrishnan, learned counsel appearing for the Petitioner, that her information is that the Petitioner is just being taken away from his house. No further precipitate action of removing the Petitioner from Delhi be taken till the matter is taken up again at 4 pm.”

5. The petition was again taken up at 4 pm on 28th August 2018. This time, DCP Bachhan Singh and ACP Ganesh Gawade, officers of Respondent No.3, were present to instruct Mr. Mehra. They were also accompanied by ACP K.G. Tyagi of the Special Cell of the Delhi Police. The order passed by the Court at 4:30 pm reads as under:

“1. This order has to be read in continuation of the order passed by this Court earlier in the day at around 2.45 pm upon an urgent mentioning before the Hon'ble Chief Justice and upon his assigning the petition to this Bench. The Court had issued notice in the petition and kept it for further hearing at 4 pm. It had directed that no precipitate action of removing the Petitioner from Delhi be taken till then.

2. Court is informed at 4 pm by Mr. Rahul Mehra, learned Standing counsel for the State that an order was passed today by the learned Chief Metropolitan Magistrate (CMM), South East District, Saket in the post lunch session granting transit remand for producing the Petitioner before the learned Special Court, Shivaji Nagar, Pune on or before 30th August, 2018.

3. The Court is also shown the documents produced before the learned CMM most of which (including FIR No. 4 of 2018 registered at Police Station Vishrambagh, Pune) are in Marathi language and only the application filed for transit remand before the learned CMM is in Hindi. However, it is not possible to make out from these

documents what precisely the case against the Petitioner is.

4. Since it is already 4.30 pm, the Court considers it appropriate to direct that pursuant to the order dated 28th August, 2018 of the learned CMM, the Petitioner will not be taken away from Delhi and this case will be taken up as the first case tomorrow morning.

5. Translations of all the documents produced before the CMM be provided to this Court tomorrow.

6. The Petitioner shall, in the meanwhile, be kept at the same place from where he was picked up with two guards of the Special Cell, Delhi Police along with local Police that was originally here to arrest the Petitioner, outside the house. Barring his lawyers, and the ordinary residents of the house, the Petitioner shall not meet any other persons or step out of the premises till further orders.

7. *Dasti* under the signature of the Court Master.”

6. This morning, the case was called as the first case. The Court was informed by learned ASG Mr. Aman Lekhi, who is appearing on behalf of Respondent No.3, that the translation of the documents which were in Marathi and which were to be produced before this Court is taking some more time. He, however, stated that copies of the translation will be provided to counsel for the Petitioner positively by today. Recording this, the Court passed a short order listing the case at 2:15 pm today. “Mr. Aman Lekhi learned Additional Solicitor General of India appearing for the Maharashtra Police informs the Court that translation of the documents in Marathi language, which was required to be produced before this Court is taking some more time. He states that copies of translation will be provided to counsel for the Petitioner positively by noon.”

7. At 2.15 pm, the Court has been shown a bunch of documents which runs into 36 pages and which includes a copy of FIR

No.4/2018 in Marathi, the English version of the FIR, the letter for adding Section 120B IPC (in English), the letter to add provisions of the UAPA (in English), the letter for search under Section 166 (3) Cr PC (in Marathi), the English version of the search letter, the letter to arrest in Marathi, and the English version of the arrest letter. The bunch also includes the search and seizure form, the search *panchnama*, and the arrest memo, all of which are in Marathi. For some reason, these have not been translated as yet. Mr. Lekhi stated that some more time is required for this purpose. However, the Court did not consider it appropriate to give any further time for this purpose and proceeded to hear the petition on the core issues that arose. The papers also include the copy of transit remand application (in Hindi) which was presented before the Chief Metropolitan Magistrate, South East, District Court, Saket ('CMM') yesterday, i.e. 28th August 2018, at around 2.45 pm after the Petitioner was arrested from his residence at Nehru Enclave at 2:15 pm.

