

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 2338 OF 2022

Rakesh Kumar Wadhwan

...Petitioner

Versus

State of Maharashtra

...Respondent

....

Mr. Niranjan Mundargi a/w. Mr. Ashish Verma, Sonia Redkar,
Mr. Akshay Naik i/by Mr. Sagar Shetty, Advocate for the Petitioner.
Mr. Arfan Sait, APP for the Respondent – State.
Mr. Vinay Ghorpade, Sr.PI. EOW Unit VI, present.

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CORAM : PRAKASH D. NAIK, J.

DATE : JULY 11, 2022

PC :

1. This petition has been preferred under Article 227 of the Constitution of India and Section 482 of Cr.PC. for following reliefs:

a. Pass an Order setting aside the Order dated July 7th 2022, passed by the Ld. Addl. Chief Metropolitan Magistrate, 47th Court,, Esplanade, Mumbai C.R. No.50/2018;

b. Pass an ad-interim ex-parte Order staying the Order dated July 7th 2022, passed by the Ld. Addl. Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai C.R. No.50/2018 during the pendency of this Application.

2. First Information Report (for short “FIR”) was registered with Goregaon Police Station, Mumbai vide C.R. No. 291 of 2018 on 18th

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May 2018 for offences under Sections 409, 420, 120-B of Indian Penal Code and Sections 3, 4, 5, 6 and 13 of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (for short “MOFA Act”). Investigation was thereafter taken over by EOW, Mumbai and the crime was registered vide C.R. No. 50 of 2018.

3. The Petitioner preferred an application for bail before the Court of learned Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai on 19th April 2022.

4. On 7th July 2022, the Investigating Officer filed an application for taking physical custody of the Petitioner in C.R. No.50 of 2018. In the said application it was stated that, further investigation in accordance with Section 173(8) of Cr.P.C. is in progress. In C.R. No. 50 of 2018, the Petitioner, who is the main accused is in judicial custody from 1st July 2022. On account of his ill-health, he was not arrested for the purpose of investigation. Hence, physical custody of the said accused be granted for the purpose of investigation.

5. Learned Advocate for the Petitioner submitted that, charge-sheet has been filed in C.R. No. 50 of 2018 and the proceedings are pending before the concerned Court vide C.C. No.637 of 2020. Once the charge-sheet is filed, the police custody of the accused cannot be granted. The charge-sheet was filed without arresting the accused.

Since, the Court has taken cognizance of the case, the Court cannot remand the accused to police custody under Section 167 of Cr.P.C. The Petitioner had preferred an application for bail, which is pending. The prosecution had filed say to the said application, which is silent about the need for physical custody. After filing the charge-sheet and taking cognizance of case, the accused could be remanded to custody in accordance with Section 309 of Cr.P.C.

6. Learned Advocate for the Petitioner has relied upon the following decisions:-

(a) Mohamad Ahmed Yasin Mansuri Vs. State of Maharashtra¹;

(b) Mithabhai Pashabhai Patel and Ors. Vs. State of Gujarat delivered by Supreme Court in Criminal Appeal No. 941 of 2009 (arising out of SLP (Cri.) No.6759 of 2008) decided on 06.05.2009.

(c) Central Bureau Of investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni²;

(d) Dinesh Dalmia Vs. CBI delivered by Supreme Court in Criminal Appeal No. 1249 of 2007 (arising out of SLP (Cri.) No.513 of 2007) decided on 18.09.2007;

7. Learned APP submitted that, on the day when the cognizance of the charge-sheet was taken by Court, the Petitioner was not in custody. In the application filed by the Investigating Officer it was stated that, further investigation under Section 173(8) of Cr.P.C. is in

1 1994 Mh.L.J.688

2 (1992) 3 SCC 141

progress in connection with C.R. No.50 of 2018 and that, the main accused in the case i.e. Petitioner is in judicial custody from 1st July 2022. On account of his ailment, he was not arrested for the purpose of investigation. Hence, his physical custody be handed over to the Investigating Agency. There is no illegality in the order passed by learned Magistrate. Even after taking cognizance of an offence, the Court can authorise detention in police custody of a person arrested during further investigation.

8. Learned APP has relied upon the following decisions:-

- (a) State though CBI Vs. Dawood Ibrahim Kaskar and Ors.³;
- (b) Central Bureau Of Investigation Vs. Rathin Dandapat and Ors.⁴.

9. On perusal of Roznama dated 29th April 2022 in C.C. No.PW/637/2020 it is evident that, the learned Magistrate had recorded that, the accused No.4 (Petitioner) is absent. He is in custody in another case. Issue production warrant against accused No.4. The Roznama dated 1st July 2022 recorded that, the accused No.4 (Petitioner) was produced before the Court on production warrant. He be taken in MCR till 15th July 2022. The case was adjourned to 7th July 2022.

3 (2000) 10 SCC 438

4 (2016) 1 SCC 507

10. The Investigating Officer filed an application Exhibit-4 before the trial Court on 7th July 2022 stating that, C.R. No.50 of 2018 has been registered and further investigation in accordance with Section 173(8) of Cr.P.C. is in progress with the permission of the Court. The accused No.4 (Petitioner) is in judicial custody from 1st July 2022. He was not arrested for the purpose of investigation due to his ill-health and his custody is required for investigation.

