

(2012) 07 JH CK 0116
In the Jharkhand High Court
Case No : W.P (Cr) (H.B) No. 116 of 2012

Ram BilashSahu

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 18-07-2012

Acts Referred:

Constitution of India, 1950 — Article 21, 22(1), 22(2)
Criminal Procedure Code, 1973 (CrPC) — Section 167, 41(B), 41B, 57, 71
Penal Code, 1860 (IPC) — Section 120B, 420, 467, 468, 471
Prevention of Corruption Act, 1988 — Section 12(2), 13(1)(d)

Citation : (2012) 07 JH CK 0116

Hon'ble Judges : R.K. Merathia, J;Dhrub Narayan Upadhyay, J

Bench : Division Bench

Advocate : Krishna Murari, for the Appellant; Md. Mokhtar Khan for the Respondent CBI, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard the counsel for the parties. This Criminal Writ Petition has been preferred by the petitioner for quashing of the order dated 24.2.2012 (Annexure-6) passed by the Special Judge, CBI, Ranchi, in connection with RC case No. 20(A)/2009R whereby and whereunder the petitioner has been remanded to judicial custody on the ground of non compliance of section 41(B) of the Code of Criminal Procedure and section 80 read with section 76 of the Cr. P.C. The legality of the order has also been challenged on the ground of violation of Article 22(1) and 22(2) of the Constitution of India. It is further prayed that the petitioner may be directed to be released forthwith from custody and an exemplary compensation be granted for his illegal detention by the CBI.

2. Respondent CBI has appeared and filed counter affidavit stating inter alia that the petitioner is in Judicial custody since 24.2.2012 and he is under lawful detention and therefore instant writ petition is not maintainable. It is also contended that the petitioner was wanted in connection with RC case No. 20(A)/2009 in which he has been charge sheeted but he did not appear even

after issuance of warrant of arrest and proclamation.

3. The background behind filing of this writ petition is required to be reproduced in brief as follows :

The petitioner was posted as an Assistant Engineer, Road Construction Sub Division, Chaibasa with effect from 3.1.2007. During his tenure in the said department, tender was invited from the office of the Executive Engineer, against repair work in KM 61, 62, 63 & 64 (763M) of Seraikella-Chaibasa Road and KM-1(150M, 2(800M), 3(800M), 4(800M) and 5(150M) of Chaibasa Bye-Pass Road. The work was allotted to respective contractors, but it was found that the work done was not satisfactory and the money allotted against said contract work was defalcated causing loss to the Government in connivance with the officers of the concerned department and the contractors. As a result, FIR was lodged on 22.10.2009 vide RC case No. 20(A)/2009R under sections 120B, 420, 467, 468, 471 IPC and section 12(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 against the then Executive Engineer, contractor M/s Navnirman Builders & others. Pursuant to the said case, the petitioner was summoned by the investigating officer of the CBI and he was also suspended by the Road Construction Department vide Letter No. 6576 dated 4.11.2010 and a departmental enquiry was set up by letter No. 6591 dated 8.11.2010. On the same set of charges and evidence of witnesses, charge sheet No. 12 dated 3.12.2010 u/s 120B of the Indian Penal Code and section 12(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 was filed by the CBI against the petitioner and others. Consequently, cognizance was taken on 4.12.2010 and processes to compel appearance of the accused persons were issued. It is necessary to mention here that the petitioner applied for grant of anticipatory bail vide ABA No. 904 of 2011 which was dismissed as withdrawn on 19.11.2011. The petitioner had also preferred Cr.M.P. No. 532 of 2011 for quashing of the entire criminal prosecution launched against him vide aforesaid RC case No. 20(A)/2009R, but it was dismissed on 28.2.2012 on which date, he was already in judicial custody. Since the petitioner was evading his appearance and concealing himself, he was declared proclaimed offender and accordingly, proclamation was issued by the concerned court giving present and permanent address of the petitioner. In view of the warrant of arrest and the proclamation issued, the petitioner was arrested on 22.2.2012 from his native village within Ladania P.S. District Madhubani from where he was brought to PATNA CBI office and detained during night in the CBI lock-up. On the next day he was produced before medical officer for his medical examination and then brought to Ranchi on 24.2.2012 and kept in CBI lock-up at Ranchi between 6.00 a.m. to 12 noon and then forwarded to the court of the Special Judge, CBI, Ranchi from whose court, warrant of arrest and proclamation were issued against the petitioner in connection with RC case No. 20(A)/2009R.