8. The bunch of papers also includes a copy of the order passed by the learned CMM yesterday, i.e. 28th August, 2018. The said order reads as under:

“FIR No.4/18

PS: Vishrambagh, Pune, Maharashtra

U/s: 153A/505 (1) (B)/117/34 IPC & u/s

13/16/17/18/18B/20/30/40 of Unlawful Activities

Prevention Act

State Vs. Gautam Pratap Navlakha

28.08.2018

Present:- Sh. Jagdamba Pandey, Ld. APP for
the State.

IO Assistant Police Inspector Sushil V. Bobde
along with ACP Ganesh Gawade and DCP Bachan
Singh.

Inspector Sanjay Gupta, PS Special Cell, Lodhi
Colony, New Delhi.

Accused Gautam Pratap Navlakha produced
in Police custody.

Sh. Om Prakash, Ld. LAC for the accused.

This is a handwritten application preferred by the IO Assistant Police Inspector Sushil V. Bobde seeking transit remand of two days the above noted accused persons. The identity of IO as a police officer of PS Vishrambagh, Pune, Maharashtra is established upto my satisfaction upon his having shown his identity card.

Heard. It is submitted by the IO that above noted accused is required in above noted case FIR registered at PS Vishrambagh, Pune, Maharashtra and has been arrested from his house at Kalkaji, Delhi. It is further submitted by the IO that the accused has been arrested without warrant and he is required to be produced before a competent court i.e. Court of Ld. Special Court, Shivaji Nagar, Pune, Maharashtra and therefore, his transit remand may be granted.

Heard. Considered. I have given my thoughtful consideration to the submissions made by the IO and the learned APP for the State.

As per the police papers, FIR No.4/18 has been registered under Sections 153A/505 (1) (B)/117/34 IPC and Sections 13/16/17/18/18B/20/39/40 of Unlawful Activities Prevention Act at Police Station Vishrambagh, Pune, Maharashtra wherein the accused is required. As per the arrest memo the accused namely Gautam Pratap Navlakha was arrested on 29.08.2018 at 2.15 at Kalkaji, Delhi. Information of arrest of accused has been given to his partner/friend.

As the accused is required for further investigation of the case, therefore, his transit remand is granted till 30.08.2018. The accused be produced before the concerned Ld. Special Court Shivaji Nagar, Pune, Maharashtra on or before 30.08.2018 without fail. Accused be got medically

examined as per rules and the directions of the Hon'ble Supreme Court. A copy of this order be given dasti to the Investigating Officer.

Application of transit remand is disposed of accordingly. Necessary record be maintained by the Ahlmad.

(Manish Khurana)
CMM/SE/District Court, Saket
New Delhi/28.08.2018.”

9. It must be noted here that the above order was shown to the Court when the matter was heard at 4 pm yesterday. Therefore, the Court reasonably presumes that after having been arrested at Nehru Enclave at 2:15 pm, the Petitioner may have been produced before the learned CMM at Saket Courts at around 2:45 pm. Thereafter, the matter was heard, the order passed and signed by the CMM, and the copy of the order was issued and then given to counsel who produced it before this Court at 4 pm.

10. The Court in the present petition is concerned with the legality of the arrest of the Petitioner. This will include examining the legality of the order of transit remand passed by the learned CMM.

11. It was urged by Mr. Lekhi that although the FIR itself does not name the Petitioner or refer to his involvement in the offence for which the FIR has been registered, Respondent No.3 has other sufficient material which points to his involvement. When asked whether any of the papers in the bunch shown to this Court, which presumably was available even when the remand application was moved before the learned CMM, contains such material, Mr. Lekhi referred to the remand application (in Hindi) which according to him indicated what the involvement of the Petitioner was in the case.

12. His further submission is that once a remand application has

been filed and a transit remand has been granted, a writ of *habeas corpus* does not lie and the Petitioner would have to seek regular bail and/or challenge the entire proceedings on merits in other proceedings in accordance with law.

13. The officers of the Maharashtra Police present in the Court, i.e. ACP Ganesh Gawade, DCP Bachhan Singh, were asked by Mr. Lekhi, at the instance of the Court, whether at any time during the proceedings before the learned CMM, the learned CMM asked to see the case diary in which purportedly the relevant material concerning the involvement of the Petitioner is contained. The answer, on the instructions of the said police officers, was in the negative. The Court is further informed that the case diary is also written in Marathi.

