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HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 952 of 2018**Order reserved on : 17.05.2019Order delivered on : 17.06.2019

Smt. Nilima Murgesh Achari W/o R. Murgesh Achari, aged about 56 years, R/o Shubham Vihar, Bilaspur, District Bilaspur Chhattisgarh

---- Petitioner**Versus**

1. State of Chhattisgarh, through the Principal Secretary, Home Department, Mahanadi Bhawan, Atal Nagar, Raipur, District Raipur Chhattisgarh
2. Superintendent of Police, Bilaspur, District Bilaspur Chhattisgarh
3. Station House Officer, Police Station Civil Lines, Bilaspur, Chhattisgarh
4. Smt. Triveni Singh W/o Late Hira Singh Rajput, aged about 85 years, R/o Shubham Vihar Near Om Zone Gate, Bilaspur Chhattisgarh
5. Chief Judicial Magistrate, Bilaspur, Distt. Bilaspur Chhattisgarh
6. District and Sessions Judge, Bilaspur Chhattisgarh

---- Respondents

For Petitioner	:	Mr. T.K. Jha, Advocate.
For Respondents No. 1 to 3/State	:	Mr. Chandresh Shrivastava, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Order**

1. Petitioner's son namely Shubham Achari was arrested by the jurisdictional police in connection with crime No. 11/2018 for offences punishable under Sections 307, 397 and 459 of the Indian

Penal Code on 07-01-2018. He was produced before the Chief Judicial Magistrate, Bilaspur for grant of remand on 09-01-2018 and the said Magistrate, on due application of mind, granted remand and sent accused Shubham Achari into judicial custody till 19-01-2018. Thereafter, further judicial remand was granted by the learned Chief Judicial Magistrate on 19-01-2018, 16-02-2018, 01-03-2018, 15-03-2018, 28-03-2018 and finally on 06-04-2018, in the absence of accused Shubham Achari, he was charge-sheeted on 06-04-2018 and case was also committed to the court of Session on 20-04-2018. After full dressed trial, he was ultimately acquitted by the court of Session, Bilaspur for the charged offences on 04-04-2019.

2. This writ petition has been preferred by his mother during his custody on 01-11-2018 mainly complaining that except on 09-01-2018 he was never produced before the Chief Judicial Magistrate who remanded him on judicial custody time to time from 19-01-2018 to 28-03-2018 and even no video conferencing was made available to her son/accused Shubham Achari before extending period of judicial remand by the learned Chief Judicial Magistrate which is clearly in flagrant violation of the provisions contained in 2nd proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure, therefore, her son Shubham Achari who has ultimately been acquitted by the jurisdictional court of Session is entitled for compensation for his illegal custody from 19-01-2018 to 28-03-2018 and as such, accused Shubham Achari is entitled for reasonable compensation for his unauthorized and illegal detention

for the aforesaid period.

3. The respondents/State has filed its return stating *inter alia* that the accused was produced before the learned Chief Judicial Magistrate on 09-01-2018 thereafter, on various subsequent dates further remand was sought by the police authorities and that was duly granted by learned Chief Judicial Magistrate in absence of accused Shubham Achari due to shortage of police force in the further dates of hearing and as such no exception can be taken to the fact of not producing accused Shubham Achari physically before the Jurisdictional Criminal Court on the further dates of extending period of judicial remand due to shortage of police force, therefore, this writ petition deserves to be dismissed.
4. Mr. T.K. Jha, learned counsel for the petitioner would submit that the petitioner's son/accused namely Shubham Achari was not produced in person before the learned Chief Judicial Magistrate from 19-01-2018 to 28-03-2018 nor any video conferencing facility was made available to him before judicially remanding him by the learned Chief Judicial Magistrate and ultimately, he was charge-sheeted and acquitted by the Jurisdictional court of Session which shows that he was absolutely an innocent person and he remained in custody for a fairly long time and as such, petitioner's son Shubham Achari is entitled for reasonable compensation flowing from illegal act of State authorities and this writ petition deserves to be allowed granting compensation which he is entitled in Law.
5. Mr. Chandresh Shrivastava, learned Deputy Advocate General

appearing for the State, would submit that mere non-production in person of the petitioner's son Shubham Achari on the date of extension of judicial remand before the learned Chief Judicial Magistrate does not itself make the custody of the accused Shubham Achari illegal and therefore the petitioner's son is not entitled for any compensation flowing from the aforesaid remand order as he has already been acquitted from the charges which were levied against him.

6. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the material available on record with utmost circumspection.
7. In order to adjudge the plea raised at the Bar, it would be appropriate to notice the provisions contained in Section 167(2)(b) of the CrPC which provides for the power of the Magistrate to grant remand.

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 of the accused in custody of the police 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;]

8. Originally, 2nd proviso to sub-section (2) of Section 167 of the CrPC provided as under:-

“no magistrate shall authorise detention in any custody under this Section, unless the accused is produced before him.”

