

High Court for the State of Telangana

The Hon'ble The Chief Justice Raghvendra Singh Chauhan

and

The Hon'ble Sri Justice A. Abhishek Reddy

W.P.No. 22461 of 2019

Date: 28-10-2019

Between:

Smt. N. Sandhya and another

...Petitioners

and

The State of Telangana
Rep. by its Principal Secretary,
Home Department, Secretariat,
Hyderabad and 5 others.

...Respondents

Counsel for the petitioners: Mr. V. Raghunath

Counsel for the respondents: Addl. Advocate General

The Court made the following:

Order: (per Hon'ble The Chief Justice Raghvendra Singh Chauhan)

Smt. N. Sandhya, the wife of *detenu* No. 1, *namely* Nalamasa Krishna, and Smt. B. Chandrakala, the wife of *detenu* No. 2, *namely* B. Maddileti, have filed the present Habeas Corpus petition ostensibly on the ground that on 15-10-2019, at about 7:50 a.m., about forty persons in plain clothes had entered the office –cum- residence of Telangana Praja Front situated at Baghlingampally, Hyderabad, and took away their respective husbands. Amongst these plain clothed persons, there were two policemen in their uniforms. While the *detenus* were being taken away, both the petitioners and their well wishers requested the police to give the reasons for apprehending the *detenus*, but the police did not give any reasons. Only one of those policemen disclosed his name as Sri Srinivas Rao, and gave his contact number to one Smt. Rani, w/o Manchu Ramesh. Subsequent to that date, the whereabouts of the *detenus* are unknown. Hence, the present Habeas Corpus petition before this Court.

By order dated 15-10-2019, this Court had directed Mr. Sripathi Santosh Kumar, the learned Government

Pleader attached to the office of the Advocate General, to produce both the *detenus* before this Court.

On 16-10-2019, the learned Government Pleader informed this Court that in fact, both the *detenus* were arrested in connection with FIR. No. 191 of 2019 dated 05-10-2019, registered at Police Station, Gadwal, for the offences under Sections 120(B) IPC, Section 8(i)(ii) of Telangana State Public Security Act, Section 18, 18(B) & 20 of Unlawful Activities (Prevention) Act. Subsequently, they were produced before the Judicial First Class Magistrate (FAC) Additional Judicial First Class Magistrate, Gadwal. The learned Magistrate has remanded both the accused persons to judicial custody till 18-10-2019. Thus, according to the learned counsel, the custody of the *detenus* is not an illegal one. Moreover, on 21-10-2019, the State has filed a counter-affidavit. Along with the counter-affidavit, the State has filed not only the copy of FIR No. 191 of 2019 dated 05-10-2019, but also the continuation remand case diary, the remand order dated 16-10-2019, and the arrest memo dated 15-10-2019, in order to support its case that both the arrest and the remand are legal.

Mr. V. Raghunath, the learned counsel for the petitioners has raised the following contentions before this Court:

Firstly, during the arrest of the *detenus*, the police has failed to follow the procedure prescribed under Sections 41-A and 41-B of the Code of Criminal Procedure, 1973 (Cr.P.C.). For, prior to the arrest, no notice was issued to the *detenus* under Section 41-A (1) of Cr.P.C.

Secondly, even at the time of the arrest, Section 41-B of Cr.P.C., requires that after preparation of the memorandum of arrest, the same shall be attested by at least one witness, who is either a member of the family of the person arrested, or a respectable member of the locality where the arrest is made. Moreover, Section 41-B (c) of Cr.P.C. prescribes that the person arrested should be informed that he has a right to have a relative or a friend named by him, who shall be informed of the arrest. However, in the present case, the arrest memo has neither been attested by a witness, who is either a family member of the *detenus*, or a respectable member of the locality. Moreover, no information had been given to the family members of the *detenus*. According to the

learned counsel, both the arrest memos do contain in column 13, the information that the petitioners, who are the wives of the *detenus*, were informed on their mobile phones with regard to the arrest of the *detenus*. But, neither of the two arrest memos bear any signature of the persons so informed. Therefore, the arrest has been made contrary to the mandatory provisions of Sections 41-A and 41-B of Cr.P.C. Since the arrest itself is illegal, the subsequent remand by the judicial Magistrate would not convert the custody into a legal one. In order to support this plea, the learned counsel has relied on the case of **Madhu Limaye and others**¹. Moreover, in order to impress upon this Court, the fact that a remand order is a judicial act, the learned counsel has relied on the case of **Manubhai Ratilal Patel through Ushaben vs. State of Gujarat and others**².