14. As already noted hereinbefore, it is apparent from the translated version of the FIR No.4/2018 that the FIR itself does not contain anything which shows the involvement of the present Petitioner. It indicates that apart from Sections 153A, 505(1)(b), 117/34 IPC and the UAPA provisions, i.e. Section 13 UAPA (punishment for unlawful activities), Section 16 UAPA (punishment for terrorist acts), and Section 17 UAPA (punishment for raising funds for terrorist acts), Section 18 UAPA (punishment for conspiracy, etc.), Section 18B UAPA (punishment for recruiting of any person or persons for terrorist act), Section 20 UAPA (punishment for being member of terrorist gang or organisation), have been added.

15. Relevant to the question of the arrest of a person for the aforementioned cognizable offences under UAPA is Section 43D UAPA. Section 43D(4) UAPA states that the provision of anticipatory bail under Section 438 Cr PC is not available to a person arrested for commission of an offence cognizable under the UAPA. The proviso to Section 43D(5) UAPA states that the said accused person “shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that these are reasonable grounds for believing that the accusation against

such person is prima facie true”. Section 43D(6) UAPA states that the “restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail”. These provisions make it explicit that once a person is taken into custody pursuant to an FIR for cognisable offences under the UAPA, it would be extremely difficult for such person to obtain regular bail, till at least the filing of the charge sheet.

16. Section 43C UAPA makes it clear that provisions of the Cr PC “shall apply, insofar as they are not inconsistent with the provisions of this Act, to all arrests, searches, and seizures made under this Act”.

17. At this stage, while this order was being dictated, at 5:03 pm in the Court, Mr. Lekhi interjected to state that the Supreme Court has been petitioned in a PIL under Article 32 of the Constitution questioning the validity of the arrest and transit remand orders passed by the MMs not only in the Petitioner’s case but in other similar cases as well. He is informed that the Supreme Court has in the said petition passed an interim order today staying the transit remand orders, including the one passed by the CMM in respect of the Petitioner, and has ordered that all those who have been arrested including the Petitioner shall continue under house arrest. The next date of the said PIL is stated to be 6th September 2018.

18. In view of the above development, it would not be appropriate for this Court to continue considering the validity of the transit remand order passed by the learned CMM. The Court considers it appropriate to list this matter tomorrow at 2:15 pm by which time the order of Supreme Court would be available.

19. List on 30th August 2018 at 2:15 pm.”

2. On the following day, i.e. 30th August 2018, the Court passed the following further order:

“1. This order has to be read in continuation of the order passed

by this Court yesterday, i.e. 29th August 2018.

2. Yesterday this Court was in the process of pronouncing an order on the validity of the transit remand order passed by the Chief Metropolitan Magistrate, Saket Courts, New Delhi and consequently, the validity of the arrest of the Petitioner, when it was informed by Mr. Aman Lekhi learned Additional Solicitor General of India appearing for the State of Maharashtra that the Supreme Court had passed an interim order continuing the house arrest of the Petitioner and some others similarly placed. The dictation of the order was then halted and this petition was adjourned by a day to peruse the order of the Supreme Court.

3. The Court has today been shown a copy of W.P. (Crl) [Diary No. 32319/2018] (*Romila Thapar & Ors. v. Union of India & Ors.*) filed in the Supreme Court of India under Article 32 of the Constitution of India as well as the order dated 29th August 2018 passed therein by the Supreme Court, the relevant portion of which reads as under:

“Mr. Tushar Mehta and Mr. Maninder Singh, learned Additional Solicitor Generals being assisted by Mr. R. Balasubramanian, learned counsel shall file the counter affidavit by 5.9.2018. Rejoinder thereto, if any, be filed within three days therefrom.

We have considered the prayer for interim relief. It is submitted by Dr. Abhishek Manu Singhvi, learned senior counsel appearing for the petitioners that in pursuance of the order of the High Court, Mr. Gautam Navalakha and Ms. Sudha Bhardwaj have been kept under house arrest. It is suggested by him that as an interim measure, he has no objection if this Court orders that Mr. Varavara Rao, Mr. Arun Ferreira and Mr. Vernon Gonsalves, if arrested, they are kept under house arrest at their own homes. We order accordingly. The house arrest of Mr. Gautam Navalakha and

Ms. Sudha Bhardwaj may be extended in terms of our orders.

