



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Criminal Writ Petition No.539/2024

1. Abhishek Vinodsingh Thakur,
Aged about 38 years, occ.-Business,
2. Rohitkumar Vinodsingh Thakur,
Aged about 34 years, Occ.-Business,
Both R/o Jairaj Nagar, Tutum, Chandrapur,
Tahsil and District Chandrapur. Petitioners.

Versus

State of Maharashtra, through Investigating Officer,
EOW, Crime Branch, Chandrapur. Respondent.

Mr. Shyam Dewani, Advocate for petitioners.

Mr. D.V. Chawhan, Public Prosecutor with Mr. M.K. Pathan, APP for respondent.

CORAM : Smt. Vibha Kankanwadi & Mrs. Vrushali V. Joshi, JJ

Closed on : 12-07-2024.

Pronounced on : 18-07-2024.

J u d g m e n t (Per Smt. Vibha Kankanwadi, J.)

. Present writ petition has been filed by invoking the constitutional powers of this Court under Articles 226 and 227 of the Constitutional of India read with inherent powers under Section 482 of the Code of Criminal Procedure ("Cr.P.C.", for short), for the following relief :-

"(a) Issue directions for the immediate released of the petitioners from judicial custody, which has become illegal as of 05-07-2024, due to failure of the Investigating Agency in completing the investigation in Crime No.937/2023, registered with Ramnagar Police

Station, Chandrapur, within a period of 90 days and the chargesheet is not filed within period permissible under Section 167(2) of Cr.P.C. and consequently it has given rise to statutory and fundamental rights of the Petitioners, in facts and circumstances of the present case;

(b) *****

(c) *****"

2. In other words, it can be said that the petitioners are seeking Writ of Habeas Corpus.

3. Heard learned Advocate for the petitioners and learned APP for the respondent only.

4. It has been vehemently submitted on behalf of the petitioners that the petitioners came to be arrested on 04-04-2024 in connection with Crime No.937/2023 registered with Ramnagar Police Station, District Chandrapur for the offence punishable under Sections 420, 406 and 409 r/w Section 34 of the Indian Penal Code ("IPC", for short). The investigation is now carried out by the Economic Offences Wing of District Chandarpur. After the arrest of the petitioners, they were remanded to Police custody from time to time up to 16-04-2024, and thereafter they are in Magisterial custody. The petitioners had approached this Court by filing Criminal Application (ABA) No.620/2023 before their arrest, and that application was rejected by this Court by order dated 22-01-2024 which then led to their arrest on 04-04-2024. They had then approached learned

Sessions Judge, Chandrapur, for grant of regular bail after they were remanded to Magisterial custody that is also rejected, and therefore they have approached this Court for regular bail by filing Criminal Bail Application (BA) No.529/2024 in the month of May, 2024. Notices have been issued to the respondents, thereafter prosecution has sought time to file reply. In the said bail application, submissions on behalf of both sides have been heard and the matter is closed for orders on 05-07-2024.

5. Learned Advocate for the petitioners further submits that without prejudice to the rights of the petitioners to seek bail under Section 167(2) of the Cr.P.C., the said regular bail application has been filed. The fact is that the investigation has not been completed and chargesheet has not been filed within a period of 90 days from the date of the arrest of the petitioners, therefore, the petitioners had applied before the learned Chief Judicial Magistrate at Chandrapur on 06-07-2024 for grant of bail under Section 167(2) of the Cr.P.C. Learned Advocate for the petitioners also points out that in the reply filed by the prosecution in the regular bail application before this Court, specific averments have been made that taking into consideration the magnitude it will take time for completion of the investigation. The prosecution contends that there were 27 bank accounts in different banks maintained by the petitioners which were used by them to siphon the money through the TATR Bookings Account (ICICI Bank, UP). When the investigation is

not complete and chargesheet is not filed within the stipulated period of 90 days, the indefeasible right under Section 167(2) of the Cr.P.C accrued in favour of the petitioners. He also points out that the petitioners have also filed Criminal Application (APL) No.577/2024, seeking quashment of the First Information Report (FIR) in the present matter. After *prima facie* satisfaction, this Court has issued notices to the prosecution/respondent and this Court has also allowed the investigation to go on but, specified that the charge-sheet shall not be filed without obtaining the leave of the Court. That order came to be passed on 08-04-2024 in the presence of learned APP who waived the service on behalf of the State. The said order cannot be considered as a hurdle to file the chargesheet, if the investigation is complete. If the investigation is complete then, prosecution can seek leave of the Court and file the chargesheet. No such procedure has been undertaken in this matter. In fact, day in and day out such orders are passed by this Court, granting permission/leave to the Investigating Officer to file chargesheet when the orders are passed that the chargesheet shall not be filed without obtaining the leave of this Court. However, the said order has been taken as a hurdle in grant of statutory bail under Section 167(2) of the Cr.P.C by the learned Magistrate and learned Magistrate has rejected the said application on 06-07-2024. Learned Magistrate has not considered that it was the fundamental right under Article 21 of the Constitution of India to be released on bail in view of the statutory provision under

