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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 27th September, 2021

Decided on : 30th September, 2021

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CRL.M.C. 1883/2021 & CRL.M.A.12911/2021

GAUTAM THAPAR

..... Petitioner

Through : Mr.Vijay Aggarwal, Mr.Sandeep Kapur, Mr.Vivek Suri, Mr.Mudit Jain, Mr.Mridul Yadav, Mr.Sahil Modi, Mr.Abhimanshu Dhyani, Mr.Sidhant Singh, Mr.Ayush Jindal, and Mr.Rhythm Aggarwal, Advocates.

versus

DIRECTORATE OF ENFORCEMENT

..... Respondent

Through : Mr.S.V. Raju, ASG with Mr.Amit Mahajan, CGSC, Mr.Kritagya Kumar Kait and Ms.Ananya Khanna, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J. (Though Video Conferencing)

1. This petition is filed with following prayers :

“A. Pass necessary orders and directions, thereby quashing and setting aside the impugned Para No.6 of the order dated 05.08.2021 whereby the Ld.Special Judge dismissed the Application filed by the Petitioner for declaring his arrest illegal in terms of A. 22 (2) of Constitution of India r/w s. 57 CrPC and for necessary orders for remanding the Petitioner to judicial custody till the disposal of the said application, as the Petitioner was not produced within 24 hours from the time of his actual arrest;”

2. The petition challenges an order dated 05.08.2021 wherein an application moved by the petitioner herein to declare the arrest of the

petitioner as illegal was dismissed without any reason. It is the submission of learned counsel for the petitioner the arrest memo of the petitioner shows he was arrested at 19.55 hours of 03.08.2021 but was put under restrain at 8.30 AM itself when his premises was raided. The search and seizure continued from 8.30 AM till 3.30 PM of 03.08.2021. Thereafter he was taken to office of Directorate of Enforcement for recording of his statement. It is argued per settled law the time when an offender is first put to restraint is the time of arrest and if this Court adheres to this argument then in that event the petitioner was not produced before the learned Special Judge, PMLA within 24 hours of his arrest, hence his arrest would be illegal.

3. The learned counsel for the petitioner has referred to *Ashfak Hussain Allah Detha @ Siddiqui and another vs. The Assistant Collector of Customs (P) Bombay and another* (1990) 1 BOM CR 451 wherein the Court held:

“10. It is thus clear that arrest being a restraint on the personal liberty, it is complete when such restraint by an authority, commences. Whether a person is arrested or not does not depend on the legality of the act. It is enough if an authority clothed with the power to arrest, actually imposes the restraint by physical act or words. Whether a person is arrested depends on whether he has been deprived of his personal liberty to go where he pleases. It stands to reason, therefore, that what label the Investigating Officer affixes to his act of restraint is irrelevant. For the same reason, the record of the time of arrest is not an index to the actual time of arrest, the arrest commences with the restraint placed on the liberty of the accused and not with the time of "arrest" recorded by the Arresting Officers.”

4. Further in *Ramu vs. State of Karnataka* ILR 1991 KAR 1861 the Court held:

“A man can be in custody without his being formally arrested when restriction is imposed on his movements either by police surveillance or some other restriction by the police. Arrest commences with the restraint

placed on the liberty of the accused and not with the time of the formal arrest recorded by the Arresting Officer. In this case, it is not in dispute that the petitioner was under police surveillance during his period of stay for treatment in the hospital from 30-09-1989 to 12-11-1989. There were restrictions on the movement of the petitioner even in the hospital. Therefore, there were restrictions placed in the form of surveillance on the movement of the petitioner even when he was in the hospital. The period of surveillance over the petitioner in the hospital from 30-9-1989 to 12-11-1989 will have to be considered as a period of custody in the light of the various Rulings cited above. Besides, there is a mahazar produced at Annexure D which is drawn by the police on 12-11-1989 at the time when this petitioner was taken into the formal custody”

5. *And in State of Punjab vs. Davinder Pal Singh Bhullar and Others* (2011) 14 SCC 770 the Court held:

“107. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact situation, the legal maxim sublato fundamento cadit opus meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.

6. *In Ritesh Tewari and Another vs. State of Uttar Pradesh and Others* (2010) 10 SCC 677 the Court held:

“32. It is settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironical to permit a person to rely upon a law, in violation of which he has obtained the benefits.”

7. He further argued the learned Judge has not given any reasons to decide his application and being an unreasoned order, it needs to be set aside. He relies upon *Jitender Kumar @ Jitender Singh vs. The State of Bihar* passed in CRL.A.888/2019 dated 10.05.2019 wherein the Supreme Court held:

9. In the entire impugned order, which consists of 13 paras, we find that the High Court did not assign any reason as to why the petition is liable to be dismissed. In other words, neither there is any discussion and nor the

reasoning on the submissions urged by the learned counsel for the parties.
10. In our view, such approach of the High Court while disposing of the petition cannot be countenanced. Time and again, this Court has emphasized the necessity of giving reasons in support of the conclusion because it is the reason, which indicates the application of mind. It is, therefore, obligatory for the Court to assign the reasons as to why the petition is allowed or rejected, as the case may be.”

