

(2009) 07 OHC CK 0007

In the Orissa High Court

Case No : Writ Petition (Criminal) No. 247 of 2009

Harasa Ghadei

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 16-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 209, 309(2)
Penal Code, 1860 (IPC) — Section 276, 294, 34, 341, 342

Citation : (2009) 44 OCR 506

Hon'ble Judges : S.C. Parija, J;A.S. Naidu, J

Bench : Division Bench

Advocate : R.C. Sarangi, S.S. Mohanty, M.K. Pattnaik, C. Tripathy and N. Roy, for the Appellant; A.K. Mishra, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Naidu, J.—Does an order of commitment with a direction to the Superintendent of jail to produce the accused before the Court of Session as and when required by the Sessions Court, amounts to illegal detention, only on the ground that the learned Magistrate had not remanded the accused to custody, is the question which needs to be answered in this case.

2. This petition for issuance of a Writ of Habeas Corpus is filed by one Haras Ghadai on behalf of her son Mukunda " Babaji with a prayer to declare the detention of her son as illegal and not in accordance with law and to direct his release. Mukunda " Babaji was arrested in G.R. Case No. 366 of 2008 of the court of learned JMFC, Pipili, for alleged commission of offences under Sections 341, 376, 294, 506/34, IPC. He was produced before the learned SDJM on 5.11.2008 along with the forwarding report and other relevant documents like statements recorded u/s 161, Code of Criminal Procedure, seizure list etc. The petition filed on behalf of the accused to release him on bail was rejected mainly on the ground that the offences alleged against the accused were triable by the

Court of Session. Learned Magistrate after ascertaining that he had not been ill-treated by the police while in custody remanded him to jail till 8.11.2008. Thereafter, the accused was produced on several dates and was also remanded to custody with a direction to produce him before the court on a given date. The police after completion of investigation submitted its charge-sheet on 3.3.2009 and the learned Magistrate after perusing the materials on record and on being prima facie satisfied that offence u/s 366, 376, 342, IPC has been made out and that there are materials to proceed against the accused, took cognizance of the said offence.

3. On 7.3.2009 Anr. petition was filed with a prayer to release the accused on bail. The said petition was rejected by the learned JMFC, Pipili. Order dated 27.3.2009 passed by the learned JMFC reveals that the bail application filed by the Petitioner before the Sessions Court, Puri (B.A. No. 132 of 2009) was rejected. On the same day, the learned JMFC, Pipili passed the following order:

Copy of the order No. 3 dt. 23.3.09 passed in B.A. 132/ 09 along with original record is received from Registrar, Sessions Court, Puri vide memo No. 1251 dt. 24.3.09. Perused the order. In the result the prayer for bail stands disposed of being rejected.

Later-Accd. Babaji " Makunda Ghadei is produced from jail custody. Copies of police paper has already supplied to R.L. This is a case u/s 366/376/342 IPC out of which u/s 366/276 IPC are exclusively triable by the court of Sessions. Hence I commit the accd. to the Court of Sessions to face his trial. Now accd. is on jail custody. Supdt. Jail, Nimapara is directed to produce the accd. before the court of Sessions as and when required by the Sessions Court. On being asked accd. stated to have means to engage his own lawyer for his own defence. Notify commitment. Intimate C.J.M./P.P. Puri accordingly.

4. According to Mr. Sarangi, learned Counsel for the Petitioner, as the learned JMFC, after committing the accused to the Court of Session has sent him to jail without an order of remand, the custody becomes illegal and contrary to law and as such, the petition for habeas corpus should be allowed and the accused should be released forthwith. In support of such contentions, Mr. Sarangi relies upon the decision reported in the case of Durei Behera and Ors. v. Suratha Behera and Anr. 1987 Cri.L.J. 1462.

5. After hearing Mr. Sarangi, learned Counsel for the Petitioner and Mr. Mishra, learned Standing Counsel, this Court finds two important questions for consideration.

