

2023:PHHC:058613

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-8166-2023 (O&M)

Date of Decision:- 24.4.2023

State of Haryana

.....Petitioner

Versus

Vashisht Kumar Goel

.....Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. Gurmeet Singh, AAG, Haryana.

Mr. P.S. Ahluwalia, Advocate for the respondent.

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GURVINDER SINGH GILL, J.

1. State of Haryana assails order 3.1.2023 (Annexure P-5) passed by learned Judicial Magistrate First Class, Gurugram, whereby the learned Magistrate while disposing off an application filed by the prosecution seeking issuance of production warrants for producing accused/respondent Vashisht Kumar Goel simply ordered that the investigating agency would be at liberty to interrogate the accused Vashisht Kumar Goel in the jail premises itself and no direction was issued for producing he accused.
2. The respondent Vashisht Kumar Goel is involved in two FIRs i.e. FIR No. 42 dated 28.11.2022, Police Station SVB Gurugram (Annexure P-1) and FIR No. 43 dated 28.11.2022, Police Station SVB, Gurugram (Annexure P-2).

While the respondent Vashist Kumar Goel presently is in custody in respect

of FIR No. 43 dated 28.11.2022, Police Station SVB, Gurugram (Annexure P-2), the respondent/accused has not been formally arrested in respect of FIR No. 42 dated 28.11.2022, Police Station SVB Gurugram (Annexure P-1).

3. The prosecution/State Vigilance Bureau moved an application dated 3.1.2023 (Annexure P-4) before the learned JMIC, Gurugram seeking issuance of production warrants against accused/respondent Vashisht Kumar Goel in respect of FIR No. 42. The specific prayer made in concluding portion of the said application dated 3.1.2023 (Annexure P-4) is reproduced herein-under :-

“.....Hence, through the application it is prayed that after issued the production warrant of the accused Vashisht Kumar Goel **may be ordered to be produced in the Hon'ble Court** so that further investigation in the case could be conducted.”

4. The learned JMIC, Gurugram disposed off the said application on the same date itself vide order dated 3.1.2023 (Annexure P-5). The operative portion of the said order reads as follows :-

“.....However, without commenting on the same, keeping in view the contents of the prayer clause of the instant application, which is relevant in order to facilitate the investigation alleged to be done by the investigating agency qua the accused Vashisht Kumar Goel. **Accordingly, the investigating agency is at liberty to interrogate the accused Vashisht Kumar Goel in the jail premises itself and join him in investigation, as the case may be, when it deems fit. Accordingly, application in hand is allowed and disposed off.** Copy of this order be also given to the Investigating Officer of the present case for the purpose of interrogation of accused Vashisht Kumar Goel in District Jail, Bhondsi. Papers be tagged with main file, as the case may be.”

5. The prosecution is aggrieved by the aforesaid order inasmuch as the Magistrate, instead of ordering production of the accused, granted liberty to interrogate in jail premises only.
6. The learned State counsel submitted that by passing the aforesaid order, the Magistrate has virtually curtailed the rights of investigating agency to seek police custody for the purpose of custodial interrogation. It has been submitted that it would have been only after production of accused before Court that the investigating agency could have filed an application seeking police remand. The learned State counsel has submitted that as a matter of fact, the case having been registered for offences including an offence under the Prevention of Corruption Act, 1988, the Magistrate had over-stepped its jurisdiction in passing such an order.
7. The learned counsel representing the respondents/accused has, however, submitted that there is no infirmity in the impugned order and that the Magistrate, having regard to facts and circumstances of the case, had chosen to grant liberty to investigating agency to interrogate the accused in jail premises only.
8. This Court has considered rival submissions addressed before this Court.
9. The first consequence that takes place upon arrest of an accused is that he is taken into 'police custody', following which he is produced before a Magistrate who may either remand the accused to 'judicial custody' or send him back into 'police custody'. 'Police Custody' means that police has the physical custody of the accused while 'Judicial Custody' means an accused is in the custody of the concerned Magistrate.