Section 167(2) of the Cr.P.C. When that indefeasible right has been denied, the further custody of the petitioners becomes illegal, and therefore, the petition for habeas corpus is maintainable.

6. Learned Advocate for the petitioners has relied upon M. Ravindran vs Directorate of Revenue Intelligence, reported in (2021) 2 SCC 485, S. Kasi vs State, reported in (2021) 12 SCC 1, Rakesh Kumar Paul vs State of Assam, reported in (2017) 15 SCC 67, Gautam Navlakha vs National Investigation Agency, reported in 2021 SCC OnLine SC 382, Satender Kumar Antil vs CBI, reported in (2022) 10 SCC 51, Dattatray Pathade vs State of Maharashtra (Criminal Writ Petition No.1290/2020, decided on 03-11-2020) by this Court (to which one of us Smt. Vibha V. Kankanwadi, J. as a Member), Union of India vs Nirala Yadav, reported in (2014) 9 SCC 457 and Ritu Chhabaria vs Union of India, reported in 2023 SCC OnLine SC 502, to canvass his point that 'the moment accused files application for bail on default of investigating agency in filing chargesheet within prescribed period and offers to furnish bail bond as directed by the Court, he is deemed to have "availed of" his indefeasible right to be released on bail'. It is further held that 'Section 167(2) of the Cr.P.C. is unambiguous and clear and stipulates that the accused shall be released on bail if he is ready to furnish bail bonds. In common legal parlance, the right to bail under the Proviso to Section 167(2) is commonly referred to as

'default bail' or 'compulsive bail'. The right of accused to be released on bail after expiry of the maximum period of detention provided under Section 167(2) of the Cr.P.C can be denied only when an accused does not furnish bail as is apparent from *Explanation-1* of Section 167(2) of the Cr.P.C. Section 167(2) of the Cr.P.C is a beneficial provision for curing the mischief of indefinitely prolonging the investigation and thereby affecting the liberty of a citizen'. Further in *Satender Kumar* (supra), it has been observed that "a habeas corpus petition is one seeking redress in the case of illegal detention. It is intended to be a most expeditious remedy as liberty is at stake". After taking note of *Manubhai Ratilal Patel vs State of Gujarat*, reported in (2013) 1 SCC 314 and other decisions, it was held that "if the remand is absolutely illegal or the remand is afflicted with the vice of lack of jurisdiction, a habeas corpus would indeed lie. Equally, if an order of remand is passed in an absolutely mechanical manner, the person affected can seek the remedy of habeas corpus. Barring such situations, a habeas corpus petition will not lie".

7. It has been further submitted by the learned Advocate for the petitioners that in view of the decision in *M Ravindran* (supra) and *Rakesh Kumar* (supra), it is not even necessary for such accused persons who want to seek bail or to be released under Section 167(2) of the Cr.P.C to make a written application, even oral request to the concerned Court, would suffice. He further submits that in view of *Rakesh Kumar* (supra)

and *Achpal vs State of Rajasthan*, reported in *(2019) 14 SCC 599* that there is no power to any Court to extend the period of 60 days or 90 days, as the case may be, for completion of investigation and therefore under the garb that this Court has asked that the chargesheet should not be filed without the leave of the Court, the prosecution cannot get the period of investigation extended. Again on the point of indefeasible statutory right under Section 167(2) of the Cr.P.C., he relies on *ED V Arvind Kejriwal, SLP (Criminal) No.5154/2024*, of which copy is not made available. He, therefore, submits that since the rejection of the application under Section 167(2) of the Cr.P.C by the learned Magistrate was wrong, the detention of the petitioners beyond the period of 90 days from the date of their arrest, is illegal. They deserve to be released forthwith.

