

(1991) 07 RAJ CK 0017

In the Rajasthan High Court

Case No : Habeas Corpus Petition No. 3674 of 1991

Chaman Lal Jain and Another

APPELLANT

Vs

The State and Another

RESPONDENT

Date of Decision : 04-07-1991

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 227, 32
Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 344, 482
Explosive Substances Act, 1908 — Section 3, 4, 5
Explosives Act, 1884 — Section 9
Terrorist and Disruptive Activities (Prevention) Act, 1985 — Section 15, 16
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 19, 20(4), 6

Citation : (1992) CriLJ 955 : (1991) 2 RLW 450 : (1992) 1 WLC 76 : (1991) 2 WLN 259 : (1991) 2 WLN 212

Hon'ble Judges : V.S. Dave, J; Mohini Kapur, J

Bench : Division Bench

Advocate : S.R. Bajwa, for the Appellant; M.I. Khan, Addl. Advocate-General and R.M. Lodha, for Central Government, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Dave, J.—This habeas corpus petition has been filed by the petitioners praying that the order granting remand to judicial custody to accused SVS Kuldeep Jain, Meethalal and Khajulal by the Chief Judicial Magistrate, Ajmer, be declared illegal and consequently the detention to be unlawful. They further prayed that they be directed to be released forthwith.

2. The main ground of challenge is that mandatory provisions of Section 167(2), Cr. P.C. have been grossly violated and the order granting remand to judicial custody has been passed in the absence of any prayer by the police or production of the case diary. The petitioners' case is that the Station House Officer, Police Station Motidoongri, Jaipur submitted a written report at the said police station on 19-11-1990 on which F.I.R. No. 275/90 was registered against one Shri D.P. Gupta at whose residential place as well as business premises a

search was carried out revealing a sizable stock of explosives. The case was registered for offences under Sections 3, 4 and 5 of Explosive Substances Act, 1908, Section 9(b) of Explosives Act, 1884 and Section 6 of Terrorists and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA"). Meethalal and Khajulal were also arrested in the same case in November, 1990 while Kuldeep Jain in December, 1990. The investigating agency had been investigating the case since the registration of the case but till date no charge-sheet or final report has been filed in the case and repeated remands in casual and routine manners are being obtained. The petitioners' grievance is that on 5-6-1991, 19-6-1991 and 21-6-1991 the Investigating Officer has not produced the case diary before the Court nor application has been moved praying for the remand, yet the Chief Judicial Magistrate granted remand to judicial custody up to July 4, 1991 which order is patently contrary to law making the custody illegal.

3. Notice of the petition was given to the Addl. Advocate General, Shri M.I. Khan, as well as senior standing counsel for the Central Government, Shri R.M. Lodha. Since pure question of law was involved in the case learned counsel for the parties offered to argue the case on the next day only. When the case was taken up learned Addl. Advocate-General submitted that he wants time for filing a reply to the petition regarding the facts of the case. We asked learned Addl. Advocate-General that he would be given an opportunity in case the Court is of the opinion that the merits of the case are required to be gone into the case. We therefore heard learned counsel for the parties regarding the question as to whether remand to judicial custody can be interfered by this Court when it is mechanically drawn and the mandatory provisions of Section 167(2), Cr. P.C. have been violated.

4. It is submitted by the learned counsel for the petitioners that the orders Annexures 1 to 4 placed on record are no orders in the eye of law, particularly that no satisfaction has been recorded by the learned Magistrate that he had material before him to authorise further judicial custody by passing the order of remand. It is submitted that the learned Magistrate himself has conceded that in granting the order he has been handicapped and such orders are not judicially drawn orders therefore the accused should be released forthwith after holding that the detention is illegal. He has submitted that remand order has been passed in the absence of the accused as well as in the absence of the case diary. No law permits the Magistrate to pass a remand order mechanically as it is required to be a judicial order. Learned counsel submits that the jurisdiction of the High Court is unlimited and under Article 226 of the Constitution of India directions can be given to the respondents to release the accused persons. Learned counsel placed reliance on *Ram Narayan Singh Vs. The State of Delhi and Others*, *Ved Prakash Chaudhry Vs. State of Haryana and Others*, *Raradeo Mahto Vs. State of Bihar*, *Jiwan Singh v. State of Bihar* 1978 Cri LJ 119 , *Kadavanathil Baby and Another Vs. The State*, and *Raj Narain Vs. Superintendent, Central Jail, New Delhi*,