Let the matter be listed on 6.9.2018.”

4. As the Supreme Court has, by the aforementioned interim order, extended the house arrest of the Petitioner, this Court does not consider it appropriate to proceed further. It will await the further orders of the Supreme Court.

5. List on 14th September 2018. Liberty is, however, granted to the parties to mention for an earlier listing, if so warranted by the orders of the Supreme Court.

6. Copies of this order and the order passed yesterday be given to the parties *dasti* under the signatures of the Court Master.”

3. Thereafter, the writ petition filed in the Supreme Court being W.P. (Crl.) 260 of 2018 continued to be heard by that Court from time to time. This Court accordingly kept adjourning this writ petition awaiting the orders of the Supreme Court.

4. On 28th September 2018, the Supreme Court by a majority of 2:1 disposed of the writ petition and the applications filed in the said writ petition with liberty to the concerned accused to take recourse to appropriate remedy as may be permissible in law. It was further directed that the interim order passed by the Supreme Court on 29th August 2018 (extracted hereinbefore as part of this Court’s order on 30th August 2018), “shall continue for a period of four weeks to enable the accused to move the concerned Court”. It was further clarified that “the said proceeding shall be decided on its own merits uninfluenced by any observation made in this judgment, which is limited to

the reliefs claimed in this writ petition to transfer the investigation to an independent investigating agency and/or Court monitored investigation.” It was further clarified that the Investigating Officer (‘IO’) “is free to proceed against the concerned accused as per law”.

5. This writ petition was listed for hearing today at 2:15 pm before this Court. It is noted that the Supreme Court in para 7 of the majority judgment notes that the Petitioner has filed the present petition on 28th August 2018 “challenging the transit remand order passed by the Chief Metropolitan Magistrate (CMM) on 28th August 2018”. At this stage it is required to be noted that although when the writ petition was originally filed the ground of challenge was that the arrest of the Petitioner was in violation of Section 165 and 166 Cr PC, during the course of arguments on 28th August 2018 in light of the developments that took place subsequent to the filing of the petition, challenge was laid to the remand order of the learned CMM. It was further contended that there had been a violation of the mandatory provision contained in Section 41 (1) (ba) Cr PC.

6. Mr. Vinay Navare, learned counsel appearing for the State of Maharashtra, raised a preliminary objection to the maintainability of the present writ petition relying on the recent judgment dated 5th September 2018 of a three judge bench of the Supreme Court in Crl. A. 1124 of 2018 (*State of Maharashtra v. Tasneem Rizwan Siddiquee*). He submitted that the Supreme Court has, in said decision, reiterated the settled position in law, as explained in the decisions in *Manubhai Ratilal Patel v. State of Gujarat (2013) 1 SCC 314* and *Saurabh Kumar v. Jailor, Koneil*

Jail (2014) 13 SCC 436, that once a person is in judicial custody pursuant to a remand order passed by a magistrate in connection with an offence under investigation, a writ of *habeas corpus* is not maintainable.

7. Mr. Navare submitted that even though in the said decisions, the Supreme Court had required that a Magistrate passing a remand order should not do so mechanically, the Courts have always adopted a ‘hands off approach’ once it was clear that a cognisable offence involving the person arrested had been committed and the request for remand was made by officer authorized to investigate the offence. According to him, at the stage of seeking remand, and in particular the transit remand, the concerned Magistrate cannot examine the matter any further.

8. Ms. Nitya Ramakrishnan, learned counsel appearing for the Petitioner on the other hand, referred to the observations of the Supreme Court in the very same decisions and pointed out that in the present case the learned CMM had not satisfied himself about the existence of material, and not the adequacy thereof, which could justify the prayer made in the remand application filed by the Maharashtra Police.