Lastly, the learned counsel has relied on a decision of the Constitutional Bench in **Ram Narayan Singh v. State of Delhi**³ in order to plead that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must

¹ 1969 (1) SCC 292

² (2013) 1 Supreme Court Cases 314

³ AIR 1953 SC 277

strictly and scrupulously observe the forms and rules of the law. However, that has not been done in the present case.

On the other hand, Mr. J. Ramachandra Rao, the learned Additional Advocate General, has pleaded as under:

Firstly, detenu No. 1, *namely* Nalamasa Krishna, has been involved in large number of cases from 2007 till present. He has been actively involved in organizing the revolutionary movement of the banned CPI (Maoist) party. Similarly, even *detenu* No. 2, *namely* G. Maddileti, has been involved in series of criminal activities from 2018 to 2019. In order to buttress these pleas, the learned Additional Advocate General has drawn the attention of this Court to the counter-affidavit wherein the previous criminal cases, in which the alleged *detenus* were allegedly involved, have been spelt out.

Secondly, according to the Police Station Gadwal, Jogulamba Gadwal District, *detenu* No. 1 is having regular contact with Maoist leaders, and is involved in executing the ideology of the banned CPI (Maoist) party. Moreover, they are working against the Government at the dictates and instructions of the banned CPI (Maoist) party; they are attempting to overthrow the ruling Government.

Thirdly, after their arrest, memory cards have been recovered from both the *detenus*, which contain secret documents pertaining to the banned CPI (Maoist) party. These memory cards have been sent to the FSL for its report.

Fourthly, according to the learned Additional Advocate General, at the time of arrest, the police had endeavoured to inform the wives of both the *detenus* repeatedly. Once they could get through, at around 10:00 p.m., they were, indeed, informed about the fact of the arrest of the *detenus*. Therefore, the requirements of Sections 41-A and 41-B of Cr.P.C., were duly complied with.

Fifthly, since the *detenus* have been sent to judicial custody, and since the remand orders have not been challenged by the petitioners before this Court, the learned Additional Advocate General pleads that their custody is not an illegal one but is a legal one. Therefore, a writ of Habeas Corpus cannot be issued by this Court. In order to buttress this plea, the learned counsel has relied on a case of **Serious**

Fraud Investigation Office vs. Rahul Modi and another⁴.

Lastly, while the petitioners may have other legal remedies open to them, they are not justified in invoking the Habeas Corpus jurisdiction of this Court under Article 226 of the Constitution of India. Therefore, according to the learned Additional Advocate General, the present petition deserves to be dismissed by this Court.

Heard the learned counsel for the parties, and perused the record submitted by the State.

Sections 41-A and 41-B of Cr.P.C., are as under:

“41-A Notice of appearance before police officer:- (1) [The police officer shall], in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to

⁴ (2019) 5 Supreme Court Cases 266

in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent court in this behalf, arrest him for the offence mentioned in the notice.]

41-B. Procedure of arrest and duties of officer making arrest:-

Every police officer while making an arrest shall-

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification.

(b) prepare a memorandum of arrest which shall be-

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) countersigned by the person arrested;

and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest."

Section 41-A uses the word 'shall', which ordinarily indicates a mandatory provision. Therefore, under Section 41-A, prior to arresting a person, the police is required to issue a notice directing such a person to appear before him, or at such other place as may be specified in the notice. Once such a notice is issued, the person is duty bound to comply with the terms of the notice. As long as the person

continues to comply with the notice, he shall not be arrested irrespective of the offence referred to in the notice, unless, for reasons to be recorded, the police officer is of the opinion that he has to be arrested. According to Section 41-A (4), it is only when the person fails to comply with the terms of notice that the police may arrest him for the offence mentioned in the notice subject to any order passed by a competent court.