5. On behalf of the Central Government, Mr. R. M, Lodha submitted that the proper remedy for the petitioners is to approach Hon"ble Supreme Court in appeal against the order rather than filing a writ petition under Article 226 of the Constitution. He agrees that the case is not being dealt with in the manner it should and it is submitted that the order passed by the learned Magistrate prima facie appears to be illegal but since the Court has jurisdiction to pass that order this Court should not interfere as every order passed under the TADA Act is appealable before Hon"ble Supreme Court. Learned Addl. Advocate-General submitted that there is no illegality in the order though the same cannot be appreciated. He submitted that unless a reference is made to the case diary he is unable to show to the Court as to whether sufficient ground existed for asking further judicial custody or not. His submission is that High Court has no jurisdiction express or implied to order the release of the accused arrested under the TADA Act. His submission is that all orders passed by any authority under the Act are purported to have been passed by the designated Court and, therefore, no writ petition would lie as an alternate remedy by way of appeal is available. His submission is that writ of habeas corpus does not lie against a judicial order because there is no inherent lack of jurisdiction of the Court authorising custody. Learned Addl. Advocate-General tried to make distinction between an unlawful detention and judicial custody under an illegal orders. He has placed reliance on A. A. Lakshmanarao Vs. Judicial Magistrate, First Class, Parvatipuram and Others, Sandip Kumar Dey Vs. The Officer-in-charge, Sakchi P.S., Jamshedpur and Others, Manohari Vs. State of Rajasthan, and Suresh Ramtirth Yadav Vs. State of Gujarat,

6. Mr. Bajwa in rejoinder submitted that the order granting remand has not been passed by the designated Court but has been passed by the Chief Judicial Magistrate and therefore, the same is not appealable before the Supreme Court. His further submission is that this Court has unfettered powers under Article 226 of the Constitution in case it comes to the conclusion that the detention is illegal.

7. We have given our earnest consideration to the rival contentions and have gone through the case law.

8. Before we go to the legal position it will be essential to mention few facts about the orders placed on record. On 5-6-1991 Asstt. Public Prosecutor produced before the Court three out of four accused. He wanted time to move an application for grant of remand as well as for producing the case diary. The Court posted the case for attendance of the accused on 19-6-1991. An application was filed by the learned counsel for the accused which was ordered to be placed before the Court on 19-6-1991 along with the case diary. On 19-6-1991 again accused D.P. Gupta was not produced before the Court though the other three accused, namely, Kuldeep Jain, Khajulal and Meethalal were produced. However, neither the case diary was produced before the Court nor an application for grant of remand was filed as is apparent from the opening words of the order where the learned Chief Judicial Magistrate has observed, "Investigating Officer has not

produced the case diary and no application for postponement has been filed". An objection was raised before the learned Magistrate that mechanically remand cannot be granted more particularly when the investigation is not in progress and unnecessarily delay is being caused. A prayer for discharge was made. Learned counsel for the accused made a grievance that despite the orders of the Court on 5-6-1991 case diary has not been produced nor a report has been submitted before the Court justifying the adjournment. Learned Public Prosecutor submitted that the Chief Judicial Magistrate was not competent to discharge the accused as the case was under TADA Act. The learned Magistrate finding himself to be helpless sent the case to the learned Judge of the designated Court, Ajmer and posted the same before him on 21-6-1991, till then he remanded the accused to judicial custody. The learned Judge of the designated Court took up the matter on 21-6-1991 on being referred to by the learned Chief Judicial Magistrate. Neither the Public Prosecutor appeared before him on behalf of the State nor the case diary was placed before him. The learned Judge of the designated Court observed that the Chief Judicial Magistrate has all the powers to call for the case diary and satisfy himself about the grant of remand subject to the provisions of Section 20(4) of the Terrorists Act. He observed that as papers can be placed before any Magistrate he sent the matter back to the learned Chief Judicial Magistrate to dispose of the application filed before him in accordance with law. He further observed that since the Public Prosecutor is not present any application filed in the matter before him will be decided after hearing the Public Prosecutor. It may be observed here that the Investigating Officer was present in the designated Court but did not produce the case diary. For the reasons best known when the matter went back to the Chief Judicial Magistrate's Court on the same day neither the Public Prosecutor appeared nor the Investigating Officer Shri Hanuman Singh was present before the Court, who was present before the designated Court and the learned Chief Judicial Magistrate again bemoaned that neither the Investigating Officer was present nor the case diary was placed before him nor an application for further remand has been filed. He however, keeping in view the provisions of Section 167(2), Cr. P. C. called for the case diary and wrote to the Director-General of Police in this respect. He however, sent the accused to judicial custody till July 4, 1991.