8. Learned APP has filed the parawise reply on behalf of the respondent and submitted that the foundation of the petition is on the background that the investigating agency has not filed the chargesheet within the stipulated period of 90 days and therefore the indefeasible right has arisen in favour of the petitioners. However, the interpretation of the order passed by this Court in the application filed by them for quashment of the FIR appears to have been wrongly taken by the petitioners. The first and the foremost fact is that the petitioners have created the hurdles in the investigation process. They have filed various petitions and even simultaneously also when they have chosen to

file application for regular bail under Section 167(2) of the Cr.P.C, then it will have to be presumed that they have waived their right under Section 167(2) of the Cr.P.C. The petitioners had approached the learned Magistrate by filing application under Section 167(2) of the Cr.P.C. The said application has been rejected by giving elaborate reasons. In the said application before the learned Magistrate, the petitioners had raised the same facts that there is failure on the part of the investigating agency to file the chargesheet. Learned Magistrate by considering the order passed this Court in application for quashment of the FIR i.e. restraining the investigating agency to file the chargesheet without the leave of the Court; took it as a reasonable ground for not filing the chargesheet within the prescribed time and came to the conclusion that there was no indefeasible right in favour of the petitioners to be released on bail. In fact, the petitioners have remedy to challenge the said order passed by the learned Magistrate to the legal forum. However, instead of exhausting the efficacious remedy, the petitioners are before this Court seeking Writ of Habeas Corpus. It cannot be held by any stretch of imagination that, the detention of the petitioners is unauthorized or illegal when their application under Section 167(2) of the Cr.P.C has been rejected on merits. When there is a valid judicial order and in absence of challenge to that valid judicial order, the petitioners cannot seek Writ of Habeas Corpus. Learned APP has also pointed out that the other proceedings which were taken up by the petitioners and also has given the background of the

facts of the case which the petitioners are facing. He submitted that it appears that the petitioners want to take advantage of their own wrong when the order has been passed by this Court on their request that the chargesheet should not be filed without the leave of the Court.

9. Learned APP has relied on the decision in V. Senthil Balaji vs State represented by Deputy Director and other, reported in (2024) 3 SCC 51. When after considering the catena of judgments of the Hon'ble Apex Court it has been observed that, "sub-section(3) of Section 167 of the Cr.P.C., 1973, warrants a Magistrate to record the reasons by speaking and reasoned order while granting authorization as stated, this being a judicial order, touching upon the rights of an accused, adequate reasons are expected to be recorded. Needless to state that any such order passed is amenable to challenge before the higher judicial forum though not by way of a Writ of Habeas Corpus petition." Salutation of law in para 97 would disclose--

"97.6 The word 'Such custody' occurring in Section 167(2) CrPC, 1973 would include not only a police custody but also that of other investigating agencies.

97.7 The word 'custody' under Section 167(2) CrPC, 1973 shall mean actual custody."

10. Further it is held that 'a Writ of Habeas Corpus shall only be issued when detention is illegal-- thus as the matter

of rule, remand order by judicial order culminating into a judicial function cannot be challenged by way of Writ of Habeas Corpus, while it is open to the person aggrieved to seek other statutory remedies'. It was also clarified that 'when there is a non-compliance of the mandatory provisions along with a total non application of mind there may be a case for entertaining a Writ of Habeas Corpus'.

11. Learned APP has also relied on *Chhagan Chandrakant Bhujbal vs Union of India and others*, reported in *2016 SCC OnLine Bom 9938*, wherein the Division Bench of this Court at Principal Seat after considering the various decisions and also the provisions of the Prevention of Money-Laundering Act, 2002 (PMLA Act) took the view that -

"75. Thus, it is clear that, even after finding that the Magistrate has acted rather mechanically in remanding the petitioner/accused to the judicial custody, and has taken the process in a cavalier fashion, that betrayed his insensitivity towards denial of personal liberty of a citizen, the Hon'ble Apex Court did not thought it fit to issue the writ of habeas corpus. It is also significant to note that the Hon'ble Apex Court has expressed its regrets towards the kind of apathy shown by the Magistrate but even then the Hon'ble Apex Court did not issue the writ of habeas corpus. It is also pertinent to note that though the Hon'ble Apex Court opined that the nature of offences alleged to have been committed by the Petitioner/accused is not so serious, so as to probabalise the version of the Respondent that accused has indeed absconded, despite that, the

Hon'ble Apex Court refused to grant the relief of writ of habeas corpus and observed that the Petitioner was free to make an application for grant of bail to the Court concerned who shall consider the same and pass an appropriate order thereon expeditiously.