4. It is contended on behalf of the petitioner that the CBI has violated the provisions contained under Article 21 read with Article 22(2) of the Constitution.

Liberty of the petitioner was curtailed and he was illegally detained by the CBI within the districts of Madhubani, Patna and Ranchi. After his arrest, no arrest memo was prepared as required u/s 41B of the Code of Criminal Procedure and he was not produced before the nearest Magistrate, as envisaged u/s 57 of the Code of Criminal Procedure. No transit remand as required u/s 80 read with section 76Cr.P.C. was taken by the arresting officer. The petitioner was not produced, after his arrest, before the Magistrate for seeking transit remand as per the provisions contained in section 76Cr.P.C. The detention of the petitioner by the CBI was in utter violation of Article 22(2) and therefore the learned Special Judge, CBI should not have remanded the petitioner to judicial custody. Thus the order dated 24.2.2012 is illegal ab initio and is liable to be quashed and the petitioner be directed to be released forthwith and exemplary compensation be awarded.

5. The petitioner has mainly relied upon the following judgments :

D.K. Basu Vs. State of West Bengal,

In the Matter of Madhu Limaye and Others,

Manoj Vs. State of Madhya Pradesh,

6. We have carefully examined the relevant provisions of law highlighted from both sides and have also considered the contention made in the writ petition. It appears that the petitioner has tried to mingle the provisions contained in Chapter V & Chapter VI of the Code of Criminal Procedure (hereinafter referred to as the Code). Chapter V of the Code deals with the power conferred on the Police who may arrest a person without warrant. It is true that after pronouncement of judgment by the Hon''ble Supreme Court in the case of D.K. Basu (supra), certain amendments have been made in Chapter V of the Code of which Section 41B is the result which reads as follows :

Section 41B : Procedure of arrest and duties of officer making arrest.

-Every police officer while making an arrest shall -

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

7. The power given to Police to arrest a person without warrant was grossly

misused and it was considered by the Apex Court in the case of D. K. Basu (supra) and guideline was given to protect the constitutional guarantee that if a person is arrested without warrant, he must be made acquainted with the ground of his arrest, time and place of arrest for which a memorandum of arrest is required to be prepared. The arrest of such person must be made known to the relative(s) of such arrested person and he should be given an opportunity to consult or engage lawyer of his choice and so on. This requirement of the Act is derived from Article 22(1) of the Constitution.

8. Section 57 of the Code of Criminal Procedure speaks as follows:

57. Person arrested not to be detained more than twenty-four hours.-No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate u/s 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Again, the object is that the person so arrested shall not be harassed or detained in police custody for a longer period and, therefore, it is indicated that he must be produced before the Magistrate within 24 hours, so that arrest of such person and his detention, if necessary, may be justified by judicial order. Although, the petitioner had taken all these plea, but we feel that Chapter-V is not relevant in the context of the arrest and detention of the petitioner in the present case, rather, Chapter VI shall be more applicable. Before discussing the provisions contained in sections 76, 80, 81 and 82 of the Code, we feel inclined to deal with the respective events highlighted in the writ petition. The institution of the RC case No. 20(A)/2009R was well within the knowledge of the petitioner when he was summoned by the investigating officer; departmental proceeding was initiated and he was suspended on the charges appearing in the FIR.

9. The petitioner had preferred the application for grant of anticipatory bail which was dismissed on 19.11.2011. When he did not get a favourable order, Cr.M.P. No. 532 of 2011 was preferred which was also dismissed on 28.2.2012. In view of the above admitted facts, it cannot be said that the petitioner had no knowledge about the progress prevailing in RC case No. 20(A)/2009R and the subsequent orders passed by the Special Judge, CBI. What we mean to bring on record is that even after submission of the charge-sheet and order of cognizance, the petitioner did not appear and warrant of arrest (non-bailable) was issued. When the Special Judge, CBI got himself satisfied with the submission made by the investigating officer that the petitioner is concealing himself and evading his appearance, proclamation against him was issued indicating present and permanent address of the petitioner. Even after issuance of proclamation, the petitioner did not appear and finally he was arrested by the CBI officials on 22.2.2012 from a village lying within Ladiana Police Station of the district of Madhubani. Therefore, the arrest of the petitioner was in pursuance of the warrant of arrest issued against him by the court of Special Judge, CBI, Ranchi,

in connection with RC case No. 20(A)/2009R. Section 76 of the Code requires that the police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person. It is further provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court.