9. On the question of the maintainability of the present petition, as already noticed earlier, this Court had even prior to the learned CMM passing the order on the remand application directed at around 2.45 pm on 28th August 2018 that “no further precipitate action of removing the Petitioner from Delhi be taken till the matter be again taken up at 4 pm.” Mr. Rahul Mehra, learned Standing Counsel for the State (NCT of Delhi) informed the Court

that he had conveyed the aforementioned interim order to the concerned police officials at 2.54 pm on 28th August 2018. While it is not clear if the learned CMM was actually informed of this Court's interim order, the arrest memo of the Petitioner shows that he was arrested at 2.15 pm at his residence in Nehru Enclave. Given a reasonable time taken to reach the Saket Court complex, it is unlikely that the learned CMM heard the matter, perused the remand application and then passed the order before 2.45 pm, i.e. before this Court passed the interim order.

10. Consequently, when the present *habeas corpus* petition was entertained and the above interim order was passed by this Court, there was no order of the learned CMM granting transit remand of the Petitioner. In each of the aforementioned decisions cited by Mr. Navlakha the entertaining of the *habeas corpus* petition by the High Court was subsequent to the transit remand order passed by the concerned Judicial Magistrate. This one factor distinguishes the present case from the above cases. Consequently, this Court rejects the preliminary objection raised by Mr. Navakre as to the maintainability of the present writ petition.

11. Mr. Navare next tried to draw a distinction between the scope of the function of a Magistrate before whom an application for transit remand is moved and the jurisdictional Magistrate who should be approached for an order of remand in terms of Section 56 of the Cr PC. According to Mr. Navare, at the stage of transit remand the concerned Magistrate would not be required to satisfy himself anything more than whether an offence is made out and whether the Police Officer seeking the remand is in fact the one

authorized to do so.

12. In order to examine the above submission, the Court would like to first notice the relevant provisions. Article 22 (1), (2) and (3) of the Constitution of India read as under:

“Article 22. Protection against arrest and detention in certain cases. -

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) 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 the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

- (a) to any person who for the time being is an enemy alien; or
- (b) to any person who is arrested or detained under any law providing for preventive detention.

13. For the purposes of arrest and remand Sections 56 and 57 of the Cr PC are relevant and they read as under:-

“56. Person arrested to be taken before Magistrate or officer in charge of police station. –

A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a

Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

57. Person arrested not to be detained more than twenty four hours. –

No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.”

14. A combined reading of the above provisions shows that Article 22 (2) of the Constitution, and Section 56 read with Section 57 of the Cr PC, envisage the production of a person arrested before the concerned Court within a period of 24 hours, excluding the time necessary for the journey from the place of the arrest to the Court of the concerned Magistrate before whom the arrested person is required to be produced ‘without unnecessarily delay’. Under Section 57 Cr PC the period of detention by the police officer cannot exceed 24 hours ‘in the absence of a special order of a Magistrate under Section 167 Cr PC’. That takes us to Sections 167 (1) and (2) Cr PC which reads as under:

“167. Procedure when investigation cannot be completed in twenty four hours.

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of

sub- inspector, 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.

(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 woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.”

15. Therefore, when a person who after arrest is required to be produced before a jurisdictional Judicial Magistrate is detained in a place which is away from that jurisdiction, and therefore cannot be produced before the jurisdictional Magistrate within 24 hours, as mandated both by Article 22 (2) of the Constitution and by Section 57 Cr PC, he will be produced before the ‘nearest Judicial Magistrate’ together with ‘a copy of the entries in the diary’. Therefore, even before a Magistrate before whom a transit remand

application is filed, the mandatory requirement of Section 167 (1) Cr PC is that a copy of the entries in the case diary should also be produced. It is on that basis that under Section 167 (2) such ‘nearest Judicial Magistrate’ will pass an order authorising the detention of the person arrested for a term not exceeding 15 days in the whole. Where he has no jurisdiction to try the case and he finds further detention unnecessary, he may order the accused to be forwarded to the jurisdictional Magistrate.

