

18.12.2020

Ct No. 42

Item no. 53

g.b.

CRR 1814 of 2020

The Central Bureau of Investigation

Vs.

Md. Enamul Haque

Mr. Y. J. Dastoor, Ld. A.S.G.
Mr. Phiroze Edulji
Mr. Samrat Goswami

....For the petitioner

Mr. Farook M. Razak, Sr. Advocate
Mr. Manoj Malhotra
Mr. Shubail Farook
Mr. Ravi Kr. Dubey

.....For the Opposite Party

Mr. Dastoor, Learned Additional Solicitor General has completed his submission by relying upon the judgment of the Hon'ble Apex Court in State of W.B. –Vs. – Dinesh Dalmia reported in (2007) 5 SCC 773. He stressed on the issue that the Jurisdictional Court which is in seisin of the matter is the only court which is entitled to grant remand of the accused for the purpose of investigation of the case and the same cannot be completed without the accused appearing before the said court.

Mr. Razak, learned senior counsel appearing for the opposite party files a list of dates and draws the attention of this court to the conduct of the present accused/respondent emphasizing that from the very inception he is cooperating with the Investigating Agency and till date there has been no allegation that the accused respondent has

evaded the due process of law or did not cooperate with the Investigating Agency as and when called for to do so. To that extent the learned Senior counsel has drawn the attention of this court to the Notice under Section 41A Cr.P.C. which was served upon the accused/respondent on 28.09.2020 as well as on 16.10.2020. Learned counsel for the accused/respondent submits that without any reason the accused/respondent was served with a notice under Section 160 of the Code of Criminal Procedure on 06.11.2020 and when the accused/respondent responded to the same he was taken to his office and thereafter placed under arrest and produced before the learned Special Judge, (PC Act, CBI-20), New Delhi on 07.11.2020. The learned Special Court was pleased to grant interim bail to the respondent till 12.00 hours of 09.11.2020. The accused/respondent thereafter returned to Kolkata and he was tested COVID-19 positive at about 5.50 pm. on 08.11.2020. On 09.11.2020 the accused/respondent informed the Investigating Agency regarding his medical condition along with the enclosed medical documents and test reports from a private hospital as tested COVID-19 positive. The accused/respondent was thereafter taken to I.D. Hospital, Beliaghata, Kolkata wherein he had to undergo COVID-19 test and on the advice of the doctors he was kept in isolation. A memorandum was prepared regarding the test being conducted in respect of the accused/respondent and as per the option given by the accused/respondent he was allowed to stay at his residence having its address at Flat No. 4B, Heritage Regency, 101, Karaya Road, Beckbagan, Park Circus, Kolkata.

The learned counsel also drew the attention of this court to the memorandum prepared by the Investigating Agency at Beliaghata, B.G & I.D. Hospital, Kolkata wherein test was conducted. The memorandum

reflected that the accused/respondent was continued to allow to stay at the address of his residence at Kolkata. In the mean time the accused/respondent preferred an application under Article 226 of the Constitution of India being W.P.A. No. 9668 of 2020 wherein His Lordship was pleased to direct that the accused/respondent would appear before the learned Special Judge, CBI Court, Asansol within seven days from the date of receipt of report or before his test being COVID-19 negative from the Beliaghata I.D. Hospital. On 04.12.2020 the accused/respondent tested COVID-19 negative and accordingly appeared before the learned Special Judge, Asansol on 11.12.2020.

It has been brought to the notice of this court by the learned Senior counsel appearing on behalf of the accused/respondent that the order dated 09.11.2020 and 12.11.2020 so passed by the learned Special Judge would reflect that the appearance before the Investigating Agency was admitted by the Public Prosecutor appearing for the CBI and the learned Court in response to the same directed for production of the accused. In fact the order dated 09.11.2020 reflects that the learned Special Judge after consideration of the submissions of the learned Public Prosecutor was pleased to observe that the accused/respondent was taken into custody with the direction of his final production on 12.11.2020. By the order dated 12.11.2020 the learned Special court was further pleased to observe that the I.O. was directed to produce the accused on 26.11.2020. It is further submission of the learned counsel that since 9th November, 2020 till 11th December, 2020 the accused/respondent appeared before the Jurisdictional Court. He was in absolute monitoring of the Investigating Agency as there were persons everywhere more pertinently the test being conducted at the hospital and the residence where he was staying over phone and also

through virtual mode. That being the relationship since 9th November, 2020 according to the learned counsel the custody of the accused/respondent should have commenced from 9th November, 2020 and therefore, the prayer of the CBI for police custody before the learned Special Judge was without any foundation as under the provisions of Section 167 of the Code of Criminal Procedure it is only on the first fifteen days the Investigating Agency is empowered to take an accused into police custody.

Mr. Dastoor, learned Additional Solicitor General appearing for the Investigating Authority opposes such prayer and submits that the requirement of police custody is for the purpose of investigation of the case more particularly, to ascertain the allegations levelled in the FIR and the involvement of the accused in cattle smuggling for ascertainment of the *modus operandi* and the persons who have facilitated/extended patronage in course of the transaction pursuant to which the offences have been committed.

