

**(2021) 12 PAT CK 0025**

**In the Patna High Court**

**Case No :** Criminal Writ Jurisdiction Case No. 606 Of 2021

Hamed Akbari

APPELLANT

Vs

Union Of India

RESPONDENT

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**Date of Decision :** 07-12-2021

**Acts Referred:**

Constitution Of India, 1950 — Article 14, 21, 22, 226  
Indian Penal Code, 1860 — Section 447  
Foreigners Act, 1946 — Section 14B  
Code Of Criminal Procedure, 1973 — Section 173(2)

**Citation :** (2021) 12 PAT CK 0025

**Hon'ble Judges :** Ashwani Kumar Singh, J;Rajeev Ranjan Prasad, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## **Judgement**

1. Heard Mr. Nafisuzzoha, learned counsel for the petitioner, Dr. Krishna Nandan Singh, learned Additional Solicitor General of India being assisted by Mr. Manoj Kumar Singh, learned counsel for the Union of India and Mr. Prabhu Narayan Sharma, learned counsel for the State.

2. The prayers made on behalf of the petitioner in paragraph-1 of the present application are as follows:-

I. For issuance of a writ of Habeas Corpus or any other appropriate writ/writs, order/orders or direction for immediate release of the petitioner from Central Jail, Motihari into the custody of UNHCR, New Delhi, as the petitioner is an UNHCR, Refugee Certificate holder since 2018.

II. For issuance of a writ in the nature of Certiorari or any other writ/writs, order/orders or direction for quashing the Raxault P.S. Case No. 478/2019 dated 29.12.2019 instituted for offences under Section 447 of I.P.C. and u/s 14(B) of Foreigners Act, 1946. The petitioner being a Refugee certificate holder issued by United Nations High Commissioner for Refugees, the case is not make out against the petitioner.

III. For granting of any other appropriate relief or reliefs for which the petitioner may be deemed entitled.

3. Learned counsel for the petitioner submitted that the petitioner is a citizen of Islamic Republic of Iran, who resided in India under valid refugee certificate issued by the United Nations High Commissioner for Refugees, New Delhi (for short 'UNHCR'). He was arrested by the Immigration Office, Raxaul on the basis of a written information given by one Ajay Kumar Pankaj, AFRRO, ICP, Raxaul to the SHO, Raxaul Police Station, East Champaran stating therein that on 28.12.2019 at about 10:00 PM, he was going to Nepal via Raxaul. In the written information, it was further alleged that the petitioner was living in India illegally and he came to Raxaul via Bodh Gaya by Indo-Nepal Bus Service.

4. On receipt of the written report of the informant, Raxaul P.S. Case No. 478 of 2019 was registered on 29.12.2019 for the offences punishable under Sections 447 of the Indian Penal Code and Section 14(B) of the Foreigners Act, 1946 against the petitioner. He was taken into custody and produced before the court of Jurisdictional Magistrate, who remanded him to judicial custody and since then he is in jail.

5. Learned counsel for the petitioner further contended that the petitioner is having valid passport upto 22.06.2023 issued by the Islamic Republic of Iran and he had entered India on the basis of valid VISA. He contended that the allegation made by the informant is completely false and misleading. He further contended that the allegation under Section 14(B) of the Foreigners Act is not applicable against the petitioner. He further contended that at the time of institution of the FIR, the petitioner was having valid certificate of refugee issued by the UNHCR, which was valid upto 13.06.2020. He produced the documents before the informant, but he knowingly and intentionally concealed the above fact and took him under custody. He also contended that the detention of the petitioner in the Central Jail, Motihari pursuant to the remand orders being passed by the Jurisdictional Magistrate since 29.12.2019 is wholly illegal and without jurisdiction. Hence, he submitted that a case for issuance of writ in the nature of habeas corpus is made out.

6. On the other hand, Dr. Krishna Nandan Singh, learned Additional Solicitor General of India being assisted by Mr. Manoj Kumar Singh, learned counsel submitted that no case for issuance of writ in the nature of habeas corpus is made out. He contended that the investigation of the case is complete and the police have submitted charge-sheet in the case. The Jurisdictional Magistrate has also taken cognizance of the offence. In case, the petitioner was aggrieved by the order taking cognizance, he ought to have challenged the said order, but at this stage, it cannot be said that the detention of the petitioner is without jurisdiction. He further contended that the Supreme Court has considered the issue in several cases and this issue is no more res integra and a Full Bench of this Court in Shikha Kumari v. State of Bihar through Principal Secretary, Home (Police) Deptt. & Ors. since reported in 2020 (2) PLJR 15, has categorically held

that a writ of habeas corpus would not be maintainable if the detention in custody is as per judicial order passed by a Judicial Magistrate or a court of competent jurisdiction.

7. Mr. Prabhu Narayan Sharma, learned counsel appearing for the State also supported the contentions advanced by the Dr. Krishna Nandan Singh, learned senior counsel for the Union of India.

8. We have heard learned counsel for the parties and carefully perused the record.

9. The allegations made in the FIR do constitute a cognizable offence. In the investigation conducted by the police, the allegations made in the FIR have been found true. Accordingly, a report under Section 173(2) of the Code of Criminal Procedure has been filed before the court. On perusal of the police report, the learned Jurisdictional Magistrate has taken cognizance of the offence. The matter is pending trial before the court of Magistrate. At this stage, in a writ petition under Article 226 of the Constitution of India, the defence of the petitioner cannot be looked into for setting aside the FIR or holding the detention of the petitioner to be illegal.