8. Heard.

9. The short question involved is if the time of arrest of petitioner is 8:30 PM of 03.08.2021 or 7:55 PM of 03.08.2021.

10. Admittedly, the search started on 03.08.2021 in the premises of the petitioner at 8:30 AM and it continued till afternoon upto 3 o'clock and thereafter the petitioner was taken to office of respondent for recording of his statement. It was recorded till 7.55 PM when he was arrested. He was then produced on 04.08.2021 at about 4 PM before the learned Court. The question is whether he was produced before Court within 24 hours of his arrest. For examining the true meaning of arrest one may refer to *Directorate of Enforcement v. Deepak Mahajan*, (1994) 3 SCC 440 (1) wherein the Hon'ble Supreme Court held :

“46. The word 'arrest' is derived from the French word 'Arreter' meaning 'to stop or stay' and signifies a restraint of the person. Lexicologically, the meaning of the word 'arrest' is given in various dictionaries depending upon the circumstances in which the said expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in Roshan Beevi v. Joint Secretary, Government of T.N.¹⁷ had an occasion to go into the gamut of the meaning of the word 'arrest' with reference to various textbooks and dictionaries, the New Encyclopaedia Britannica, Halsbury's Laws of England, A Dictionary of Law by L.B. Curzon, Black's Law Dictionary and Words and Phrases. On the basis of the meaning given in those text book sand lexicons, it has been held that :

"[T]he word 'arrest' when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases.

When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested."

48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi."

11. Further in *Roshan Beevi v. Joint Secretary to Government of Tamil Nadu*, 1984 Cri.Lj. 134 Full Bench of Madras High Court held as under:

"2. One of the main grounds raised in all these writ petitions on the strength of an observation made by a Division Bench of this Court, consisting of Balasubrah manyan, J. and M.N. Moorthy, J. in [Kaiser Otmar v. State of Tamil Nadu, 1981 Mad LW (Cri) 158 : (1981 Cri LJ (NOC) 208) is that the detenu should be deemed to have been arrested from the moment they were taken into custody by the Customs officials

5. In order to answer the reference, the following questions are framed for consideration: (1) When is a person said to be under arrest? (2) Are the terms 'custody' and 'arrest' synonymous? (3) Are the customs officials vested with powers under the Customs Act, 1962 to detain any person for any period and at any place for the purpose of an inquiry, interrogation or investigation? (4) Will the detention of a person by the customs officers for the purpose of inquiry, interrogation or investigation, amount to an

'arrest' of the said person? (5) Is detention of a person by the customs officers for the purpose of inquiry or interrogation or investigation beyond 24 hours without producing him before a Magistrate, violative of Article 22 of the Constitution of India?

61. We have already expressed that the modality of arrest indicated in Kaiser Otmar's case, 1981 Mad LJ (Cri) 158 : (1981 Cri LJ (NOC) 208) is not in conformity with Section 46, Cr. P.C., which section by itself is very clear. We feel that the Bench perhaps would not have laid down this dictum regarding the mode of arrest had Section 46, Cr. P.C. been brought to their notice. Further, the Bench has not also adverted to the leading Full Bench decision of this Court in Collector of Customs v. Kotumal, AIR 1967 Mad 263 : (1967 Cri LJ 1007) and Harban Singh v. State, AIR 1970 Bom 79 : (1970 Cri LJ 325) touching on this issue. For the reasons stated above, we hold that the rule laid down by the learned Judges constituting the Division Bench, in Kaiser Otmar's case, 1981 Mad LW (Cri) 158 : (1981 Cri LJ (NOC) 208) with great respect, with regard to the mode of arrest is not good law.

62. The other question that arises for our consideration in this reference is whether the Customs Officers can detain any person under the guise of an enquiry, interrogation or investigation beyond twenty-four hours before producing him before the Magistrate and whether such a detention would be violative of Article 22 of the Constitution of India. We have launched on a detailed discussion while interpreting the term "custody", which discussion has a bearing on this question. The question of production of a person before a Magistrate within twenty-four hours as envisaged in Article 22(2) of the Constitution of India, would arise only if that person is arrested and detained in custody."

