

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.2639 OF 2019

Harshad Dinanath Bari	...Petitioner
vs.	
The State of Maharashtra	...Respondent

WITH
WRIT PETITION NO.2640 OF 2019

Ravindra Vasudev Bari and Ors.	...Petitioners
vs.	
The State of Maharashtra	...Respondent

Mr. Subhash Jha a/w. Mr. Harekrishna Mishra i/b. Law
Global Advocates, for the Petitioners.
Mrs. M.M. Deshmukh, APP for Respondent-State.

**CORAM : S.S. SHINDE &
N.B. SURYAWANSHI, JJ.**

JUDGMENT RESERVED ON : 17th OCTOBER, 2019
JUDGMENT PRONOUNCED ON : 18th DECEMBER, 2019

JUDGMENT : (Per N.B.Suryawanshi, J.)

. By these Petitions, the Petitioners seek their release by invoking the writ of Habeas corpus on the ground that their judicial custody was authorized beyond a period of 15 days by the designated Court, which is contrary to the mandate of section 309(2) of Cr.P.C, the same is violative of Article 21 of the Constitution of India.

2. The Petitioners are accused in Boisar police station C.R. No. I-267/2017 (MPID Case No. 2 of 2018) for the offence punishable under sections 406, 467, 468, 471 read with section 120-B of Indian Penal Code and section 3 of Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 (in short “MPID Act”).

3. Rule. Rule made returnable forthwith. Heard with consent of the parties.

4. Heard learned counsel for the Petitioners and learned APP for the State. Perused the record with the assistance of both learned counsel for the parties.

5. In pursuance of the registration of the offence on 27th December, 2017, the Petitioners came to be arrested on 19th February, 2018 and were remanded to police custody up to 12th March, 2018. The Petitioners, were thereafter remanded to judicial custody.

6. The Petitioners’ first bail application, filed under section

167(2) of Code of Criminal Procedure (“Cr.P.C.”) came to be rejected on 23rd April, 2018, as section 467 of Cr.P.C. came to be added in the said crime. This Court permitted the Petitioners to withdraw bail application No. 2513 of 2018 as the investigation was in progress. On 17th May, 2018 charge-sheet came to be filed. Supplementary charge-sheet is filed on 23rd June, 2018. The Petitioners’ bail application after filing of the charge-sheet was rejected by the learned trial Court on 30th May, 2018 and thereafter successive bail applications filed by the Petitioners came to be rejected. Even the learned single Judge of this Court dismissed the bail application No. 477 of 2019 filed by the Petitioners on the ground that the Petitioners have not disclosed the withdrawal of the bail application No. 2513 of 2018.

7. The main ground pressed in to service by the learned counsel for the Petitioners is that, proviso to Section 309(2) of Cr.P.C. provides for remand of the accused for a term not extending 15 days at time. In the present case, from time to time, the judicial custody of the Petitioners was extended beyond 15 days, which according to the Petitioners is in

violation of Article 21 of the Constitution of India. Hence, the Petitioners are entitled for their release by invoking the writ of Habeas Corpus.

8. The learned counsel for the Petitioners further urged that since no remand was sought or granted for added offence under sections 406, 467, 468, 471 read with section 120-B of Indian Penal Code and section 3 of MPID Act, the detention of the Petitioners is illegal, particularly in view of the fact that in the affidavit in reply filed by the State, it is admitted that no further remand was obtained after addition of new section. Learned counsel for the Petitioners further contends that in terms of provisio under MPID Act, the provisions of Cr.P.C are applicable for the cases under section 13(2) of the MPID Act and the learned special Judge also exercises powers of the Magistrate.

9. Learned counsel for the Petitioners has placed reliance upon the following decisions:

(i) **Babu Nandan Mallah vs. The State.**¹ (ii) **Saquib Abdul Hamid**

1 1971 SCC OnLine Pat 47.

Nachan vs. State of Maharashtra and Anr.² (ii) Rajkumar Bhagchand Jain vs. Union of India and Anr.³ (iii) Ram N. Singh vs. State of Delhi & Ors.⁴ (iv) Manubhai Ratilal Patel vs. State of Gujrat and Ors.⁵

10. Learned APP to counter the submissions made by the learned counsel appearing for the Petitioner argued that, writ of Habeas Corpus is not maintainable, once there is a judicial order of remand. To support her argument, she places reliance on:

(i) Saurabh Kumar vs. Jailor, Koneila Jail and Anr.⁶ (ii) State of Maharashtra vs. Tasneem Rizwan Siddiquee.⁷ (iii) Serious Fraud Investigation Office vs. Rahul Modi and Anr.⁸ (iv) A. Lakshmanrao vs. Judicial Magistrate, First Class, Parvatipuram and Ors.⁹ (v) Aparna Makhal vs. State of West Bengal.¹⁰ (vi) Koomar Indraneel @ Caesar vs. State of Bihar.¹¹

2 2006 Cri.L.J. 2196.