10. In *Saurabh Kumar vs. Jailor, Koneila Jail & Anr.*, [(2014) 13 SCC 436], the petitioner, who was in judicial custody by virtue of order passed by Judicial Magistrate had filed a writ of habeas corpus under Article 32 read with Articles 14, 21, 22 of the Constitution of India for a direction to the respondents to produce him before the Supreme Court and also to direct respondent State to devise a way to prevent malicious arrest and detention by the police that too without maintaining necessary record and further to direct the State to pay the petitioner compensation considering that the detention is a black mark on his future career prospects. While dismissing the writ petition, the Supreme Court observed :

"The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced. Having said that, we are of the view that the petitioner could and indeed ought to have filed an application for grant of bail which prayer could be allowed by the court below, having regard to the nature of the offences allegedly committed by the petitioner and the attendant circumstances. The petitioner has for whatever reasons chosen not to do so. He, instead, has been advised to file the present petition in this Court which is no substitute for his enlargement from custody."

11. In *State of Maharashtra & Ors. vs. Tasneem Rizwan Siddiquee*, [(2018) 9 SCC 745], the question before the Supreme Court was again as to whether a writ

of habeas corpus could be maintained in respect of a person who is in police custody pursuant to remand order passed by the Jurisdictional Magistrate in connection with offence under investigation. In that case relying on the ratio laid down in Saurabh Kumar vs. Jailor, Koneila Jail & Anr. (supra) and Manubhai Ratilal Patel vs. State of Gujrat & Ors. [(2013) 1 SCC 314], the Supreme Court held as follows :-

"The question as to whether a writ of habeas corpus could be maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in Saurabh Kumar v. Jailor, Koneila Jail [(2014) 13 SCC 436 : (2014) 5 SCC (Cri) 702] and Manubhai Ratilal Patel v. State of Gujarat [(2013) 1 SCC 314 : (2013) 1 SCC (Cri) 475] . It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the respondent on 18-3-2018/19-3-2018 and decided by the High Court on 21-3-2018 [Tasneem Rizwan Siddiquee v. State of Maharashtra, 2018 SCC OnLine Bom 2712] her husband Rizwan Alam Siddiquee was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No. I-31 vide order dated 17-3-2018 and which police remand was to enure till 23-3-2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order passed by the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued."

12. In Serious Fraud Investigation Office vs. Rahul Modi & Anr., [(2019) 5 SCC 266], the Supreme Court cancelled bail granted by the Delhi High Court to Rahul Modi and Mukesh Modi accused of duping investors of several hundred crores through a ponzi scheme run by their Gujarat based other co-operative societies. Both the accused were released by the Delhi High Court in a habeas corpus writ petition even though they were remanded to judicial custody under the orders of a competent court. After elaborately dealing with the ratio laid down by the Supreme Court in earlier cases, the Supreme Court held as follows :-

"The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition. The first question posed by the High Court, thus, stands answered. In the present case, as on the date when the matter was considered by the High Court and the order was passed by it, not only were there orders of remand passed by the Judicial Magistrate as well as the Special Court, Gurugram but there was also an order of extension passed by the Central Government on 14-12-2018. The legality, validity and correctness of the order or remand could have been challenged by the original writ petitioners by filing appropriate proceedings. However, they did not raise such challenge before the competent

appellate or revisional forum. The orders of remand passed by the Judicial Magistrate and the Special Court, Gurugram had dealt with merits of the matter and whether continued detention of the accused was justified or not. After going into the relevant issues on merits, the accused were remanded to further police custody. These orders were not put in challenge before the High Court. It was, therefore, not open to the High Court to entertain challenge with regard to correctness of those orders. The High Court, however, considered the matter from the standpoint whether the initial order of arrest itself was valid or not and found that such legality could not be sanctified by subsequent order of remand. Principally, the issue which was raised before the High Court was whether the arrest could be effected after period of investigation, as stipulated in the said order dated 20-6-2018 had come to an end. The supplementary issue was the effect of extension of time as granted on 14-12-2018. It is true that the arrest was effected when the period had expired but by the time the High Court entertained the petition, there was an order of extension passed by the Central Government on 14-12-2018. Additionally, there were judicial orders passed by the Judicial Magistrate as well as the Special Court, Gurugram, remanding the accused to custody. If we go purely by the law laid down by this Court with regard to exercise of jurisdiction in respect of habeas corpus petition, the High Court was not justified in entertaining the petition and passing the order."

13. In *Shikha Kumari (supra)*, a Full Bench of this Court held that a writ of habeas corpus would not be maintainable if the detention in custody is as per juridical orders passed by a Judicial Magistrate or a court of competent jurisdiction. It further held that consequently an order of remand passed by a Judicial Magistrate having competent jurisdiction cannot be assailed or set aside in a writ of habeas corpus.

14. The issue involved in the present case is squarely covered by the aforementioned judgments of the Hon'ble Supreme Court as also the Full Bench Judgment of this Court in *Shikha Kumari (supra)*.

15. In that view of the matter, we see no merit in this application. It is dismissed accordingly.