9. 2nd Proviso to sub-section (2) of Section 167 of the CrPC was amended and inserted by amendment Act 5 of 2009 w.e.f. 31-12-2009 quoted in para 7. Originally enacted Section 167(2)(b) which was substituted by the Act 5 of 2009 is an addition which did not

exist in the old Section 167 Code of Criminal Procedure, 1898. Originally, Section 167(2)(b) specifically provides for physical production of the accused before the Magistrate before he can be remanded to custody and it clearly contemplates that if a person is arrested without a warrant and investigation cannot be completed within twenty-four hours and there are grounds to believe that charge is well founded, then it is obligatory upon the investigating officer to produce the accused with a copy of case diary before the judicial Magistrate for a remand to custody to enable him to complete the investigation.

10. The aforesaid provisions are to see that person arrested by the police is brought before the Magistrate with least possible delay. In order to enable the later to judge if a person has to be kept further in the police custody and to enable such person to make a representation in the matter. (See: **Gauri Shanker v. State of Bihar**¹). The order authorizing the detention of the accused in the custody is a judicial order and it has to be passed after applying judicial mind. The Supreme Court in the matter of **Manubhai Ratilal Patel through Ushaben v. State of Gujarat**² clearly held that the act of directing remand of an accused is fundamentally a judicial function and it is obligatory on the part of Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner and as such, the exercise of jurisdiction by the learned Magistrate is a judicial act and their Lordships observed succinctly as under:-

¹ AIR 1972 AIR SC 711.

² (2013) 1 SCC 314

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.

25. It is apt to note that in **Madhu Limaye, in re**³ it has been stated that: (SCC p. 299, para 12)

“12. Once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters.”

26. In **CBI v. Anupam J. Kulkarni**⁴ it has been stated that: (SCC p. 153, para 7)

“7. ... ‘16. ... *Where an accused is placed in police custody for the maximum period of fifteen days allowed under law either pursuant to a single order of remand or more than one order, when the remand is restricted on each occasion to a lesser number of days, the further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise.*”^{1*}

(emphasis in original in Anupam J. Kulkarni case)

Thus, the exercise of jurisdiction clearly shows that the Magistrate performs a judicial act.

11. The question for consideration would be whether order of extending judicial remand of an accused would be vitiated if it is passed in the absence of the accused person. In the matter of **Gauri**

³ (1969) 1 SCC 292

⁴ (1992) 3 SCC 141 : 1992 SCC (Cri) 554 : AIR 1992 SC 1768

* Ed. As observed in *Chaganti Satyanarana v. State of A.P.*, (1989) 3 SCC 141, pp. 149-50, para 16

Shanker(supra) it was held that an order of remand can be passed in absence of the accused if his presence at that time could not be secured. Similarly, in the matter of **Sambasiva Rao v. Union of India**⁵, their Lordships of Supreme Court expressed the view that an order of remand cannot be considered to be invalid merely because an accused has not been produced before the Magistrate, however, their Lordships also held that it is highly desirable that the accused should be personally produced before the Magistrate so that he may, if he so chooses, make a representation against his remand and for release on bail.

12. A Constitution Bench of seven Judges with a majority of five to two, the Supreme Court in the case of **Raj Narain v. Superintendent Central Jail**⁶ has observed that even if it is desirable for the Magistrate to have the prisoner produced before him when they remit him to further custody, the Magistrate can act only as the circumstances permit. Similar view has been expressed by Supreme Court in the matter of **S.K. Dey v. Officer-in-charge, Sakchi**⁷, **Manoharlal v. State of Rajasthan**⁸.

13. Recently, in the matter of **Tmt. Affiya v. State Rep. By the Superintendent of Central Prison**⁹, it has been held by the Madras High Court, to which I respectfully agree, that while it is desirable to secure the presence of the accused at the time of granting extension of custody but nonetheless, his detention does not become illegal only due to his failure to produce before the Magistrate.

⁵ AIR 73 SC 850

⁶ AIR 71 SC 1878

⁷ 1974 (2) Cr. L.J. 40 SC

⁸ 1983 (2) Cr.L.J. 1231 SC.