10. It is apposite to refer to some relevant provisions pertaining to production of accused either upon his arrest or pursuant to an order of the Court in case he happens to be already in custody. The foremost reference needs to be made to the constitutional provisions in this regard. The relevant extract from Article 22 of the Constitution of India, reads as under :-

22. Protection against arrest and detention in certain cases

- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
- (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
- (3) x x x
- (4) x x x
- (5) x x x
- (6) x x x
- (7) x x x

11. Section 57 Cr.P.C. also echoes clause 2 of Article 22 of Constitution of India and contains identical provisions, which read as under:-

“57. Person arrested not to be detained more than twenty- four hours. No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty- four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate' s Court.”

(emphasis supplied)

12. The provisions of Section 167 Cr.P.C. are most relevant with respect to remand of the accused after his arrest i.e. the period for which he may be

kept in custody either judicial custody or police custody. Section 167 Cr.P.C.

reads as under :-

167. Procedure when investigation cannot be completed in twenty-four hours. –

- (1) **Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57,** and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith **transmit to the nearest Judicial Magistrate** a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time **forward the accused to such Magistrate.**
- (2) **The Magistrate to whom an accused person is forwarded** under this section may, whether he has or has not jurisdiction to try the case, from time to time **authorise the detention** of the accused in such custody as such Magistrate thinks fit, for a term **not exceeding fifteen days** in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that –

- (a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding, -
 - (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
 - (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;
- (b) **no Magistrate shall authorise detention of the accused in custody of the police under this Section unless the accused is produced before him in person for the first time** and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.
- (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I -

Explanation II. -

Provided further that..... ..

(2-A) Notwithstanding anything contained in sub-section or (1) sub-section (2), the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate, or Metropolitan Magistrate have been conferred, a copy of the entry in the diary, hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order, and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2) :

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer-in-charge of the police station or the police officer making the [investigation], as the case may be.

- 3. x x x
- 4. x x x
- 5. x x x
- 6. x x x

(emphasis supplied)

13. Hon’ble Apex Court in Central Bureau of Investigation, Special vs. Anupam J.Kulkarni (AIR 1992 SC 1768), while discussing the scope of magisterial powers contemplated under Section 167(2) Cr.P.C., summed up its conclusions as under :

“13. Whenever any person is arrested under Section 57, Criminal Procedure Code, 1973 he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial magistrate is not available, the police

officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate may authorise further detention within that period of first fifteen days to such custody either police or judicial. **After the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody.** There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. **But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter** in accordance with the proviso as discussed above. If the Investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody.”

(emphasis supplied)

14. From perusal of the above referred provisions of Cr.P.C., and also the ratio of Kulkarni's case(supra), it is clearly borne out that while an accused upon

his arrest is required to be produced before the nearest Magistrate within 24 hours of his arrest, his further detention can only be ordered by the Magistrate in terms of provisions of Section 167 Cr.P.C. It is for the Magistrate concerned to decide as to whether such person is to be detained in police custody or in judicial custody. Magistrate can also change the nature of custody within the first period of 15 days. Hon'ble Apex Court in Kosanapu Ramreddy vs State of A.P. AIR 1994 Supreme Court 1447, held as under:

“4. We have considered the submissions of 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 Terrorists 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.”

15. However, after expiry of first 15 days, further remand can only be granted in the nature of judicial custody. In other words, the police custody, under no circumstances can exceed a period of 15 days and can be sought only during first 15 days. This bar is, however, not applicable where accused is involved in a different case and re-arrested.
16. The present case is also such where accused is involved in two cases i.e. in FIR No.42 and 43 dated 28.11.2022. The accused is already in judicial custody in connection with FIR No.43 dated 28.11.2022, Police Station SVB, Gurugram (Annexure P-2). However, he has not been formally arrested in respect of the present case i.e FIR No. 42 dated 28.11.2022, Police Station