11. Learned Magistrate vide order dated 7th July 2022 passed below Exhibit-4 observed that, the Investigating Officer has filed an application for taking physical custody of the accused (Petitioner). Learned APP submitted that, initially C.R. No.50 of 2018 was registered. At the same time, the accused was in custody of Enforcement Directorate and thereafter also he was in custody of Central Bureau of Investigation (C.B.I.). Thereafter the accused was suffering from several ailments. He was admitted in hospital and recently discharged from the hospital. On 1st July 2022, the Court has taken the said accused in judicial custody in C.R. No. 50 of 2018. Physical custody of the accused is necessary for interrogation. Seven days are over. The accused is in judicial custody from 1st July 2022. Therefore permission may kindly be granted to take accused in police custody. The Court also recorded the submission of defence counsel that, the bail application of the accused is pending. Investigating

Officer has filed his say to the said application. Investigation is completed. Charge-sheet is filed. It was not stated that, due to several ailments and since the accused was in judicial custody in other crime, he could not be interrogated by the Investigating Officer. In the say, there is no mention about physical interrogation of the accused and surprisingly the Investigating Officer has filed this application for seeking physical custody of the accused. Order further records that, considering the rival submissions, in the opinion of the Court, the accused is taken in judicial custody on 1st July 2022 in C.R. No.50 of 2018. Within 15 days, investigating Officer can ask for police custody and therefore permission granted for the physical custody of the accused and he be produced before the Court within 24 hours without fail.

12. Learned APP submitted that, when the charge-sheet was filed and cognizance of the case was taken, the Petitioner was not in custody in connection with C.R. No. 50 of 2018.

13. Considering the contents of the application dated 7th July 2022 (Exhibit-4) and the documents on record, I do not find any infirmity in the impugned order passed by learned Magistrate. Apparently, the Petitioner was taken in custody on 1st July 2022 and the Roznama dated 1st July 2022 indicate that, he was taken in MCR till 15th July 2022. The Roznama dated 7th July 2022 also mentions that

permission is granted to physical custody of the accused by allowing the application Exhibit-D-4 filed by Investigating Officer for physical custody of accused/Petitioner for investigation. It is apparent that, the accused was in custody in another case and on production warrant he was produced before the Court and judicial custody was granted on 1st July 2022. It is also apparent that, further investigation was in progress. The Petitioner was never available for investigation and was not in custody in the present case before 1st July 2022.

14. In the case of *Mohamad Ahmed Yasin Mansuri Vs. State of Maharashtra* (supra), this Court had observed that, after cognizance of an offence is taken by the Court, accused cannot be remanded to police custody. Provisions of enquiries and trials contained in Chapter 24 of the Criminal Procedure Code come into play. The Court has no discretion under Section 309 of the Code but has the only option to remand the accused to judicial custody.

15. In the case of *Mithabhai Pashabhai Patel and Ors. Vs. State of Gujarat* (supra) it was observed that, the power to remand is vested in a Magistrate in terms of Sub-Section (2) of Section 167 of the Code. The accused, who was granted bail cannot be taken into custody unless bail was cancelled.

16. In the case of *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni* (supra) held that, the total period of remand to police or judicial custody shall initially be 15 days by a single order or several orders of Judicial Magistrate. After expiry of the period of first 15 days of custody, further remand for 90/60 days under proviso to sub-Section (2) shall only be to judicial custody. In connection with different offence alleged against the same accused in any other case, there can again be an order of remand to police custody. The remand under Section 309 Cr.P.C. can only be to judicial custody in terms mentioned therein. Section 309 comes into operation after taking cognizance and not during the period of investigation and the remand under this provision can only be to judicial custody and there cannot be any controversy about the same.

17. It is pertinent to note that, in the aforesaid decision it is made clear that, the Police custody, if found necessary can be ordered during first period of 15 days. In the present case, the learned Magistrate has observed that, period of 15 days from the date of taking the Petitioner in custody is not at over and granted permission to the police to take physical custody of the Petitioner with direction to produce before the Court within 24 hours.

18. In the case of *Dinesh Dalmia Vs. C.B.I.* (supra) it was observed that, the Investigating Agency is required to complete investigation within reasonable time if, the investigation is not completed within stipulated period. The same would not be detrimental to the accused and on expiry of stipulated period, he would be entitled for bail.

19. The Hon'ble Supreme Court in the case of *CBI Vs. Dawood Ibrahim Kaskar and Ors.* (supra) has observed that, even after taking cognizance of an offence the Court can authorise detention in police custody of a person arrested during further investigation. The words "accused if in custody" in Section 309 (2) does not refer to in first proviso to Section 309 relates to post-cognizance stage and can only be to judicial custody. In the case of *C.B.I. Vs. Rathin Dandapat and Ors.* (supra) it was observed that, absconding accused persons arrested during further investigation after filing of charge-sheet against them. Grant of police remand in respect of these accused was permissible subject to requirements of Section 167. Expression "accused if in custody" in Section 309(2) Cr.PC. as clarified in *Dawood Ibrahim Kaskar* case, does not include accused, who is arrested on further investigation before supplementary charge-sheet is filed.

20. In the light of the ratio laid down in two decisions referred to hereinabove, there is no illegality in the impugned order. While

charge-sheet was filed in the said case, the Petitioner was not in custody. While taking cognizance of the said case, the Petitioner was not in custody. Further investigation was in progress. The Petitioner was in custody in another case. Production warrant was issued and on production Petitioner was remanded to custody. In view of the aforesaid circumstances, no case is made out to interfere in the impugned Order.

ORDER

(i) Criminal Writ Petition No. 2338 of 2022, is rejected and stands disposed of.

(PRAKASH D. NAIK, J.)