⁹ (2017) SCC OnLine Madras 31276

14. From the conspectus of aforesaid authorities, it is quite vivid and well settled that though it is desirable to have the accused produced physically before the Magistrate when they are remanded for further judicial custody, but an order of remand made in the absence of accused will not be *per se* invalid which has been passed in the absence of accused, if there are valid reasons for not producing the accused in person at the time of extending period of judicial remand. The Madhya Pradesh High Court in the matter of **Rajkumar and others v. State of Madhya Pradesh and others**¹⁰ has enumerated some circumstances and held that order of remand made in absence of accused would not be *per se* invalid. It was observed as under:-

12. Thus on a critical examination of proviso (b) of section 167(2) together with the explanation, we find that the mandate of Law is that the accused should be physically produced before the Magistrate at the time when he is to be remanded in custody. But it may be pointed out that this principle and the requirement cannot be stretched to such an extent as to cover even those cases and circumstances where it is almost practically impossible to physically produce the accused in person before the Magistrate. There may be situation and circumstances where in spite of all due diligence, *bona fide* intention and precautions it may not be possible for the State to physically produce the accused in person before the Magistrate and, therefore, due to the absence of the accused the order of remand may not be vitiated. There may not be any dearth of such situations and circumstances, a few of which may, for example, be stated herein. Let us take the cases of terrorists and dangerous criminals whose escort from the place of their custody to the Court or Magistrate concerned and back may not be free from hazards and risk of attack by their associates and accomplices with a view to free them from lawful custody. There may also be a case where the accused himself may refuse to appear before the Court or Magistrate on the apprehensions of being shown to the witnesses who are supposed to identify him in a test parade. So also, where several cases are pending against an accused at different places or say

¹⁰ 1990 MPLJ 289

in different States and if by chance same dates are fixed in two or more such cases or in close proximity so that it may not be practically possible to produce the accused before all the Courts. The accused may have been seriously injured in the same incident or otherwise by reason of which he may have been hospitalised making it quite impossible for him to move about. The accused may become seriously ill and it may be only at the risk of his life that he may be produced before the Court or Magistrate. These are only a few instances and there may be many more factors where it may not be practically possible for good and valid reasons to physically produce the accused.

15. In view of the consistent judgments of their Lordships of the Supreme Court noticed herein-above, the provision contained in proviso to sub-section (2) of Section 167 of the CrPC has to be complied with substantially and the jurisdictional Magistrate has to secure the presence of the accused at the time of granting/extending his judicial custody by his physical presence or through the medium of electronic video linkage. The criminal Courts are expected to ensure the presence of the accused person while extending period of judicial remand without fail by either of the means enabling him either to make representation and/or for release on bail.

16. Reverting to the facts of the present case, it is quite vivid that the petitioner's son viz. Shubham Achari was arrested by jurisdictional police on 07-01-2018 for the offences punishable under Sections 307, 397 and 459 of the Indian Penal Code and he was produced in person before the Chief Judicial Magistrate on 09-01-2018 and on that day he was granted judicial custody till 19-01-2018. But, admittedly, from 19-01-2018 further judicial remand was extended by learned Chief Judicial Magistrate on 16-02-2018, 01-03-2018, 15-03-2018, 28-3-2018 up to 06-04-2018, and on 06-04-2018, accused Shubham

Achari was charge-sheeted, but he was not produced in person or through the medium of electronic video linkage before the Chief Judicial Magistrate and the justification extended by the State by way of return is that on account of shortage/unavailability of police force, the accused could not be produced in person before the Chief Judicial Magistrate. The return filed by the State authorities is supported by the affidavit of Officer-in-charge filed on 19-02-2019 but, no rejoinder supported with affidavit has been filed on behalf of the petitioner. Controverting the said fact that though police force was available to produce the accused before the Chief Judicial Magistrate on several days on extending the period of judicial remand, but he was not produced deliberately before the Chief Judicial Magistrate and he has suffered prejudice on the ground of non-production before the jurisdictional Criminal Court which goes to show that the reason assigned by the State authorities for not physically producing the accused before the Chief Judicial Magistrate on the date of extension of the order of judicial remand is valid reason acceptable to this Court and his detention for the period during which he remained in judicial custody is neither illegal nor unauthorized rather it is in accordance with law, therefore, he is not entitled for any compensation for not producing the accused on subsequent dates for extending the period of judicial remand.

17. On the basis of the aforesaid legal analysis, I am of the opinion that due to non-production of accused Shubham Achari on further dates of extending judicial remand, his detention in Jail was neither illegal nor unauthorized and was based on sufficient and valid reasons

as assigned by State and accepted by this Court. Consequently, the petitioner's son is not entitled for any compensation, as the said detention was not illegal and unauthorized, it is supportable in law.

18. No other point was pressed for consideration, though raised in this petition.

19. As a fallout and consequence of the aforesaid discussion, I do not find any merit in the writ petition. The writ petition deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (227) No. 952 of 2018

Smt. Nilima Murgesh Achari

Versus

State of Chhattisgarh

Head Note

Criminal Courts are expected to ensure the presence of accused while extending period of judicial remand either by physical presence or by medium of electronic video linkage.

दांडिक न्यायालय से अपेक्षा की जाती है कि न्यायिक अभिरक्षा की अवधि का विस्तार करते समय अभियुक्त की उपस्थिति या तो शारीरिक उपस्थिति द्वारा या इलेक्ट्रॉनिक वीडियो लिंकेज के माध्यम से सुनिश्चित करे |