

(1994) 07 OHC CK 0010

In the Orissa High Court

Case No : Original Jurisdiction Case No. 4242 of 1994

Purak Chand Chandak and Another

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 13-07-1994

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1994) CriLJ 3014 : (1994) 2 OLR 541

Hon'ble Judges : G.T. Nanavati, C.J.;P.C. Naik, J

Bench : Division Bench

Advocate : G.N. Mohapatra, for the Appellant; S.K. Das, Government Advocate and K.N. Jena, for the Respondent

Final Decision : Dismissed

Judgement

G.T. Nanavati, C.J.—The two petitioners along with ten others are the accused in G. R. Case No. 271 of 1993 of the Court of Sub-Divisional Judicial Magistrate, Cuttack. They are charged with an offence punishable u/s 302, read with Section 34, of the Indian Penal Code. it is alleged that the accused persons killed one Bina Jhawar,, daughter of Kali Prasad Bharadia, by pouring some liquid on her body and setting her on fire. The incident of burning took place on 17.2-1993 and Bina died as a result of the burns on 27-2-1993. The petitioners were released on bail by this Court on 26-7-1993. Against that order, the State went in appeal to the Supreme Court, and by its order dated 15-4-1994. the Supreme Court cancelled the bail and directed the petitioners to surrender forthwith. Pursuant to that order, the petitioners surrendered on 20-5-1994 and were remanded to the jail custody. The matter again came up before the Court of the Sub-Divisional Judicial Magistrate, Cuttack, for passing appropriate orders on 27-5-1994. The petitioners could not be produced before the Court on that day as they were reported to be in hospital by the jail authorities. All other accused exept of those who were absconding were produced before the learned Magistrate. The accused who were in custody were directed to be produced

before the Court again on 10-6-1994/24-6-1994/1-7-1994. On 2-6-1994, the two petitioners, Purak Chand Chandak and Rajendra Prasad Bharadia, who were reported to be in hospital and were not produced before the learned Magistrate when the order dated 27-5-1994 was passed, presented this petition and prayed for a writ of habeas corpus and direction that they be set at liberty forthwith on the ground that their custody in jail has become illegal in absence of a valid remand order. The petition was placed before the Court on 27-6-1994 and was adjourned at the instance of the learned Government Advocate, on whom a copy of the petition was served. It was posted for hearing on 28-6-1994. On that day also, the learned Government Advocate prayed for time and, therefore, it was adjourned to 29-6-1994. On 29-6-1994, the learned Government Advocate again applied for time to verify the record and also raised a contention that merely because there does not appear to be a valid remand order, the petitioners need not be released. Further hearing was, therefore, adjourned to 1-7-1994. On that day, the petition was again heard for some time and then adjourned to 5-7-1994. The learned advocate for the petitioner applied for time on 5th, so it was adjourned to 7-7-1994. It was again heard for some time on 8-7-1994 and the hearing was concluded on 12-7-1994.

2. What was submitted by the learned advocate for the petitioners was that the learned Magistrate could not have passed an order for remand for more than 15 days at a time. If the order of remand passed on 27-5-1994 is construed as an order of remand up to 1-7-1994, then it should be regarded as an invalid order for that reason. If the order is construed as an order of remand up to 10-6-1994, the custody of the petitioners after that date should be regarded as illegal as no fresh order of remand was passed either on 10-6-1994 or 24-6-1994. In either case, the custody of the petitioners was illegal and they were entitled to be released when this petition was presented before this Court. On the other hand, it was contended by the learned Government Advocate that on 27-5-1994, the petitioners were not produced before the learned Magistrate and it was reported by the jail authorities to him that they were in hospital. He also submitted that in all probability, keeping that in mind and also for the reason that he was merely holding the charge of the Court of the Sub-Divisional Judicial Magistrate, he passed an order directing the jail authorities to produce the petitioners on 16-6-1994, 24-6-1994 and 1-7-1994. He further submitted that on verification of records it now appears that the jail authorities for reasons unknown omitted to produce the petitioners before the Court on 10-6-1994 and 24-6-1994. He even suggested that this was a result of collusion. The learned Sub-Divisional Judicial Magistrate, who heard the matter on 1-7-1994, has also called for an explanation from the jail authorities as to why the petitioners were not produced in Court as directed by it. For these reasons and also because now a valid order has been passed on 1-7-1994, this Court should not order release of the petitioners. He submitted that the date on which the Court hears the matter for finally deciding the same is the material date for deciding what relief can be granted in such cases and not the date on which the petition was presented.