3 2017 SCC OnLine Bom 9435.

4 AIR 1953 SC 277.

5 (2013) 1 Supreme Court Cases 314.

6 (2014) 13 Supreme Court Cases 436.

7 AIR 2018 Supreme Court 4167.

8 (2019) 5 Supreme Court Cases 266.

9 1970(3) Supreme Court Cases 501.

10 2014(3) RCR (Cri) 18.

11 2000 Law Suit (PAT) 233.

11. We have given our thoughtful consideration to the points urged by both sides, and we are of the considered view that writ of Habeas Corpus is not maintainable in the facts of the present case.

12. To consider the points raised by the learned counsel for the Petitioners, it is necessary to refer the relevant provisions of Cr.P.C. Section 309(2) of Cr.P.C. reads as under:

If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time

... ..
... ..

13. On plain reading of Section 309(2) of Cr.P.C., it is clear that the Court after taking cognizance of an offence, or at the time of commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, after recording reasons, on such terms as it thinks fit,

and for such time as it considers reasonable and it may accordingly issue warrant remanding the accused in custody. In our considered opinion, the restrictions imposed on the Magistrate by this proviso are not applicable to the Court of Sessions.

14. It is the settled principle of the Interpretation of Statutes that the words of statutes must prima facie be given their ordinary meaning unless the construction leads to absurdity. The Court must give meaning to each and every word used by the legislature. On plain reading of the said provision, it is clear that the legislature did not intend to impose any restriction on the power of the Sessions/Special/Designated Court before whom the trial is being conducted as is imposed by the proviso to it.

15. The principles of interpretation of proviso of section 309(2) of Cr.P.C. are laid down by the Hon'ble Apex Court in catina of decisions. The reference to the some of them in the context of the present case can be usefully made:

(i) The natural function of proviso is to except something out

of the enactment or to qualify something enacted therein, which but for the proviso would be within the purview of enactment¹². When one finds proviso to a section, the natural presumption is that but for the proviso, the enacting part of the section would have included subject matter of the proviso¹³. As a general rule, a proviso is added to enactment to qualify or to create an exception to what is in the enactment and ordinarily a provision is not interpreted as set a general rule¹⁴. The construction placed upon a proviso which brings it into general harmony with the terms of section and prevail the absolute term with a later to be read as a supplemental to the earlier one¹⁵. It is settled rule of interpretation that of fair construction if provision is clear, a proviso cannot expand or limited¹⁶.

16. If we apply the above settled principles of interpretation to section 309(2) of Cr.P.C, on plain reading of the said provision, it is clear that legislature did not intend to impose any restriction on the power of the Sessions/Special

12 AIR 1966 S.C. 12.

13 AIR 1961 S.C. 1596.

14 AIR 1985 SC. 582.

15 1985 Vol-I SCC 591.

16 AIR 1975 S.C. 1758.

/Designated Court to remand the accused in further judicial custody for a particular period. Of course, this can be done only after cognizance is taken by the Sessions/ Special/ Designated Court and when the matter is to be adjourned, reasons for the same have to be recorded.

17. The proviso to section 309(2) of Cr.P.C however carves out the exception to the general provision thereby imposing restriction that no Magistrate shall remand the accused persons to custody under section 309(2) of Cr.P.C. for a term exceeding 15 days at a time. Thus, on plain reading of section 309(2) of Cr.P.C and its proviso, we are of the considered view that the said provision is clear and unambiguous and the distinction enshrined in provision cannot be read in the main provision of section 309(2) of Cr.P.C to put limitation on the power of the trial Court while exercising the powers under section 309(2) of Cr.P.C.

18. In the light of above discussion, we are unable to accept the proposition of the learned counsel for the Petitioner that the designated Court could not have authority to remand of the

Petitioner for a period exceeding 15 days. According to us, no such restriction can be read in section 309(2) of Cr.P.C.

19. The next argument of the Petitioners is that, in terms of Section 13 of the M.P.I.D. Act, the designated Court is deemed to be a Magistrate and hence it cannot remand the accused for a period beyond 15 days. Section 13 of M.P.I.D Act reads thus:

“(1) The designated Court may take cognizance of the offence without the accused being committed to it for trial and, in trying the accused person, shall follow the procedure prescribed in the Code of Criminal Procedure, 1973, for the trial of warrant cases by Magistrates.

“(2) The provision of the Code of Criminal Procedure, 1973 shall so far as may be, apply to the proceedings before a designated Court and for the purposes of the said provisions a designated Court shall be deemed to be a Magistrate.”

On plain reading of section 13 of the M.P.I.D Act the designated Court is entitled to take cognizance of an offence without the accused being committed to it for trial and during trial the designated Court shall have to follow the procedure prescribed in Cr.P.C which is prescribed for the trial of warrant cases by the Magistrate. Sub section (2) of section 13 makes it clear that the provisions of Cr.P.C. shall so far as may be, apply to the proceedings before a designated Court and for the

purposes of the said provisions a designated Court shall be deemed to be a Magistrate.