12. *Harbansingh Sardar Lenasingh and another vs. The State 1970 Cri.Lj. 325* also notes :

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It may be convenient at this stage to set out the precise position in regard to what happened in the present case after the accused persons were apprehended at 2 a.m. somewhere near Bassein. When it was decided that the panchnama should be made in Bombay, and not at the lonely place at which the accused persons had been apprehended, the police party, the panchas and the accused persons came to Bombay and reached Churchgate at about 9 a.m. as is clear from the evidence of Superintendent Wagh as well as the panchnama (Ex. 12). The panchnama (Ex. 12) was then continued in Bombay and was concluded at as late an hour as 2 p.m. as is shown by what is recorded at the foot of the said panchnama itself, and it is not surprising that it should have taken so long,

having regard to the fact that the quantity of gold in respect of which the panchnama was made was as large a quantity as 6920 Tolas contained in four gunny bags which, in their turn, contained seven jackets with innumerable small pockets therein, with different markings on the gold which had all to be noted. After the panchanama was concluded at 2 p.m., the investigation was handed over to Senior Superintendent Robb, and taking over charge of the investigation and the gold would itself take some time. Superintendent Robb then recorded the statement of the driver of the car Bapu. After the recording of the statement of Bapu was concluded, he started recording the statement of the 2nd accused at about 4 p.m. and followed this up by the statement of the 1st accused which he finished recording as late an hour as 6 p.m. It was after he had satisfied himself from the statements of the accused persons and come to the conclusion that there was reason to believe that they were guilty of an offence punishable under Section 135 of the Customs Act that he placed them under arrest in accordance with the provisions of S. 104(1) of that Act. It was then too late in the day to put them up before a Magistrate, and the accused persons were therefore put up before the Chief Presidency Magistrate the next day as stated in the evidence of Superintendent Robb. In view of this sequence of events, it could not possibly be said that there was “unnecessary delay” in putting up the accused persons before a Magistrate within the terms of Section 104(2) of the Customs Act, 1962.

13. Thus *Deepak Mahajan* (supra); *Roshan Biwi* (supra) and *Harbhajan Singh* (supra) all in unison clarify the *custody* and *arrest* are not synonymous. In every arrest there is always a custody but in every custody there may not be arrest. Even otherwise, if one look at the scheme of PMLA it shows arrest needs to be made only under Section 19(1) of the Act after completion of process under Section 17(1) and 18(1) and the accused is to be produced before the concerned court within 24 hours of his arrest under Section 19(1).

14. Section 17(1), 18(1), 19(1) and (3) are reproduced as under :

“17. Search and seizure. —

(1) Where 15 [the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section,] on the basis of **information in his possession**, has reason to believe (the reason for such belief to be recorded in writing) that any person—

- (i) has committed any act which constitutes money-laundering, or
- (ii) is in possession of any proceeds of crime involved in money-

laundering, or

(iii) is in possession of any records relating to money-laundering, then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to—

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18. Search of persons. —

*(1) If an authority, authorised in this behalf by the Central Government by general or special order, has reason to believe (the reason for such belief to be recorded in writing) that **any person has secreted about his person or in anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings** under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act.*

19. Power to arrest.—

*(1) If the Director, Deputy Director, Assistant Director, or any other officer authorised in this behalf by the Central Government by general or special order, has on the **basis of material in his possession reason to believe** (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.*

(2) xxxxxx..

(3) Every person arrested under sub-section (1) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction: Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's Court."

15. A bare perusal of Section 17(1) and Section 18(1) would show under Section 17(1) the officer authorised in its behalf, has only an information in his possession whereupon he has a reason to believe that any person has committed any act of money laundering etc. Then such person can be searched and his properties/documents can be seized; per Section 18(1) which gives power to search such person if there are reasons to believe he has secreted about his person or anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act. It is only thereafter per Section 19(1) of the Act, if the officer has collected

sufficient material then on the basis of *material in his possession* with a reason to believe such person has been guilty of an offence punishable under this Act, the officer *may* arrest such person and shall inform him of grounds for his arrest.

16. Thus the arrest is only under Section 19(1) of the Act after the formalities under Section 17(1) and Section 18(1) are complete viz. the search and seizure is made and the officer has in his *possession the material* to proceed further. Once the person is arrested under Section 19(1) he needs to be produced before the Special Court within *twenty four hours* per Section 19(3) of the Act. Section 19(3) rather clarifies it is only after the arrest is made under Section 19(1), the person needs to be produced within twenty four hours before the Court.

17. Admittedly, in this petition there is no challenge to this scheme of the Act hence the petitioner cannot allege his arrest made by following the above procedure is illegal. Admittedly per facts, the officers on the basis of information per Section 17(1) had entered the building at 8.30 AM; conducted search per Section 18(1) till 3 PM and recorded statements till 7.55 PM and then arrested him per Section 19(1) of the Act. The petitioner was thus produced within 24 hours before the court from the time of his arrest under Section 19(1) of the Act, per Section 19(3) of the Act. Hence the petition has no merit. It stands dismissed. Pending application, if any, also stands disposed of.

YOGESH KHANNA, J.

SEPTEMBER 30, 2021

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