

(1981) 12 DEL CK 0018
In the Delhi High Court
Case No : Criminal Writ No. 83 of 1981

Dalam Chand Baid

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 18-12-1981

Acts Referred:

Citation : (1981) 12 DEL CK 0018

Hon'ble Judges : J.D. Jain, J;D.K. Kapur, J

Bench : Division Bench

Judgement

D.K. Kapur, J.—It is necessary to set out a few facts indicating how the present petition for a writ of habeas corpus has come to be moved in this Court. According to the facts set out in the affidavit of Shri Devinder Malhotra, Enforcement Officer in the Enforcement Directorate at New Delhi, the petitioner is a resident of Bombay, but he had been going abroad often. It is not necessary to give the details here. On 1st June, 1981, he left India on an Air-India Flight and arrived at Heathrow Airport, London, the same day. He was carrying a suitcase which was found to contain currency of various countries which was the equivalent of \$ 2,38,492. Accordingly, the petitioner was refused entry into the United Kingdom and was directed to be deported. He appealed, but was unsuccessful; he was, Therefore, deported and arrived at Palam Airport, New Delhi, on 20th July, 1981. He was thereupon asked to appear in the office of the Enforcement directorate situated at Khan Market, New Delhi. He was questioned by the deponent who came to the conclusion that the petitioner was guilty of an offence punishable under the Foreign Exchange Regulation Act, 1973 (contravention of Section 8(1)). The petitioner was Therefore, arrested and produced before the Additional Chief Metropolitan Magistrate, New Delhi. A bail application moved by the petitioner was rejected and he was remanded to judicial custody till 4th August, 1981. Another bail application moved to the Additional District & Sessions Judge was rejected on 7th August, 1981. The petitioner was again remanded to judicial custody and is still in custody. It was brought to our notice that the petitioner had been informed on 15th September,

1981, that he was no longer required for investigation and he could be released on bail if he moved an application, but he did not move any application.

2. The case of the petitioner in this petition is slightly different. He claims that he was man-handled in the Enforcement Directorate and his Advocate was also not allowed to interview him; he claims that his statements were recorded under torture, duress and mal-treatment. He claims that a statement recorded on 21st July, 1981, was recorded by a procedure otherwise than contemplated by law and Articles 20(3) and 21 of the Constitution have been infringed.

3. As regards the proceedings before the Additional Chief Metropolitan Magistrate, it is claimed that the petitioner was not an accused person and no judicial custody could be ordered by the Magistrate. It is also claimed that the remand to judicial custody is unlawful. Reliance is placed on the decision in *Brian Bannet v. The Collector of Customs*, Criminal Writ No. 3 of 1969, decided by Hardy J. (as he then was) on 27th February, 1969. The petitioner's case is that he is not an accused person until a complaint is filed and he could not be remanded to judicial custody. Alternatively, if the Enforcement Officer is to be treated as a police officer, then he claims that his statement is inadmissible in evidence.

4. The attack re. the legality of the petitioner's detention is based on three unreported judgments cited by learned counsel for the petitioner. They are *Brian Bennett v. The Collector of Customs*, Criminal Writ No. 3 of 1969, decided on 27th February, 1969, by Hardy, J. (as he then was); *Munna Lal v. City Magistrate, Agra*, Criminal Misc. No. 1678 of 1969, decided on 12th August, 1969, by a Division Bench of the Allahabad High Court and finally *U. B. Singh v. Directorate of Enforcement*, Criminal Misc. (Main) No. 400 of 1981, decided by R. N. Aggarwal, J., on 2nd September, 1981.

5. On the other hand, the contention of learned counsel for the respondents has been that the petitioner can be kept in judicial custody because he is accused of a non-bailable offence and Section 437 of the Cr.P.C. allows the Magistrate to refuse bail, and Therefore, permits the petitioner to be placed in custody.

6. We have examined this case in the light of the judgments of the Supreme Court in *Illias Vs. Collector of Customs, Madras*, , and *Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa*, , and have also been referred to the judgment of the Supreme Court in *State of Maharashtra v. Nainmal Punjabi Shah*, (1969) 3 SCC 904 . We find that the case of the petitioner has shown, or exposed a lacuna in the Cr.P.C. as it is now, read with the Customs Act of 1962 and the Foreign Exchange Regulation Act, 1973.