3. In view of the rival contentions, we will first consider which date, i.e., the date of filing the petition or the date of hearing the petition, is relevant and material for the purpose of this petition. The learned advocates have drawn our attention to the decisions of the Supreme Court in *Ram Narayan Singh Vs. The State of Delhi and Others*, ; *In re Madhu Limaye and Ors.* AIR 1969 SC 1014; *Talib Hussain Vs. State of Jammu and Kashmir*, ; and *Col. Dr. B. Ramachandra Rao Vs. The State of Orissa and Others*, . In *Ram Narayan Singh's* case, the Supreme Court has held that the detention of a person in custody after expiry of the remand order without any fresh order of remand committing him to further custody while adjourning the case is illegal and that in a habeas corpus proceeding, the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings. In *re Madhu Limaye*, the Supreme Court reiterated this position of law. In *Talib Hussain Vs. State of Jammu and Kashmir*, , the Supreme Court has held that for issue of a writ of habeas corpus, the Court has to consider the legality or otherwise of the detention on the date of hearing. In that case, the Supreme Court has further observed that if on the date of hearing it cannot be said that the aggrieved party has been wrongfully deprived of his personal liberty and his detention is contrary to law, a writ of habeas corpus cannot issue. In the case of *B. Ramachandra Rao* also, the Supreme Court has held that the legality or otherwise of the detention has to be considered at the time of the return and not with reference to the institution of the proceedings. In view of this decision, it can be said that the law is well settled that it is with regard to the date of return and not with reference to the date on which the habeas corpus proceedings are instituted, the Court has to decide the legality or otherwise of the detention and what relief should be granted to the petitioners.

4. On 1-7-1994, the petitioners were produced before the learned Sub-Divisional Judicial Magistrate (S), Cuttack and on that day he has passed an order remanding the accused to jail custody till 14-7-1994. So, now the custody of the petitioners in jail is pursuant to a lawful and valid order. Therefore, in view of the settled legal position, this petition deserves to be rejected. It may, however, be stated in fairness to the learned advocate for the petitioners that he made all attempts to see that this petition was heard and disposed of before 1-7-1994. But the practice followed in this Court has come in his way. As per the practice, an advance copy of the petition was served upon the learned Government Advocate. He appeared before the Court on 27-6-1994, when the matter was first listed for admission, and took time. On 28-6-1994 and 29-6-1994 also he took time as he had not received instructions from the investigating officer. He had to verify the records also. It was under these circumstances that rule nisi was not issued and it was not made returnable before 1-7-1994.

5. Another reason which has induced us to reject this petition is that though writ of habeas corpus is a matter of right it is not a matter of course. The Court may for valid reasons refuse to issue a writ of habeas corpus and direct release of the person in custody even though it is pointed out that the custody is in pursuance

of an illegal order passed by the Court. As pointed out by the Supreme Court in B.R. Rao's case (supra), writ of habeas corpus is not granted where a person is committed to jail custody by a competent Court by passing an order which does not appear to be without jurisdiction or wholly illegal. In this case, it is not contended that the learned Magistrate had no jurisdiction to pass an order remanding the petitioners to jail custody. Though the said order has been challenged as illegal, it is not possible to say that it is wholly illegal. Moreover as pointed out by this Court in Durel Behera Vs. Suratha Behera and Another, , even where an accused succeeds in an application for a writ at habeas corpus on the ground of illegal detention, he may be re-arrested and remanded to custody having regard to the gravity and nature of the offence alleged to have been committed by him. In this case, even if the petitioners' release would have been ordered by this Court, they could have been re-arrested by the police in view of the serious charge levelled against them.

6. For all these reasons, we do not think it proper to issue a writ of habeas corpus and direct release of the petitioners. We must, however, express our dissatisfaction over the manner in which the Investigating Officer and the jail authorities have acted in this case. Since the learned Sub-Divisional Judicial Magistrate has already called for an explanation from the jail authorities, we do not think it necessary to take any action against them at this stage. The learned Magistrate who passed the order of 27-5-1994 has also not acted in accordance with the provisions of the Code of Criminal Procedure while passing the said order. We, therefore, direct the Registrar (Administration) of this Court to call for an explanation from him for passing such an order.

7. In the result, the petition fails and is dismissed.

P.C. Naik, J.

8. I agree.