76. Thus, the legal position as laid down in this authority makes it abundantly clear that even in respect of an illegal order of remand, which was passed mechanically in a cavalier fashion also, the remedy of writ of habeas corpus was not found to be appropriate remedy, but the only remedy which Hon'ble Apex Court considered appropriate was that of filing the application for bail."

12. Similarly, the Division Bench of this Court at Principal Seat in **Naresh Goyal vs Directorate of Enforcement, Mumbai** (Criminal Writ Petition No.3162/2023 decided on 07-11-2023), relying upon Gautam (supra) and V. Senthil Balaji (supra), and held that 'Writ of Habeas Corpus cannot be issued when the accused can challenge the rejection of his contention that the arrest is *ex-facie* illegal, without jurisdiction and the remand orders are passed without application of mind'.

13. A short synopsis has also been filed on behalf of the petitioners which is nothing but reiteration of the oral submissions. It has been now tried to be demonstrated as to how the decisions relied by the learned APP are not applicable or distinguishable. It is contended in Naresh Goyal (supra), the ground was physical copy of grounds of arrest order was not

served upon the petitioner and petitioner was not produced within 24 hours of arrest, and therefore it was claimed that the custody of the petitioner was illegal, and on that basis Writ of Habeas Corpus was pleaded. On the basis of V. Senthil Balaji (supra), this Court then held that the subsequent remand orders were passed in the case where the judicial orders and therefore the arrest of the petitioner was not illegal. In V. Senthil Balaji (supra) the challenge was whether in view of specific provisions under Section 19 of the PMLA, the provisions of Section 167 of the Cr.P.C. are supplementing the said provisions and the subsequent remand orders are passed in that case. It was held that the arrest cannot be termed as illegal. Even in Chhagan Bhujbal (supra), the same view was taken. Learned Advocate for the petitioners has again relied on the authorities which he has cited which we have already quoted and he resubmits that when the learned Magistrate cannot extend the maximum statutory period of 90 days from the date of arrest of the petitioners the application under Section 167 (2) of the Cr.P.C. ought to have been allowed by holding that there was indefeasible right to the petitioners to get default bail.

14. Before we turn to the legal point involved, the facts of the case for our purposes are that petitioner no.1-Abhishek though taken in custody, it appears that was admitted to Government Medical College for illness. According to the prosecution, he came to be arrested only on 08-04-2024 at 18.46 hours and thereafter produced before the Court on 09-04-2024.

As regards accused no.2- Rohit, it is stated that he was arrested on 04-04-2024 and was produced before the Magistrate on 05-04-2024. Thereafter the police custody was granted, and then it is stated that they were sent in Magisterial custody from 16-04-2024. Therefore, the 90 days period that has been reckoned by the prosecution is as against accused no.1 would complete on 07-07-2024 and for accused no.2 it would be on 03-07-2024. It is to be then noted that the application under Section 167(2) of the Cr.P.C in respect of both the accused has been filed on 06-07-2024 before the learned JMFC Court No.1, Chandrapur. By a detailed order, the said application came to be rejected on 06-07-2024. Therefore, if we take the case of prosecution in respect of accused no.1, his application under Section 167(2) of the Code on 06-07-2024 will be premature taking into consideration his date of arrest as shown. Upon enquiry with learned Advocate Mr. Shyam Dewani for the petitioners, he has stated that no proceedings have been filed before the competent higher Court to challenge the said order passed by the learned JMFC Court No.1, Chandrapur, on 06-07-2024. What is pending in respect of the petitioners is their regular bail application which is before this Court (Single Bench), i.e. Criminal Application (APL) No.577/2024 for quashment of the FIR and the present petition, it is for the habeas corpus. Important point also to be noted is that though the petitioners have invoked the powers of this Court under Section 482 of the Cr.P.C., in the present petition they have not challenged the said

order passed by the learned JMFC, but the prayer clause clearly shows that the petitioners intend to say that their custody has become illegal from 05-07-2024 due to the failure on the part of the investigating agency in completing the investigation and filing chargesheet.