7. The provisions of S. 104 of the Customs Act, 1962 and of S. 35 of the Foreign Exchange Regulation Act, 1973, are practically the same. In one case the power to arrest is exercisable by a specially authorised officer of Customs and in the other by a specially authorised Officer of Enforcement. In each case, the officer concerned may arrest the person believed to be guilty of an offence punishable

as prescribed by the Act and inform him of the grounds for such arrest. Under sub-section (2) such an arrested person has to be taken to a Magistrate without unnecessary delay. Sub-section (3) gives the Officer of Enforcement or the Officer of Customs, as the case may be, the same power for releasing the arrested person on bail or otherwise, and subject to the same provisions as are available to an officer-in-charge of a Police Station. However, neither Act indicates what the Magistrate has to do after the arrested person has been produced before him.

8. The question that has arisen before us is whether the arrested person can be remanded to Judicial Custody, or has necessarily to be given bail. Even if he refuses to furnish the bail can the Magistrate order his detention ?

9. In U. B. Singh's case (Cri. Misc. (Main) No. 400 of 1981, D/- 2-9-1981 (All), referred to earlier, R. N. Aggarwal, J. had held that Section 167 of the Criminal Procedure Code is available to the Magistrate. We have not been able to accept this as being the easy way out of the predicament in the present case. Section 167 of the Cr.P.C. deals with the power of an officer-in-charge of a Police Station who cannot complete his investigation within the period of 24 hours fixed by Section 57 of the Code. In such a case, the accused has to be produced before a Magistrate along with the diary and the Magistrate has power u/s 167(2) to order the detention of the accused in such custody as he deems fit up to a term not exceeding 15 days. The petitioner has urged before us that the Enforcement Officer should be treated as a Police Officer within the meaning of this provision, but we are not able to accept this contention. The words of Section 35(3) of the Foreign Exchange Regulation Act, 1973, applicable to this case are in the following terms :-

"Where any officer of Enforcement has arrested any person under sub-section (1) he shall, for the purpose of releasing such person on bail or otherwise, have the same powers etc."

These words, as noted earlier, are the same in substance as are to be found in Section 104(3) of the Customs Act, 1962. These words have already been interpreted by the Supreme Court in the case of *Illias Vs. Collector of Customs, Madras*, , referred to earlier. It was there urged that a Custom Officer was a Police Officer and reliance was placed on the word "otherwise". The Court held :-

"It has also been contended that all the powers of an officer-in-charge of the police station under the Code of Criminal Procedure have been conferred on an Officer of Customs in the matter of releasing an arrested person on bail or otherwise. It has even been suggested by the appellant's counsel that the word "otherwise" invest the Customs Officer with all the powers which an officer-in-charge of a Police Station can exercise under Chapter XVI of the Code. It may be observed at once that the word "otherwise" clearly relates to releasing a person who has been arrested and cannot possibly be construed in the manner suggested by the learned counsel."

This being the view of the Supreme Court, we have to hold that the statutory power which automatically transforms the Enforcement Officer into an in charge of a police station is of a restricted application and the transformation is only transitory and only for the purpose of grant of bail or refusal of the same. This being so the provisions of S. 167(2) of the Code of Criminal Procedure do not apply to an arrest of this type. A similar view was taken in Brian Bannet's case Cri. Writ No. 3 of 1969, D/- 27-2-1969 (Delhi) as well as by the Allahabad High Court in U. B. Singh's case, Cri, Misc. (Main) No. 400 of 1981, D/- 2-9-1981 (All). As the matter has already been concluded by the Supreme Court's judgment, we are unable to hold that the Magistrate can rely on Section 167 of the Cr.P.C. to remand the accused to judicial custody or other custody.

10. This brings us to the question as to what other type of remand is possible. Under the Cr.P.C. of 1898, S. 344 was available for enabling the Magistrate to order a remand. The section has been re-enacted as Section 309 in the Cr.P.C. of 1973. The new wording of the Section is quite different. Section 309(2) reads as follows :-

"If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time for reason to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time :"

This provision shows that the remand order can only be passed after the Magistrate takes cognizance of an offence.