20. The designated Court upon filing of the charge-sheet and after taking cognizance, deals with the matter in the capacity of the designated Court. As we have already observed in the foregoing paras, the Sessions Court/ Special Court and in the present case the designated Court, does not have any restrictions on extending the remand beyond period of 15 days which restriction is only applicable to the Magistrates in terms of the proviso to section 309(2) of Cr.P.C. Hence, we do not agree with this proposition advanced by the learned counsel for the Petitioners.

21. Reliance is placed by the Petitioners in the case of **Babu Mallah**(supra), in that case the Petitioner was arrested and produced before the sub divisional Magistrate as he was arrested in the crime committed under section 395 of Indian Penal Code. The Magistrate took cognizance on 23rd November, 1970. On submission of the charge-sheet, the learned Magistrate did not record any specific order of remand and the

accused was remanded for a period of more than 15 days by violating the mandatory provision of section 344 of Cr.P.C. It can be seen from the facts of that case that remand order beyond 15 days was passed by the learned Magistrate who is not entitled to do so under the mandate of section 344 of Cr.P.C. and hence the Patna High Court released the Petitioner therein. The ratio of that case is not applicable in the peculiar facts of the present case, as this is the case under special law i.e. MPID Act and orders of remand are passed in the present case by the learned Special Judge.

22. In the matter of **Rajkumar Jain** (supra), violation of section 167 of Cr.P.C. was alleged due to which violation of fundamental rights guaranteed under Article 21 of the Constitution of India. There was no record of extension of remand granted by the learned trial Court to the accused. This Court in the facts of that case held that, if the detention in the custody is not permitted by law, then this Court can order release and Habeas Corpus can be issued for that purpose. In our view the said ratio is not applicable to the present case.

23. In the matter of **Manubhai Patel** (supra) the principles of issuance of writ of Habeas Corpus were reiterated by the Hon'ble Apex Court. It was also held by the Hon'ble Apex Court that it is a well accepted principle that Habeas Corpus Petition cannot be entertained when the person is committed to judicial custody or police custody by an order which *prima facie* does not appear to be without jurisdiction or is passed in an absolutely mechanical manner or is wholly illegal. A Court has to scrutinize the illegality or otherwise of the order of detention which was passed. Unless the Court is satisfied that the person has been committed to jail custody by virtue of order that suffers lack of jurisdiction or absolute illegality, a writ of Habeas Corpus cannot be granted. If the said ratio is applied to the facts of the present case, the order of remand by the learned special Court beyond a period of 15 days, can by no stretch of imagination be called as illegal or in violation of provision of Cr.P.C. hence, the writ of Habeas Corpus in our considered opinion, is not maintainable.

24. The reliance by the learned APP in the case of **Saurabh Kumar** (supra) is well placed, which also reiterates that writ of

Habeas Corpus is not maintainable against the judicial order remanding the accused into the custody and appropriate remedy is to seek bail. The detention in these circumstances, cannot be said to be illegal. Same is the ratio of the reported judgment in the case of **Tasneem Siddiquee** (supra) wherein the Hon'ble Apex Court reiterated the position that writ of Habeas Corpus is not maintainable in respect to the person who is in custody, pursuant to the remand order passed by the judicial Magistrate, in connection with the offence under investigation. Placing reliance in the case of **Saurabh Kumar** (supra) it was held that :

Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order passed by the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued.

25. In the case of **Saquib Abdul Nachan** (supra) the accused was prosecuted under section 29 of Prevention of Terrorism Act. The accused was not presented in the Court as trial of the special Court was stayed. The accused approached this Court

claiming violation of Article 21 and seeks writ of Habeas Corpus claiming that the detention was vitiated. The Division Bench of this Court held that section 309(2) of Cr.P.C. empowers the Special Court to postpone or adjourn inquiry or trial and remand accused if in custody till disposal of case. It was further held that it was not necessary for Court to pass order of remand on each day of attendance and order of remand passed in first instance on 22nd July, 2003 till the disposal of the case is binding and the same is not violative of the Article 21 of the Constitution of India. It was also held that the Court initially clothed with the powers of a Magistrate and subsequently on filing of the charge-sheet, it is clothed with the powers of Court of Sessions. It was held that if there is no stage of commitment of the case, the scheme of section 209 of Cr.P.C. in its entirety will not be applicable to the Special Court under the Act. Thus this Court came to the conclusion that the order of remand passed by the learned trial Court can be stayed during trial and restriction of 15 days imposed on the Magistrate would not be applicable to the special Court.

26. In view of the above discussion, we do not find any merit

in the present Petitions. The Petitioners are not entitled to writ of Habeas Corpus and the Petitioners' remedy lies elsewhere.

In the result, the following order:

27. Writ Petitions are dismissed.
28. Rule is discharged.
29. There shall be no order as to costs.

(N.B. SURYAWANSHI, J.)

(S.S. SHINDE, J.)