Section 41-B also uses the word “shall”. According to Section 41-B, it is the duty of the police to have the arrest memo attested either by one witness, who is a member of the family, or to have it attested by a respectable member of the locality where the arrest is made. It is also the duty of the police to inform a relative or a friend named by the arrested person.

According to the State, on 15-10-2019 at 8:00 a.m., the *detenus* were taken into custody by the Sub-Inspector of Police, Task Force, Central Zone, Hyderabad, at the Telangana Praja Front Office where he had gone along with his staff. Subsequently, at 19:00 hours on the said date, the *detenus* were produced before the Circle Inspector of Police,

Gadwal. Thereafter, the arrest memos were prepared at the Police Station, Gadwal Town.

A bare perusal of the arrest memos of both the *detenus* clearly reveals that they bear neither the signature of any family member of the *detenus*, nor the signature of an independent respectable member of the community of the place where the arrest was made.

Although the arrest memo of *detenu* No. 1, *namely* Nalamasa Krishna, claims that his wife, *namely* N. Sandhya (petitioner No. 1), was informed on her cell phone, although the call details have been produced, but according to the call details, she was contacted at around 10:08 pm. However, the call details neither indicate that repeated calls were made to the said number, nor the State has established the fact that the said number, indeed, belongs to her.

Similar is the position of *detenu* No. 2, *namely* B. Maddileti. According to his arrest memo, he too was picked up by the Hyderabad Police on 15-10-2019 at 8:00 a.m., and handed over to the Police Station, Gadwal Town. However, even his arrest memo does not bear the signature

of a family member, or of a respectable member of the locality where the arrest was made. Even the call record of the cell phone belonging to his wife, *namely* B. Chandrakala (petitioner No. 2), does not indicate that the police had repeatedly tried to contact her, nor any evidence has been produced by the State to show that the cell number belongs to her.

The only evidence produced by the State is the cell numbers, which are registered in the names of the *detenus*. Therefore, it is rather unclear whether the wives of the *detenus* were informed or not.

However, admittedly, by remand order dated 16-10-2019, the *detenus* have been sent to judicial custody by the concerned Judicial Magistrate. Undoubtedly, the remand orders are not under challenge before this Court. Therefore, the issue that arises before this Court is, whether, once the remand order has been duly passed by a Judicial Officer, which has not been challenged as being either *ultra vires*, or without jurisdiction, or illegal, merely on the ground that the legal provision vis-à-vis the arrest has not been followed, the

custody continues to be an illegal one, or converts into a legal one ?

Although the learned counsel for the petitioners has relied on the case of **Madhu Limaye and others** (1 supra), but the facts of the said case are quite different from the facts of the present case. Moreover, in the said case, the issue involved in the present case was neither raised, nor adjudicated. Hence, the said case does not support the case of the petitioners.

Furthermore, in the case of **Rahul Modi and another** (4 supra), the Hon'ble Supreme Court dealt with the issue, which is faced by this Court, *namely* even if the arrest is an illegal one, but subsequently, if remand orders have been passed by a Judicial Magistrate, which have not been challenged before the Court, whether the High Court would be justified in declaring the custody to be an illegal one ?

The Hon'ble Supreme Court has opined as under:

The law is thus clear that "in habeas corpus proceedings a court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings". In Kanu Sanyal the validity of the detention of the petitioner in District Jail, Darjeeling was therefore not considered by this Court and it was observed

that the infirmity in the detention of the petitioner therein in District Jail, Darjeeling could not invalidate subsequent detention of the petitioner in Central Jail, Visakhapatnam.

In **Manubhai Ratilal Patel through Ushaben** (2 supra), the Hon'ble Supreme Court observed as under:

....It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal.

In **B. Ramachandra Rao**⁵, the Apex Court has held that a writ of Habeas Corpus cannot be granted. Further, at para 7, the Apex Court held as under:

7. ... in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings.

In **Kanu Sanyal vs District Magistrate**⁶, the Hon'ble Supreme Court, at para 5, held as under:

5. ... The production of the Petitioner before the Special Judge, Visakhapatnam, could not, therefore, be said to be illegal and his subsequent detention in the Central Jail, Visakhapatnam, pursuant to the orders made by the Special Judge, Visakhapatnam, pending trial must be held to be valid.