I have also taken into account the dictum of the Hon'ble Apex Court in *Kosanapu Ramreddy –Vs. – State of A.P.* reported in AIR 1994 SC 1447. The paragraph 5 of the said judgment is quoted below: *“We have considered the submissions of the learned counsel on both sides. That a person held in judicial custody could, if circumstances justify, be transferred to police custody or vice versa within a period of 15 days referred to in Section 167(2) of the Criminal Procedure Code, 1973 which by virtue of Section 20 of the Terrorist and Disruptive Activities (Prevention) Act, 1987, is to be read as 60 days in this case, cannot be disputed. There must, of course, be sufficient grounds for such a change of custody. In the present case, having regard to the nature of offence*

and the stage of the investigations it cannot be said that grounds for such custody do not exist.”

The appreciation of the events which had taken place pursuant to the accused/respondent being arrested on 07.11.2020 reflects that the Court at Delhi granted interim bail and directed the accused/respondent to appear before the Investigating Officer at 12.00 hours on 09.11.2020. On 09.11.2020 the accused appeared and intimated the Investigating Officer regarding his ailment and being tested COVID-19 positive. As such the Investigating Agency was not in a position to take him into custody and allow the accused to exercise his option of staying at his residence at Flat No. 4B, Heritage Regency, 101, Karaya Road, Beckbagan, Park Circus, Kolkata.

The prayer advanced by the accused before this Court in W.P.A. 9668 of 2020 also makes it clear that the prayer so advanced was “that unless and until the accused tested COVID-19 negative the accused should not be directed to appear before the learned Special Judge, Asansol.” The order passed in such application was that “If the petitioner tests COVID negative on the basis of the test conducted on November 24, 2020, the petitioner will appear before the learned Special Judge, CBI Court, Asansol within seven days from the date of receipt of the report. If the petitioner tests COVID positive, then a further test shall be conducted in the same manner as was done on November 24, 2020, after ten days before the Beliaghata ID Hospital, Kolkata. As and when the petitioner tests COVID negative, he shall appear before the learned Special Judge, CBI Court, Asansol within seven days from the date of receipt of such report.”

Having regard to the order so passed by a Single Bench of this Court it is clear that the accused/respondent was

also of the opinion that he has never been taken into custody by the Courts in West Bengal. The prayer of the accused was for restraining him to appear before the Jurisdictional Court. The subject matter of this application is restricted to the fact that whether on the date the accused appeared before the Investigating Officer for intimating that he has tested COVID-19 positive would be the date for commencement of his period of detention in connection with the case being RC 0102020A0019 dated 21.09.2020.

In view of the settled position of law in respect of Section 167 of the Code of Criminal Procedure in Uday Mohanlal Acharya –Vs. – State of Maharashtra reported in (2001)5 SCC 453 wherein it has been held that the date of commencement would start from the date of appearance in court, I am of the opinion that mere intimation or appearing before the Investigating Officer will not enure any benefit to the accused for commencement of his custody from 09.11.2020. As such the contentions advanced by Mr. Razak, the learned senior counsel that the first fifteen days having expired after the accused/respondent appeared before the Investigating Officer cannot be acceded to. Consequently, the commencement of the accused for the purposes of the custody under Section 167 of the Code of Criminal Procedure has to be commuted from the date on which the accused/respondent appeared before the Special Court at Asansol.

Now, the issue comes up whether it was incumbent upon the learned Court to take into account the prayer advanced by the Investigating Agency for police custody in its true perspective. There is no doubt regarding the fact that the accused was not evading the process of law so far as the appearance before the Investigating Agency is concerned. But it is settled position of law that in grave and serious

offences the Investigating Agency in the first fifteen days have a prerogative of police custody for the purposes of unveiling informations which otherwise is not possible for them to unearth. The present case involves trans-border offences and corruption associated with the same. In fact the FIR reflects that public servant having designation of a Superior Officer of Security Forces being one of the accused is involved.

Having regard to the nature and gravity of the offence and the fact the Investigating Agency will have the option only in the first fifteen days to exercise their powers in respect of such offence, I am of the opinion that the reasons so assigned for refusing police custody are not in consonance with the stage of the investigation as well as the gravity of the offence.

In view of the aforesaid order dated 11.12.2020 so far as the rejection of the prayer for police custody so advanced by the accused is concerned is interfered with and is set aside.

The CBI is directed to take the accused/respondent in police custody on 19.12.2020 and produce him before the Jurisdictional Court on 24.12.2020. The petitioner will be at liberty to advance its subsequent prayers for requirement of police custody or judicial custody before the Special Court, Asansol on 24.12.2020. In view of the issues so involved in the revisional application no further interference is called for.

As such CRR 1814 of 2020 is disposed of.

Needless to state that the observations made above are for the limited purposes of deciding whether police custody is required in this case by the Investigating Agency and is not on the merits so far as the evidence of the case is concerned.

As this matter has been disposed of at 4.10 pm., for urgency and thus for implementation of the order the Learned Registrar General, High Court at Calcutta is to ensure that certified copy is made available to the Advocate on record of the CBI in course of the day.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)