SVB Gurugram (Annexure P-1). The police in order to investigate the matter would require to associate the accused with investigation, and if deemed necessary his custodial interrogation may also be required. In order to secure the presence of the accused, it is the provisions of Section 267 Cr.P.C. which have to be invoked. Section 267 Cr.P.C. reads as under :-

267. Power to require attendance of prisoners —

- (1) Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court--
 - (a) that a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him, or
 - (b) that it is necessary for the ends of justice to examine such person as a witness, the Court may make an order requiring the officer in charge of the prison to produce such person before the Court for answering to the charge or for the purpose of such proceeding or as the case may be, for giving evidence.
- (2) Where an order under sub-section (1) is made by a Magistrate of the second class, it shall not be forwarded to, or acted upon by, the officer in charge of the prison unless it is countersigned by the Chief Judicial Magistrate to whom such Magistrate is subordinate.
- (3) Every order submitted for countersigning under sub-section (2) shall be accompanied by a statement of the facts which, in the opinion of the Magistrate, render the order necessary and the Chief Judicial Magistrate to whom it is submitted may, after considering such statement, decline to countersign the order.”

17. Although, in the application dated 3.1.2023 (Annexure P-4), as moved before the Magistrate by prosecution in the present case, the specific provisions of Cr.P.C. under which said application has been moved are not mentioned but apparently having regard to the fact that the accused is already in custody in connection with another case, the said application was filed so as to invoke powers under provisions of Section 267 Cr.P.C. While the Magistrate, in exercise of powers under Section 267 Cr.P.C. can order for production of an

accused, but under said provisions, he has no power to issue any direction as regards interrogation of the accused. It is the prerogative of the investigating agency to move an appropriate application seeking police custody or judicial custody. Such a prayer would be made by the investigating agency only when the accused is produced before the Court pursuant to issuance of production warrants. Section 167(2)(c) mandates that no Magistrate shall authorise detention in any custody unless the accused is produced before him. No such application having been moved, the observations made by the Magistrate pertaining to liberty granted to police to interrogate of accused Vashisht Kumar Goel in jail premises were unwarranted.

18. The issue as regards the distinction of powers exercised in terms of Sections 267 and 167 Cr.P.C. have been discussed in a judgement rendered by a Division Bench of Hon'ble Andhra Pradesh High Court in W.P No.45762 of 2018 titled Ahamed Riswan Versus State of Andhra Pradesh, 2019(3) ALT 474. The relevant extracts from the said judgment are reproduced herein-under :-

“16. Therefore, as observed by the Apex Court in *Anupam, J. Kulkarni's* case (supra) arrest shall never be a pre-condition for remand, and that one need not be arrested and produced before the Court, for the purpose of remand and to the judicial custody of the Court. He can be stated to be in judicial custody when remanded on his surrender before the Court and submits to its jurisdiction. However, his physical control or at least physical presence, coupled with submission to the jurisdiction and orders of Court, is a *sine qua non*. Be it on the production by the investigating agency, or on his own before the court. If the Court is of the opinion that he has committed cognizable offence and that his remand is warranted, it can direct him to be remanded to judicial custody under Section 167 CrP.C., though not arrested by any investigating agency. That being the position, the argument of the learned counsel for the petitioner that arrest is a pre condition for

remand may not be correct. **But however, the power of remand is to be exercised under Section 167 Cr.P.C. only and not under Section 267 Cr.P.C.** As held by us earlier, remand of an accused under Section 267 Cr.P.C. itself may not be correct, but remanding an accused by an order of court is a pre-requisite for the purpose of making an application for seeking bail.”

(emphasis supplied)

19. A Division Bench of Hon’ble Bombay High Court in Susan Abraham Versus State of Maharashtra and others 2010(10) RCR(Criminal) 406, also dealt with a matter pertaining to production of an accused, who was already in custody and held as under :-

“15. In view of the provisions of law interpreted as above, it will be clear that when any person is confined in a prison in one case, he may be given in police custody in another case. The limit of 15 days police custody after the first order remand is applicable to one case and if that person is required for investigation in another case, the concerned Magistrate or Court may grant police custody in such case irrespective of whether he was or was not in police custody in the case in which he is already confined. Naturally, for this purpose, a warrant may be issued for production of that person under Section 267(1)(a) by a Court within whose jurisdiction another case, in which he is required, is registered so that the Court may consider the request of the police for his custody. However, warrant has to be issued for production of the person before the Court and not before any investigating agency.