16. Thus it is clear that even Magistrate before whom a transit application is filed is not required to merely satisfy himself that an offence has been committed and that the police officer seeking a remand is properly authorised. Such Magistrate is required to apply his mind to ensure that there exists material in the form of entries in the case diary that justifies the prayer for transit remand. The scope of this exercise has been explained by the Supreme Court in *Manubhai Ratilal Patel v. State of Gujarat* (*supra*) in the following words:

“24. The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. **The purpose of remand as postulated Under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a**

warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.” (emphasis supplied)

17. This was reiterated in *Saurabh Kumar v. Jailor, Koneil Jail* (*supra*) in the concurring opinion of Thakur, J. (as the learned Judge then was) as under:

“23. We are also of the view that the Magistrate has acted rather mechanically in remanding the accused Petitioner herein to judicial custody without so much as making sure that the remaining accused persons are quickly served with the process of the Court and/or produced before the Court for an early disposal of the matter. The Magistrate appears to have taken the process in a cavalier fashion that betrays his insensitivity towards denial of personal liberty of a citizen who is languishing in jail because the police have taken no action for the apprehension and production of the other accused persons. This kind of apathy is regrettable to say the least. We also find it difficult to accept the contention that the other accused persons who all belong to one family have absconded. The nature of the offences alleged to have been committed is also not so serious as to probabalise the version of the Respondent that the accused have indeed absconded. Suffice it to say that the Petitioner is free to make an application for the grant of bail to the Court concerned who shall consider the same no sooner the same is filed and pass appropriate orders thereon expeditiously.”

18. The above two decisions have been reiterated and followed in the recent decision in *State of Maharashtra v. Tasneem Rizwan Siddiquee* (*supra*).

19. The above observations have to be understood in light of the mandatory requirement of Section 41 (1) (ba) Cr PC which requires the Magistrate that

remand is being sought because of the reasonable suspicion that the person arrested has committed a cognizable offence punishable with an imprisonment for a term exceeding seven years and that the investigating has 'credible information' that the person arrested 'has committed a cognizable offence'. While it is true that at this stage the Magistrate examining the transit remand application is not required to go into the adequacy of the material, he should nevertheless satisfy himself about the existence of the material.

20. Another mandatory procedural requirement for the Magistrate considering a transit remand application is spelt out in Article 22 (1) of the Constitution. This entitles the person arrested 'to be informed as soon as may be of the grounds of such arrest.' Further the Magistrate has to ensure that the arrested person is not denied 'the right to consult, and to be defended by, a legal practitioner of his choice.' The Magistrate should ask the person arrested and brought before him whether in fact he has been informed of the grounds of arrest and whether he requires to consult and be defended by any legal practitioner of his choice.

21. The above mandate of Article 22 (1) of the Constitution has been further reiterated by the Supreme Court in ***D.K. Basu v. Union of India (1997) 1 SCC 416.***

22. It was submitted by Mr Navare that given the seriousness of the offence and the urgency of the situation, it may not be possible for an investigating agency to comply with the above requirements in letter and spirit and that

there would always be an occasion for some or other requirement of the law to be by passed. The answer is that in the present case such contention is hypothetical. There may be a rare instance where such requirement cannot be fully complied with. But the concerned Magistrate will, have to be satisfied with the explanation offered for the non-compliance and take a call whether it is serious enough to not immediately grant the transit remand. The departure from the mandatory requirement of the Constitution and the Cr PC ought not to be lightly countenanced. In the present case for instance the FIR having been registered in January 2018, there was sufficient time available with the Maharashtra Police to anticipate the legal requirement and comply with it.

23. Turning to the order dated 28th August 2018 of the learned CMM in the present case, the Court finds that a duty lawyer empanelled pursuant to the Scheme of the National Legal Services Authority ('NLSA'), the statutory body under the Legal Services Authorities Act, 1987 (LSAA), was shown representing the person arrested, i.e. the present Petitioner. However, the Magistrate does not appear to have asked the arrested person, as mandated by Article 22 (1) of the Constitution whether he was informed about the grounds of arrest and whether he wish to consult and be defended by a legal practitioner of his choice. This requirement does not get diluted one bit only because the proceedings are for transit remand.