9. A perusal of the aforesaid orders ex facie goes to show the cold attitude of the Investigating Agency towards the case. We are unable to appreciate the manner in which the Investigating/Prosecuting Agency has dealt with this case. It was obligatory upon the Investigating Officer Shri Hanuman Singh to have placed the case diary before the Chief Judicial Magistrate and move a proper application for grant of judicial remand. No law contemplates such a disrespect for the Court where neither the Public Prosecutor presents himself before the Court nor the Investigating Officer despite directions to place the case diary. In fact not placing the case diary despite demand is contemptuous. It was not only necessary for the Investigating Officer to have placed the case diary but it was also essential to have moved a proper application for grant of remand assigning reasons for the

same. In our considered opinion the law has been followed more in breach than in observance, yet the question arises is whether we, in extraordinary jurisdiction under Article 226 of the Constitution, can grant any relief to the accused when the case is registered under TADA Act and the accused is in custody under the orders of the Court. We may also observe here that though the case is a local one yet the case diary has not been placed before us also and only time has been prayed for filing the reply.

10. We would now like to deal with the case law cited by the learned counsel for the parties. In *Ram Narayan Singh Vs. The State of Delhi and Others*, their Lordships of the Supreme Court observed as under:

Detention of a person in custody after the expiry of remand order, without any fresh order of remand committing him to further custody while adjourning the case u/s 344, Cr. P. C. is illegal.

This case is not applicable to the facts of the present case because there was absolutely no order of remand passed in the case and besides this their Lordships were dealing the case under Article 32 of the Constitution.

11. In *Mantoo Majumdar and Another Vs. State of Bihar*, their Lordships ordered the release of the petitioners and held the custody bad in view of the fact that the Magistrate had been mechanically authorising repeated detentions for a period of six years without there being any charge-sheet in the case. Their Lordships observed that not 60 days but 6 years have passed in the present case; not 90 days but 1900 days or more have passed, and yet, the Magistrates concerned have been mechanically authorising repeated detentions unconscious of the provisions which obligated them to monitor the proceedings which warrant such detention. In short, the police have abdicated their function of prompt investigation. The prison staff have not bothered to know how long these internees should be continued in their custody and, most grievous of all, the judicial officers Concerned have routinely signed away orders of detention for years by periodically appending their incarceratory authorisations. We know not how many others are languishing in prison like the petitioners before us. If the salt hath lost its savour, wherewith shall it be salted? If the law officers charged with the obligation to protect the liberty of persons are mindless of constitutional mandates and the Code's dictates, how can freedom survive for the ordinary citizens? In this case their Lordships have observed that mechanically drawn demand order should not be passed and the same were considered in light of period of detention which could be authorised u/s 167(2), Cr. P. C. In the present case since the detention can be authorised up to a period of one year the said situation would not arise though it cannot be justified that the Investigating Agency either must take the entire period permissible by law or should withhold the case diary from the Court.

12. In *Raradeo Mahto Vs. State of Bihar*, it has been held as under (at p. 1079 of Cri LJ):

Right to liberty of person is a fundamental human right. It is not granted by any particular statute. It cannot be said that society or State grants a man a right to liberty. If he has the right to liberty his liberty can be curtailed only by law in the interest of society. Thus, the curtailment of this human right is to be provided for by law. If a person has been illegally arrested and detained, in the absence of any law providing therefor, he has got to be released. The converse is not true that he has to be kept under detention unless there is a law providing for his release. A Court of justice has to decide at that point of time whether or not he has been legally arrested or is being legally detained. That is the fundamental concept underlying the law relating to habeas corpus.

13. In *Kadavanathil Baby and Another Vs. The State*, a Division Bench of the Kerala High Court held that requirement of sending the case diary along with the remand report was of a mandatory character. In the same volume a Division Bench of this Court in *Manohari Vs. State of Rajasthan*, held that remand order given in the absence of the accused is not valid and further that it is desirable that the accused should be physically present and that the remand orders cannot be passed mechanically but it all depends upon the facts and circumstances of each individual case.

14. In *Raj Narain Vs. Superintendent, Central Jail, New Delhi*, their Lordships of the Supreme Court held that there is nothing in law which require the personal presence of the prisoner before the Magistrate because this is a rule of caution for Magistrate for granting remands in the instance of the police. However, even if it be desirable for the Magistrate to have the prisoner produced before him when he recommit him to further custody, a Magistrate can act only as the circumstances permit.

15. In *A. Lakshmanarao Vs. Judicial Magistrate, First Class, Parvatipuram and Others*, their Lordships of the Supreme Court held as under (para 9):

The Court has in the exercise of its judicial discretion in granting or declining postponement or adjournment of the case and in ordering remand of the accused, to keep in view all the relevant facts and circumstances of the case.

The Court further observed that this law has to be exercised judicially on well-recognized principles and is in our view immune from challenge on the ground of arbitrariness or want of guidelines. It is further observed that if the discretion is exercised in an arbitrary or unjudicial manner remedy by way of resort to the higher Courts is always open to the aggrieved party. Their Lordships however, did not consider the detention pursuant to order of remand open to challenge in habeas corpus petition.