⁵ (1972) 3 SCC 256

⁶ (1974) 4 SCC 141

In **Sanjay Dutt v. State**⁷, the Apex Court has opined thus:

48 ... It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the Accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order.

In **State of Maharashtra and Ors. v. Tasneem Rizwan Siddiquee**⁸, the Hon'ble Supreme Court concluded as under:

... The question as to whether a writ of habeas corpus could be maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in Saurabh Kumar v. Jailor, Koneila Jail(2014) 13 SCC 436) and Manubhai Ratilal Patel v. State of Gujarat (2013) 1 SCC 314). It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the Respondent on 18-3-2018/19-3-2018 and decided by the High Court on 21-3-2018 her husband Rizwan Alam Siddiquee was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No. I-31 vide order dated 17-3-2018 and which police remand was to enure till 23-3-2018. 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

⁷ (1994) 5 SCC 410

⁸ (2018) 9 SCC 745

police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued.

The law is, thus, clear that in a Habeas Corpus proceeding, a Court has to have regard to the legality or otherwise of the detention at the time of the return, and not with reference to the institution of the proceeding. Therefore, the Court is required to see the legality or illegality when the petition is being argued, and not at the initial stage of taking a person into police custody.

Moreover, in the case of **Rahul Modi and another** (4 supra), the Apex Court has observed as under:

The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition. The first question posed by the High Court, thus, stands answered. In the present case, as on the date when the matter was considered by the High Court and the order was passed by it, not only were there orders of remand passed by the Judicial Magistrate as well as the Special Court, Gurugram, but there was also an order of extension passed by the Central Government on 14-12-2018. The legality, validity and correctness of the order or remand could have been challenged by the original writ petitioners by filing appropriate proceedings. However, they did not raise such challenge before the competent appellate or revisional forum. The orders of remand passed by the Judicial Magistrate and the Special Court, Gurugram had dealt with merits of the matter and whether continued detention of the accused was justified or not. After going into the relevant issues on merits, the accused

were remanded to further police custody. These orders were not put in challenge before the High Court. It was, therefore, not open to the High Court to entertain challenge with regard to correctness of those orders. The High Court, however, considered the matter from the standpoint whether the initial order of arrest itself was valid or not and found that such legality could not be sanctified by subsequent order of remand. Principally, the issue which was raised before the High Court was whether the arrest could be effected after period of investigation, as stipulated in the said order dated 20-06-2018 had come to an end. The supplementary issue was the effect of extension of time as granted on 14-12-2018. It is true that the arrest was effected when the period had expired but by the time the High court entertained the petition, there was an order of extension passed by the Central Government on 14-12-2018. Additionally, there were judicial orders passed by the Judicial Magistrate as well as the Special court, Gurugram, remanding the accused to custody. If we go purely by the law laid down by this Court with regard to exercise of jurisdiction in respect of habeas corpus petition, the High Court was not justified in entertaining the petition and passing the order.

Thus, in the said case, while the Apex Court was of the opinion that although the arrest was an illegal one, but subsequently, since a legal remand order has been issued, which has not been challenged by the petitioners therein, the High Court was unjustified in holding the custody to be an illegal one.

Similar is the situation in the present case. Although this Court is of the opinion that the arrest was made in violation of the mandatory provisions of Sections 41-A and

41-B of the Cr.P.C., but nonetheless, the validly passed remand orders do exist. The remand orders have not been challenged before this Court. Therefore, this Court would not be justified in concluding that continuation of the *detenus* in the judicial custody is an illegal one.

For the reasons stated above, this Court does not find any merit in the present Habeas Corpus petition. It is, hereby, dismissed.

However, it is clarified that in case the petitioners are of the opinion that the fundamental rights, or the civil rights of the *detenus* have been violated by the State, they shall be free to take recourse to the legal remedies, which may be available to them against the State.

As a sequel, Miscellaneous Petitions, pending if any, stand disposed of as infructuous.

(Raghvendra Singh Chauhan, CJ)

(A. Abhishek Reddy, J)

Dt: 28th October, 2019
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