18. It is contended by the learned Counsel for the petitioner that police misused the power of the Court to issue production warrant by seeking police custody in number of cases one after another. When production warrant is issued under section 267, the direction is to the officer in charge of the Jail to produce the accused before Court and not before the investigating officer. After production before Magistrate, he has to consider whether custody be or not be granted to police, which naturally requires application of judicial mind. That is the effective check or safeguard against misuse of the provision. This matter itself reveals that several requests by police to grant custody in number of cases were refused by J.M.F.C Desaijanj.”

20. The ratio, as culled out from the aforesaid judgments is that it is pursuant to production of an accused, who is already in custody in connection with another case, that the Magistrate may decide to authorize police custody or remand him to judicial custody, pursuant to an application made in this regard by the investigating agency, failing which the accused would be simply remanded to judicial custody. The exercise of granting such custody is undertaken by a Magistrate in terms of Section 167 Cr.P.C. However, under the Prevention of Corruption Act, certain powers have been conferred upon a Special Court, which alone can try cases for offences under the Act. Section 5 of the Prevention of Corruption Act, 1988 prescribing the procedure and powers of Special Judge is reproduced herein-under :-

5. Procedure and powers of special Judge.—

- (1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 (2 of 1974), for the trial of warrant cases by Magistrates.
- (2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall, for the purposes of sub-sections (1) to (5) of section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under section 307 of that Code.
- (3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for the purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

- (4) In particular and without prejudice to the generality of the provisions contained in sub-section (3), the provisions of sections 326 and 475 of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply to the proceedings before a special Judge and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate.
- (5) A special Judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted.
- (6) A special Judge, while trying an offence punishable under this Act, shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944 (Ord. 38 of 1944).

21. Hon'ble Supreme Court in State of Tamil Nadu v. V. Krishnaswami Naidu and another, reported in (1979)4 SCC 5, examined the question as to whether the Special Judge has the power of remand and held as under:

“7. If a Special Judge who is empowered to take cognizance without committal is not empowered to exercise powers of remanding an accused person produced before him or release him on bail it will lead to an anomalous situation. A Magistrate other than a Magistrate having jurisdiction cannot keep him in custody for more than 15 days and after the expiring of the period if the Magistrate having jurisdiction to try the case does not include the Special Judge, it would mean that he would have no authority to extend the period of remand or to release him on bail. So also if the Special Judge is not held to be a Magistrate having jurisdiction, a charge sheet under Section 173 cannot be submitted to him.

It is relevant to note that the General Clauses Act, 1897 Section 3(32) defines a Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. Section 3 of the Criminal Procedure Code provides that any reference without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires in the manner stated in the sub-sections. If the context otherwise requires the word 'Magistrate' may include Magistrates who are not specified in the section. Read along with the definition of the Magistrate in the General Clauses Act there can be no difficulty in construing the special Judge as a Magistrate for the purposes of Section 167.”

“10. In the result on consideration of the relevant provisions of the Criminal Law (Amendment) Act and the Criminal Procedure Code **we have no hesitation in coming to a conclusion that a Special Judge would be a Magistrate empowered to try a case under Section 167 of the Criminal Procedure Code** The special Judge will proceed to exercise the powers that are conferred upon a Magistrate having jurisdiction to try the case. The appeal is allowed and the order of the High Court set aside.”