11. In order to take cognizance of an offence, the conditions of S. 190 of the Cr.P.C. have to be complied with. There must either be a complaint, or a police report, or information concerning the commission of an offence; there was no complaint nor police report, so possibly the production of the petitioner together with any report that might have been filed by the Enforcement Officer could constitute information which might have led the Magistrate to take cognizance of the offence. In such a case, he could have exercised the power contained in S. 309 of the Cr.P.C. Unfortunately, this procedure is barred by Section 61 of the Foreign Exchange Regulation Act, 1973, which directs that no Magistrate can take cognizance of an offence except on a complaint in writing made by the director of Enforcement or a specially authorised officer. Therefore, it follows that the power to remand contained in Section 309 of the Code could not be exercised by the Magistrate under the present provision of law.

12. In Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa, , already referred to, the Supreme Court noted the change effected by the re-enactment of S. 309 in place of S. 344 of the Code of 1898, to point out that under the old Code various High Courts had taken the

view that the power under S. 344 could be exercised during investigation and this view had been affirmed by the Supreme Court in *A. Lakshmanarao Vs. Judicial Magistrate, First Class, Parvatipuram and Others*, , and *Gouri Shankar Jha Vs. The State of Bihar and Others*, . The Court then noted that the language of the re-enacted section only permitted a remand after the Magistrate had taken cognizance and further observations were made concerning the effect of S. 167 as amended. The Court noted that the power to remand an accused person in custody had specifically to be conferred by statute. It was said :-

"It may be emphasised here that the Court will have that the Court will have no inherent power of remand of an accused to any custody unless the power is conferred by law. In the order under appeal the High Court without reference to Section 344 of the old Code, seems to have assumed that such a power existed. That is not correct."

We are bound by those observations and we see no escape from the same. Unless the power to remand can be found in some provisions of the Foreign Exchange Regulation Act, 1973, and Cr.P.C., 1973, we have to that there was no power to remand. We have reluctantly come to the conclusion that we cannot find any provision allowing the remand. We also do not accept the contention that Section 437 of the Code permits the Court to put the petitioner in jail if bail is refused or not furnished. Such a view would be contrary to the observation of the Supreme Court reproduced above.

13. Although, this discussion is sufficient to decide this case, we must point out that a serious lacuna now exists in cases arising under the Customs Act or the Foreign Exchange Regulation Act. The learned counsel for the respondents relied on another judgment of the Supreme Court, *State of Maharashtra v. Nainmal Punjabi Shah*, (1969) 3 SCC 904 , to contend that in that case a remand had been ordered on practically the same facts as in this case. We have been unable to find the provision of law under which the accused person was arrested in that case. But, assuming that it was under the Foreign Exchange Regulation Act, it must be emphasised that the said case arose when the Cr.P.C. of 1898 was in force and at that time there was no doubt that during investigation a Magistrate could order remand for fifteen days u/s 344 of that Code. The position has only changed after the Code of 1973 was enacted restricting the power of the Magistrate to remand the accused only after he had taken cognizance. The lacuna has Therefore, arisen because of the repeal of Section 344 of the old Code and its replacement by Section 309 of the new Code.

14. We have examined the possibility of Section 167 of the new Code being available and have discussed this matter above. If the Enforcement Officer is treated as a Police Officer as held by R. N. Aggarwal J., in the case of *U. B. Singh* already mentioned, it would follow that the said Officer would have to be treated as a Police Officer for all purposes which is an argument rejected by the Supreme Court in the case of *Illias Vs. Collector of Customs, Madras*, already referred to. The learned counsel for the petitioner did contend that he did not object to the

Enforcement Officer being treated as a Police Officer for all purposes; in fact he welcomed it because the confessional statement would then become inadmissible in evidence. There being ample authority for the proposition that a Customs Officer is not a Police Officer, viz., Romesh Chandra Mehta Vs. State of West Bengal, which was a case under the Sea Customs Act of 1878, and the case of Illias already referred to, we find that we cannot stretch the provisions of S. 167 of the Code of Criminal Procedure, 1973, to cover the case of an Enforcement Officer acting under the Foreign Exchange Regulation Act, 1973. So, we have to hold that the remand to judicial custody was not valid, and Therefore, the petitioner is being detained without authority of law.

15. We may now note that the lacuna which seems to exist has to be met by the Legislature and not by the Court. In the circumstances, we have to grant the present writ of habeas corpus and accordingly we order that the petitioner be released forthwith.

16. Petition allowed.