16. In *Manohari Vs. State of Rajasthan*, the Court considered the following questions regarding the remand:

1. Whether the remand granted in the absence of the accused can be valid?
2. Whether in the absence of a valid order for remand of the accused to jail, only

an order for production of the accused on the next date can be treated as valid remand?

3. Whether any previous illegality in granting remand can make the present detention of the accused illegal even though thereafter a valid remand has been granted?

4. Whether on account of some illegality in grant of the earlier remand, the accused is entitled to be released on bail, even though at the time of giving the decision, a valid order of remand exists?

While answering the questions the Court held that in absence of the accused the order of remand is not invalid even if only the dates of next hearing are mentioned in the jail warrants, if they are read with the Court order sheets valid remand could be made out. Subsequent valid order of remand could not cure an illegal order of remand made earlier.

17. In *Jiwan Singh v. State of Bihar* 1978 Cri LJ 119 (Patna) the Court held that if no remand order is passed against the accused for a period of over three months and yet detained in jail, then accused would be entitled to a writ of habeas corpus.

18. In *Suresh Ramtirth Yadav Vs. State of Gujarat*, the Division Bench of the Gujarat High Court held as under (at Pp. 1844-45 of Cri. L. J.):

The remedy for the accused in challenging delay in trial is only to move the designated Court for appropriate relief either for bail or for carrying on with the case day to day. In any event, the petition under Article 226 for issuing a writ of habeas corpus, on the facts and circumstances of the case, is misconceived. Illegal remand and inordinate delay may come under the sweep of constitutional guarantee given under Article 21 of the Constitution of India. The question as to whether there is such an illegal remand or inordinate delay is a question of fact and law which have to be decided by going into the facts of each case, on merits, when especially those are all questions which have to be decided on factual aspects of the case, the party concerned can as well invoke the jurisdiction of the designated Court and draw its attention on this aspect of the case and if any adverse order is passed thereon, the remedy of the party concerned lies by filing appropriate petitions before the Supreme Court. When such efficacious and effective legal remedy is available to the accused, either before the designated Court or before the Supreme Court, to set right any illegality that may have been perpetrated in the trial of the case or in the remand of the prisoner; it is too much for the accused to invoke the jurisdiction of the High Court under Article 226 or Article 227 of the Constitution of India when especially there is a clear provision u/s 16 of the said Act (Section 19 of the new Act) ousting the jurisdiction of the High Court in a case pending before the designated court. When especially the main appeal or revision cannot be entertained by the High Court, a fortiori, the High Court cannot interfere in any proceedings of the designated court on the mere allegation of the violation of the constitutional right

of the party concerned. They are not without remedy when especially the Supreme Court's jurisdiction is wide open to them, both under the Constitution and also by virtue of Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1985.

19. On careful study of the entire case law we are of the opinion that a distinction has to be drawn between illegal detention and the judicial custody under an illegal order. The Chief Judicial Magistrate who has passed the order of remand had the jurisdiction to grant remand, of course, in accordance with law. If his order is not in consonance with law a remedy lies to the next higher court under the provisions of the Code of Criminal Procedure. or the TADA Act and extraordinary jurisdiction cannot be invoked when the remedy is available under the Code itself. Any illegality propriety or otherwise of the order can always be looked into under the provisions of the Code. Similarly for preventing the abuse of the process of the court or to secure the ends of justice any order can be passed u/s 482, Cr. P. C. The accused have been lodged in jail as stated above under the orders of the C.J.H. who had jurisdiction to remand them to judicial custody. Whether the order remanding to jail is legal or illegal is to be looked into by the next higher court in the hierarchy of the courts, more particularly in the cases under TADA Act when jurisdiction of this Court is completely ousted by Legislature. The accused have remedy of approaching Hon'ble Supreme Court for redress of their grievance. We are thus not inclined to entertain this habeas corpus petition. We are fortified in our view by observations of their Lordships of Supreme Court in Raj Narain Vs. Superintendent, Central Jail, New Delhi, and the decision of the Gujarat High Court in Suresh Ramtirath Yadav Vs. State of Gujarat, We, therefore, though do not approve of the manner in which the orders have been passed, yet are not inclined to interfere with the order in extraordinary jurisdiction. This habeas corpus petition, therefore, fails and is dismissed.

20. Before parting with this order we would like to observe that we strongly feel that the attitude of the investigating/prosecuting agency in this case towards the court had been most unfair. It appears to us that the investigating agency have not chosen to produce the case diary may be because the investigation might have been either stalled or completed. In either case we may observe that it is not essential for investigating officer to wait till the full term of one year is almost over, by the time the charge-sheet/final order is placed before the court, as the case may be. It should be done as early as possible and we hopefully expect that the investigating officer would proceed expeditiously in this matter as more than 7 months have already elapsed.