(emphasis supplied)

22. The aforesaid judgment makes it amply clear that the Special Court, under Prevention of Corruption Act, has all the powers as are exercisable by a Magistrate under Section 167 Cr.P.C. pertaining to remanding an accused to police custody or remanding him to judicial custody. Thus, under the scheme of the Act, it can safely be said that a Special Judge under the P.C. Act, while trying offences, has the dual power of the Session Judge as well as that of a Magistrate. In other words, a Special Judge shall be a Magistrate for the purposes of Section 167 Cr.P.C., having powers of remand, even though the word 'Special Judge' is not mentioned in Section 167 Cr.P.C.
23. However, at the same time the aforesaid interpretation of section 5(2) of Prevention of Corruption Act that Special Court can exercise powers u/s 167 Cr.P.C, can not be construed to mean that powers of remand conferred upon a Magistrate by section 167 Cr.P.C., whether Area Magistrate or the nearest Magistrate, would stand absolutely ousted. An accused, in accordance with provisions of Article 22 of the Constitution of India and Section 57 Cr.P.C. is required to be produced before the nearest Magistrate within 24 hours. Such production before nearest Magistrate is only for ensuring that the police does not detain an accused unnecessarily and to ensure that ill-treatment is not met out to such accused. The existence of the words 'nearest Magistrate' itself shows the urgency and importance attached to such production in the first

instance of an accused. The scheme of the Act in this regard is even liberal as regards the authority/officer before whom such an accused is to be produced and in certain circumstances such an accused can even be produced before an Executive Magistrate when a Judicial Magistrate is not available. The provisions in this regard are very specific in Section 167(2)(a) Cr.P.C. as have already been reproduced above.

24. Thus, an application for remanding an accused to police custody or judicial custody can be moved either before the Magistrate or the Special Court, wherever the accused is produced in the first instance. However, in case the accused has been produced before a Magistrate for the first time in respect of a case registered for offence under Prevention of Corruption Act and an application is moved by police for sending such person either to judicial custody or to police custody, the Magistrate would be competent to grant such custody only upto a period of 15 days and would thereafter be required to direct his production before Special Court. The provisions of 167(2) Cr.P.C. in this regard are clarified by Rule 6(2) of High Court Rules and Orders Volume III, Chapter 11, Part B, which reads as under:

Vol. III. 1 Ch. 11-B.

PART B.—REMANDS TO POLICE CUSTODY

1. The following instructions on the subject of remands to Police custody have been issued by the High Court.
2. x x x
3. x x x
4. x x x
5. x x x
6. It should be further remembered that remands to Police custody cannot be granted under the Code of Criminal Procedure, for a longer period than 15 days altogether,

and cannot be granted at all by a Magistrate of the third class, or by a Magistrate of the second class not specially empowered by the State Government. When an accused is brought before a Magistrate in accordance with section 167, sub-section (1), Code of Criminal Procedure, the Magistrate must adopt one of the following courses :

- (1) If he has jurisdiction to try the case or commit it for trial, either
 - (a) discharge the accused at once, on the ground that there is no cause shown for further detention, or
 - (b) remand him to Police custody (if empowered to do so) or to magisterial custody as he may think fit, for a term not exceeding 15 days, which term, if less than 15 days may subsequently be extended up to the limit of 15 days in all, or
 - (c) proceed atonce to try the accused himself, or hold an inquiry with a view to committing him for trial, or
 - (d) if for any reason it seems necessary, forward the accused atonce to the District or Sub-Divisional Magistrate to whom he is subordinate, or
 - (e) if himself a District or Sub-Divisional Magistrate, send the accused to a competent subordinate Magistrate for trial or commitment.
- (2) **If he has not jurisdiction to try the accused or commit him for trial, he must either-**
 - (a) if he thinks there is no ground for further detention, at once send the accused to a Magistrate having jurisdiction, with a view to his trial or discharge, or
 - (b) if he thinks there is ground for further detention, **remand him to Police custody** (if empowered to do so) **or to magisterial custody** as he may think fit for a term not exceeding 15 days, **which term; if less than 15 days, may subsequently be extended, up to the limit of 15 days in all.**

(emphasis supplied)

25. The words “*which term; if less than 15 days, may subsequently be extended, up to the limit of 15 days in all*”, as existing in Rule 6(2)(b), which qualify both police custody as well as magisterial custody, are indicative of the fact that although the Magistrate, who is no ‘*jurisdiction to try the accused or commit him for trial*’, may pass an order of remand on more than one

occasion if on the first occasion the remand has been granted for a period of less than 15 days but the same in totality including the subsequent remand is not to exceed 15 days, be it judicial custody or police custody.