24. The order passed by the learned CMM on 28th August, 2018 further reveals that the CMM perused the handwritten application prepared by the IO i.e. Assistant Sub Police Sushil B. Bobde and satisfied himself of the

identity of the said police officer. The CMM then noticed the submissions of the IO that the Petitioner had been arrested from his house at Kalkaji, Delhi and that he had been arrested without any warrant and that “He is required to be produced before the Court of competent jurisdiction i.e. the Court of learned Special Court, Shivaji Nagar, Pune, Maharashtra and, therefore, his transit remand be granted.” The learned CMM then observed that he has given his ‘thoughtful consideration’ to those submissions of the IO and the learned APP for the State. There is no mention of the legal aid lawyer having been made any submission whatsoever. The learned CMM did not even think it necessary to record any such submission. It thus appears to the Court that the appearance of the Duty lawyer for the Petitioner was cosmetic and not in the true spirit of Article 22 (1) of the Constitution read with Section 12 (g) of the LSA which guarantees free legal aid to every person in custody.

25. The learned CMM next notes that as per the police papers and the FIR registered and that as per the arrest memo, the Petitioner was arrested at 2.15 pm on 28th August, 2018 and that “intimation of arrest of accused has been given to his partner”. Here again, the learned CMM has overlooked that under Article 22 (1) of the Constitution, the arrested person has to be informed of the grounds of such arrest. The mere intimation of arrest to the partner/ friend of the arrested person does not satisfy the requirement of law.

26. There is no indication at all in the order of the learned CMM that he had an occasion to ask whether the IO had brought the case diary or a copy thereof with him; and asked to see the case diary. It is reiterated that it was

not necessary for the CMM to examine the case diary at that stage to see whether there was adequate material, but only to satisfy himself that the material existed. This is not a mechanical exercise as reiterated by the Supreme Court in the above decisions. There was no indication at all in the order of the learned CMM dated 28th August, 2018 that he had undertaken that exercise.

27. It will be recalled that when this case was heard on 29th August, 2018, it was unable to be disputed by the learned ASG appearing for the State of Maharashtra that the case diary was not asked for by the learned CMM although it was available. It was also not disputed that the case diary was written in Marathi language. It will also be recalled that when this Court on 28th August, 2018 asked the State of Maharashtra about the relevant documents, time was sought to prepare the translated copies of those documents, which were in Marathi, but the complete translation was not ready even on the following date of hearing i.e. 29th August, 2018. Therefore, in all probability, when the IO appeared before the learned CMM with the case diary, since the case diary was written in Marathi and since the translated version thereof was not available at that stage, even if the CMM had asked to see it, the CMM could not have been able to comprehend as to what was written in the case diary. It is nobody's case that the learned CMM was conversant in Marathi language. Consequently, the learned CMM would not have been able to appreciate whether the requirement of Section 41 (1) (ba) of the Cr PC stood satisfied.

28. With there being several non-compliances of the mandatory requirement

of Article 22 (1), Article 22 (2) of the Constitution and Section 167 read with Section 57 and 41 (1) (ba) of the Cr PC, which are mandatory in nature, it is obvious to this Court that the order passed by the learned CMM on 28th August, 2018 granting transit remand to the Petitioner is unsustainable in law. The said order is accordingly hereby set aside.

29. In view of Section 56 read with Section 57 Cr PC, in the absence of the remand order of the learned CMM, the detention of the Petitioner, which has clearly exceeded 24 hours, is again untenable in law. Consequently, the house arrest of the Petitioner comes to an end as of now.

30. It is clarified that this order will not preclude the State of Maharashtra from proceeding further in accordance with law.

31. At this stage, Mr Navare submits that this Court should extend the house arrest of the Petitioner by two more days since the Supreme Court had itself extended his house arrest for four weeks. This submission overlooks the fact that the Supreme Court had extended the Petitioner's house arrest only in order to enable him to avail of the remedies that were permissible to him in accordance with law. As far as the present Petitioner is concerned, the fact that this writ petition filed by him was already pending before this Court, was noticed by the Supreme Court and it was made clear that he is free to pursue this remedy among others in accordance with law. The extension of his house arrest by the Supreme was only for that limited purpose. Consequently, this Court is unable to accede to the request of Mr Navare.

32. The writ petition is allowed in above terms. Order be given *dasti* under the signatures of the Court Master.

S. MURALIDHAR, J.

VINOD GOEL, J.

OCTOBER 01, 2018

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