15. It is a fact on record that the Criminal Application (APL) No.577/2024 is pending for quashment of the FIR and of course when the notice was issued and it was found by this Court that there is a prayer in respect of stay to the investigation/restraining the investigating agency from filing the chargesheet, this Court (Coram- Vinay Joshi and Mrs. Vrushali V. Joshi, JJ.) by order dated 08-04-2024 passed the order -

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5. *In the meantime, the investigation may go on, but chargesheet shall not be filed without obtaining leave of this Court."*

16. Thus, the said relief was granted to the petitioners upon their own prayer. Now they cannot take advantage of the said order in saying that the Investigating Officer has not filed the chargesheet within the stipulated period of 90 days. Certainly, it was open to the investigating agency to seek leave and then file the chargesheet. But when such order is passed, it cannot be said

that it was not justified in filing the chargesheet within the stipulated period. The petitioners ought to have anticipated the situation before seeking such relief.

17. The ratio laid down in all those decisions of the Hon'ble Apex Court as well as this Court stating that upon failure of the investigating agency to file the chargesheet within the stipulated period of 60 days or 90 days, as the case may be, would be an indefeasible right, and which can be exercised even by oral application before the concerned Court. No Court has power to extend the said period of 60 days or 90 days, as it is not given by the statute itself. Therefore, even after taking into consideration all the authorities relied by the learned Advocate for the petitioners, yet the fact herein remains, whether in absence of challenge to the order passed by the learned Magistrate whether it can be said that the custody of the petitioners is illegal or unauthorized. The answer is certainly 'no'. Definitely we are guided by the decision in *V. Senthil Balaji (supra)*, which clearly lays down that 'Section 167(2) of the Cr.P.C creates a fine balance between individual liberty and adequate investigation. The time limit fixed would help an accused person to come out of incarceration and thereafter lead to the faster conclusion of the trial, it also facilitates a proper investigation by way of police custody -- the indefeasible right to default the bail under Section 167(2) of the Cr.P.C. is an integral part of the right to personal liberty under Article 21, and the said right to bail cannot be

suspended even during a pandemic situation as is prevailing currently. The right of the accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a charge-sheet'. The duties of the Magistrate or Court for authorizing detention have been again highlighted and it has been then observed that the Writ of Habeas Corpus shall only be issued when detention is illegal while observing that As a matter of rule, an order of remand by a judicial officer, culminating into a judicial function cannot be challenged by way of a writ of Habeas Corpus'. It was then stated that 'it would be open to the person aggrieved to seek other statutory remedies'. Here at the cost of repetition we are required to say that the statutory remedy to challenge the order of learned JMFC has not been exhausted by the petitioners. Based upon the said decision, the Division Bench at the Principal Seat in both the matters also held that, 'the Writ of Habeas Corpus is not maintainable'. This Court had also taken note of the decisions in Kanu Sanyal vs District Magistrate, Darjeeling, reported in (1974) 4 SCC 141, Ramnarayan Singh vs State of Delhi, reported in AIR 1953 SCC 577, Madhu Limaye vs State of Maharashtra, reported in (1969) 1 SCC 292 and Manubhai (supra). The ratio laid down in respect of all these cases are reproduced in the judgments of Chhagan Bhujbal (supra) and Naresh Goyal (supra), and therefore we are restraining ourselves from reproducing the same. It would be the bounden duty of the petitioners seeking extraordinary jurisdiction of this Court to seek Writ of Habeas Corpus that the

remand order passed by the Magistrate was without application of mind or issued mechanically. When the statutory remedy is available to the petitioners to challenge the said order dated 06-07-2024 passed by the learned JMFC Court No.1, Chandrapur, we may not go into the details, but certainly we can say that the concerned Judge had considered the order passed by this Court in Criminal Application (APL) No.577/2024 on 08-04-2024, thereby asking the Investigating Officer to seek leave of the Court before filing the chargesheet; was considered by learned Magistrate. When the reasoned order has been passed, it can be tested in appropriate proceedings only. Therefore, it cannot be stated that the impugned order is mechanically passed giving a right to the petitioners to seek Writ of Habeas Corpus.

18. Taking into consideration the fact that the petitioners had sought interim relief of not to file chargesheet and upon the submissions on behalf of the petitioners that interim relief has been granted, then the petitioners are not allowed to take advantage of the said order which can be said to have been passed in their favour to contend that their custody has become illegal now. The petition filed for Writ of Habeas Corpus is, therefore, not maintainable and deserves to be rejected. Accordingly, the writ petition stands dismissed.

19. Before parting we may observe that Criminal Application (APPW) No.106/2024 is filed for intervention. We do not find that there is any such right to the intervenor to intervene in the present petition. Taking into consideration the points raised, the application for intervention stands rejected.

(Mrs. Vrushali V. Joshi, J.)

(Smt. Vibha Kankanwadi, J.)