26. The gist of the conclusions drawn above pertaining to scope and procedural aspects of remand of an accused to custody, particularly with reference to cases under Prevention of Corruption Act, may be stated as under:

- (i) that a Special Court under Prevention of Corruption Act exercises all powers as are exercisable by a Magistrate under provisions of Section 167 Cr.P.C.;
- (ii) that the aforesaid position as regards exercise of powers by a Special Court under Section 167 Cr.P.C. would not oust the powers of a Magistrate to remand a person, accused of committing an offence under Prevention of Corruption Act, to judicial custody or police custody when such an accused is produced before him in accordance with provisions of section 57 Cr.P.C.;
- (iii) however, the Magistrate, would have jurisdiction to exercise powers under Section 167 Cr.P.C. pertaining to remand of a person, accused of having committed offence under Prevention of Corruption Act, only during the first 15 days after arrest of such accused. Thereafter, the accused would be required to be produced before Special Court for further remand. In case, by the time, the accused is produced before Special Court, the period of 15 days after arrest has expired, then the Special Court would be able to remand the accused to judicial custody only. In other words, the right of the police to seek police custody would not survive after lapse of total period of 15 days after arrest, either before the Magistrate or before the Special Court.
- (iv) that it shall be open to the Magistrate/Special Court concerned to change the nature of custody from judicial custody to police custody or *vice versa* during the first 15 days after the arrest. Permission to send accused to police custody after he has already been remanded to judicial custody, shall however be granted only on sufficient grounds and that too only during the first 15 days;
- (v) that the first remand can be ordered by the Magistrate/Special Court only upon physical production of the accused before the Magistrate/Special Court. However, subsequent judicial remand can be extended on the basis of the presence of the accused verified through video conference as has been specifically provided by Section 167(2)(b) Cr.P.C.;

(vi) that the provisions of Section 267 Cr.P.C. are only for the purpose of production of an accused and can not be used for the purpose of remanding an accused to custody. When an accused is produced before the Court with the aid of Section 267 Cr.P.C., he would normally be formally arrested by the police and thereafter an application for sending him either to judicial custody or police custody may be filed, which is required to be considered on the same day by passing a speaking order having regard to the facts and circumstances as brought to the notice of the Court.

27. In the present case however, when an application was moved by the investigating agency seeking production of the accused who is already in custody in connection with other case, the trial Court instead of ordering for production, granted liberty to the investigating agency to interrogate the accused in jail itself. By not directing production of accused, the Magistrate has virtually scuttled the right of investigating agency to even move an application seeking police custody as such an application could be filed only when accused is produced before the Magistrate, as is mandated under provisions of section 167(2)(b) Cr.P.C.

28. The impugned order, as such, cannot sustain and deserves to be set aside. The petition is, thus, accepted. The impugned order dated 3.1.2023 (Annexure P-5) passed by learned Judicial Magistrate First Class, Gurugram is hereby set aside. The application dated 3.1.2023 (Annexure P-4) moved by the prosecution/State Vigilance Bureau is hereby accepted. The Magistrate shall issue Production Warrants immediately for producing the accused. The investigating agency/police shall be informed beforehand regarding date of production. As and when such accused is produced, it shall be open to police either to seek judicial custody or police custody. Needless to mention, any such application, if filed, shall be considered and disposed off on the same day, in accordance with law.

29. It is clarified that the aforesaid order is not to be construed as any observation that the accused has to be remanded to police custody under all circumstances. Any such application, if filed, will be considered independently on the basis of facts and circumstances of the case and shall be decided by passing a speaking order.
30. A copy of this order be furnished to the State counsel and be also sent to the Court concerned through e-mail immediately for doing the needful.

24.4.2023

kamal

**(Gurvinder Singh Gill)
Judge**

Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No