10. In this context, the procedure laid down u/s 80 of the Code is applicable which reads as follows :

Section 80. Procedure on arrest of person against whom warrant issued.-When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within thirty kilometres of the place of arrest or is nearer than the Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction the arrest was made, or unless security is taken u/s 71, be taken before such Magistrate or District Superintendent or Commissioner.

11. In view of the above provisions, the petitioner who was arrested at Madhubani was required to be produced before the nearest Magistrate within 24 hours for seeking transit remand, so that he could be produced before the court which issued the warrant of arrest. According to the admitted case of the petitioner, he was produced before the Special Judge, CBI, Ranchi, on 24.2.2012, i.e. after about 30 hours of his arrest. In the counter affidavit, CBI has explained the delay. However, the alleged non-compliance of section 80 read with section 76 of the code can, at best, be termed as irregularity. Now we have to consider whether, only because the petitioner after his arrest was not produced before the nearest Magistrate for seeking transit remand, the impugned order dated 24.2.2012 (Annexure 6) passed by the Special Judge, CBI, Ranchi in RC case No. 20(A)/2009R could be considered illegal and the reason so assigned is sufficient to quash it?

To find out the answer, we have gone through the judgments cited from both sides. The facts and circumstances available in the case of D.K. Basu Vs. State of West Bengal, and the case of In the Matter of Madhu Limaye and Others, and the grounds taken by the petitioners in those cases are not available in the case at hand. So far the case of M/s. Laxmi Video Theaters and Others Vs. State of Haryana and Others, is concerned, it has been discussed and distinguished in the case of SurendraSardar Vs. State of Bihar (2000 (3) PLJR 238) wherein at paragraph 6 it was held as under :

6. It is well settled that in matters of Habeas Corpus, the relevant date to determine as to whether the remand is legal or not is the date of hearing of the application and if on the relevant date the remand is found to be legal a person is not entitled to be released. In this connection, reference may be made to a Full Bench Judgment of this Court in the case of BabuNandanMallah vs. State

reported in (1971 BLJR 1058: 1971 PLJR 605), wherein it has been held that the appropriate time to find out whether the detention is illegal and a writ of habeas corpus should issue, is the date of hearing the application. It is not a condition precedent or a valid order of remand that the accused must at the time of remand, be in valid custody under a valid remand order. If on the date of hearing of the application the remand is valid, then no writ of habeas corpus can be issued only on the ground that at earlier point of time the remand was invalid.

Again the Hon'ble Supreme Court in the case of Pragyna Singh Thakur Vs. State of Maharashtra (2011) 10 SCC 445 in para63 held as under :

63. The decisions relied upon by the learned counsel for the appellant do not support the plea that in every case where there is violation of Article 22(2) of the Constitution, an accused has to be set at liberty and released on bail. Whereas, an accused may be entitled to be set at liberty if it is shown that the accused at that point of time is in illegal detention by the police, such a right is not available after the Magistrate remands the accused to custody. Right under Article 22(2) is available only against illegal detention by the police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order.

Since the petitioner was wanted in connection with RC case No. 20(A)/2009R and to compel his appearance, processes were issued and in compliance thereof, he was arrested and forwarded to Jail custody on 24.2.2012 and thus he is in judicial custody now. In view of the observations made by the Apex Court in the case of Pragyna Singh Thakur (supra) and SurendraSardar (supra), we do not feel inclined to issue any direction for release of the petitioner in this Cr. Writ Petition and non-compliance of provisions contained u/s 76 of the Code, in such circumstance can only be an irregularity which shall not be a ground to declare the remand illegal.

This writ petition is, accordingly, dismissed.