- i. If the order of commitment does not reveal that the accused was remanded to jail custody, whether it should be held that detention of the accused in custody is illegal;
- ii. As to whether under such circumstances, a writ of habeas corpus can be issued by this Court.

6. Relying upon the decision of this Court in the case of Durei Behera (supra), Mr. Sarangi forcefully submitted that the detention of the accused is unauthorised as it infringes the provisions of Section 309(2), Code of Criminal Procedure, the prayer to issue writ of Habeas Corpus is maintainable and if this Court is satisfied that the detention itself is illegal, it has the jurisdiction to direct release of the accused.

7. It has been held in the case of A.K. Gopalan Vs. The Government of India, , while dealing with a petition for habeas corpus, the Court is to see whether the detention on the date on which the application is made to the court is legal, if nothing more had intervened between the date of application and date of hearing. The same view has also been expressed by the Supreme Court in the case of Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, . In the said decision, relying upon the ratio of the decision of A.K. Gopalan (supra), the Supreme Court reiterated the same position and held that the Court is not concerned with any illegality committed prior to the filing of the petition for habeas corpus because the Court cannot give relied on a petition, which shows that the detention on that date is legal. In other words, if the illegality is removed by the time notice was issued in the writ application, or even at the time of hearing of the petition, the Court cannot release the person by issuing a writ of habeas corpus. This view gets fortified from the decision in the cases of Ram Narayan Singh Vs. The State of Delhi and Others, and Col. Dr. B. Ramachandra Rao Vs. The State of Orissa and Others, .

8. In the case of Hari Om Prasad Vs. State of Bihar and Others, it has been held by the Supreme Court that in a habeas corpus proceeding, the Court has to have regard to the legality or otherwise of the detention at the time of return of the rule and not the date of initiation of the proceeding.

9. Examination of the records in the case in hand, reveals that the learned Magistrate had remanded the accused the custody by order dated 5.11.2008. On the said date, the accused was produced before the learned Magistrate for the first time. Thereafter, he was remanded from time to time. But then on 27.3.2009 while committing the accused to the court of Session to face his trial, learned Magistrate observed that as the accused is in jail custody, the Superintendent of the Jail is directed to produce the accused before the court of Session as and when required by the Session Court. Mr. Sarangi taken exception of the fact that in the said order, learned Magistrate has not specifically directed that the accused was remanded to jail custody. The Petitioner is facing trial for commission of offence under Sections 341, 376, 294, 506/34 IPC. He has been committed to the Court of Session for trial. Admittedly, while committing an accused, no order of remand was passed as would appear from the order dated 27.3.2009. In this respect, it would be prudent to refer to Section 209 (b) of Code of Criminal Procedure, which provides that an accused must be remanded to custody during and until the conclusion of the trial subject to the provisions relating to bail provided under the Code of Criminal Procedure Thus, once the

accused is remanded to custody, he should be deemed to continue in custody till conclusion of the trial. While committing the case to the court of Session the Magistrate had clearly directed the jail authorities to receive the Petitioner into jail custody and produce him before the Sessions court when so required. This direction of the learned Magistrate to keep an accused in custody for a specific period, is to be construed as an order of remand. Mere non-mention in the order that the accused is "remanded to custody" does not render the detention illegal.

10. A perusal Of Form No. M-54 of this Court's General Rules and Circular Orders (Crl.) Vol. II, which deals with communication to be sent to the Officer in-charge of the jail while exercising power u/s 209 Code of Criminal Procedure, requires that the jail officer is to receive the person concerned into custody and produce him before the Court of Session to which he is committed when so desired.

11. An identical case was before the Division Bench of this Court in the case of Amiya Kumar Mohanty and Another Vs. State of Orissa and Others, . In the said case Justice Hansaria, the then Chief Justice of this Court, speaking for the Bench held that mere non-mention of the word "remand" in the committal order would not make the detention illegal.

12. In view of the discussions made above and the authoritative pronouncements referred to above, we find no merit in the contentions raised by Mr. Sarangi and dismiss the writ petition.

S.C. Parija, J.

13. I agree.