

(1987) 04 PAT CK 0006

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No's. 20 and 46 of 1986

Ramesh Kumar Ravi @ Ram Prasad

APPELLANT

Vs

The State of Bihar, and 3 Others
 Bechan Mistry Vs
Shatrugban Singh, and 4 Others

RESPONDENT

Date of Decision : 21-04-1987

Acts Referred:

Arms Act, 1959 — Section 25(1)(a), 25(1)(a), 26
Constitution of India, 1950 — Article 132, 133, 134, 134, 135
Criminal Procedure Code, 1973 (CrPC) — Section 164, 167, 167(2), 167(2)(b), 203
Penal Code, 1860 (IPC) — Section 323, 341, 380, 427, 448

Citation : AIR 1988 Patna 199 : (1987) 35 BLJR 754 : (1987) PLJR 650 : (1987) 2 RCR(Criminal) 566

Hon'ble Judges : S. S. Sandhawalia, C.J.;R.N. Prasad, J;M. P. Varma, J

Bench : Full Bench

Advocate : Sudarshan Sharma in Cr. W.J.C. 20/86 Mr. Nand Kishore Prasad in Cr. W.J.C. 46/86, for the Appellant; J.P. Shukla and G.P. Jaiswal, M/s. Tara Kant Jha and M.K. Jha in Cr. W.J.C. 20/86 Mr. Krishnandan Pd. Singh G.P. 3. Mr. Tej Bahadur Singh, in Cr. W.J.C. 46/86, for the Respondent

Final Decision : Dismissed

Judgement

S. Sandhawalia, C.J.—The larger questions of criminal jurisprudence which loom for adjudication in these connected writ jurisdiction cases may well be precisely formulated in the terms following:

(i) Whether a Magistrate has no jurisdiction to pass an order of remand unless an application or a request to that effect is made by the Police or the prosecution ?

(ii) Whether the physical production of the accused before the Magistrate for the purpose of remand is so mandatory that a failure to do so would vitiate the same even if the circumstances for non-production were beyond the control of the prosecution and the Police ?

(iii) Whether a defect or illegality in the order of a remand of an accused person

is incurable and he can claim a writ of habeas corpus despite the fact that on the date of hearing he is in custody under a valid order of remand ?

(iv) Whether the judicial orders of a criminal court (stricto sensu) Under the Code of Criminal Procedure, are amenable to quashing by a writ of certiorari.

The facts giving rise to the pristinely legal questions aforesaid are not in serious dispute and lie in a narrow compass. The petitioner was arrested at dawn on the 9th of January, 1986 in connection with -Town Police Station Case No. 4 of 1986 registered under sections 25(1) (a) and 26 of the Arms Act. Subsequently he was produced before the Chief Judicial Magistrate, Darbhanga, on the 11th of January, 1986, and his case is that this was beyond the mandated period of twenty four hours. However, the Chief Judicial Magistrate directed that he be produced before Shri J.K. Srivastava, Judicial Magistrate, Darbhanga, for recording his statement u/s 164 of the Code of Criminal Procedure (hereinafter referred to as the Code"). The petitioner was, however, not produced before the said Magistrate on that date and instead was produced before him on the 13th January; 1986. He did not make any statement before the said Magistrate and was consequently directed to be produced before the Chief Judicial Magistrate which was done on the same date and he remanded him to jail custody till the 25th of January, 1986. He was again produced before the Chief Judicial Magistrate on the date aforesaid, who remanded him further till the 6th of February, 1986 awaiting the receipt of the final form, and it is the petitioner's case that no application or prayer was made by the Police or prosecution for any further remand. On the 1st of February, 1986, a petition for bail was moved on behalf of the petitioner before the Chief Judicial Magistrate on the ground that his remand was illegal. This application was heard by the learned Magistrate on the 4th of February, 1986 and he rejected the same on the same day - vide detailed order, Annexure 4. Thereafter the petitioner moved the learned Session Judge for bail on the same ground. This was ultimately heard by Shri J.P. Yadav, Additional Sessions Judge, Darbhanga. By his detailed order (Annexure 5) dated the 6th of February, 1986, he held that the remand of the petitioner could not be said to be illegal and rejected the bail application.

2. Aggrieved by the order of the learned Chief Judicial Magistrate (Annexure 4) and of the learned Additional Sessions Judge, Darbhanga, (Annexure 5) the present petition was preferred. At the motion stage itself reliance was sought to be placed on 1981 B.B.C.J. 171 (Baban Lal Yadav and others v. State of Bihar), the correctness of which was challenged on behalf of the State and consequently the application was admitted for "hearing by a Division Bench. Before the Division Bench Learned Counsel for the petitioner raised the questions formulated at the outset and noticing the significance thereof the matter has been referred for hearing by the Full Bench and that is how it is before us now.

3. For the sake of clarity the questions formulated at the outset may be dealt with separately. Taking them up seriatim, under question (i) the main thrust of Mr. Sharma, Learned Counsel for the petitioner, is directed against the remand

order dated the 13th of January, 1986, vide Annexure 3. It was vehemently submitted before us that it is manifest from both the orders that no application on behalf of the investigating agency was moved for the remand of the petitioner and this apart there does not even appear a positive prayer or request on its behalf for any further remand. Counsel submitted that there existed no power in the Magistrate to suo motu direct the remand in custody of petitioner in the absence of a formal application and, in any case, a positive request to that effect by the Police, Basic reliance was placed on the judgment of the Rajasthan High Court reported in 1983 (II) Crimes 616 (Mohan v. State of Rajasthan) and by way of analogy on 1978 Bihar Bar Council Journal 84 (Aziz Pasa and others v. The State of Bihar.)

4. The aforesaid somewhat ingenious submission may first be examined in the light of the statutory provisions. The relevant part of section 167 of the Code is in the terms following :

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate think fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

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Reference in this connection may also be instructively made to section 309 which provides for the remand of accused person after cognizance and during trial. Sub section (2) of section 309 is in the terms following:

(2) 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 reasons 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:

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It is manifest from the plain language of the aforequoted two provisions that they do not expressly mandate any formal application for remand by the prosecution, nor does it appear to be so by any necessary implication. The power is conferred and vested in the Magistrate without any such pre-condition. To my mind, it would be doing violence to the plain language of sections 167 (2) and 309 (2) of the Code by reading into them a requirement of a formal application for remand or in any case, an insistent request therefor.

5. Now, apart from the language of the statute, even on principle the contention of the Learned Counsel for the petitioner is untenable. If the stand on behalf of the petitioner were to be conceded to, the necessary legal result is that the issue of the custody of the accused would pass on completely in the discretion of the investigating agency, leaving the Magistrate or the Court as a helpless spectator of their actions and whimsicalities. Negatively put, the proposition canvassed on behalf of the petitioner is that if the Investigating Officer does not choose to apply or pray for further remand, the Court is powerless to do so. No such absurd result can be easily countenanced. The whole spirit of the Code is that the custody and liberty of the accused is entirely governed by the authority and sanction of a Court of law beyond the initial period of twentyfour hours betwixt the first arrest and production before the Magistrate thereafter. By no twisted interpretation can this power in actual fact and practice be passed on into the mere discretion of the investigating agency, whether to ask for remand or not. In my view, once an accused person is produced before a Magistrate, he is in a legal sense in (sic) *legis* and it is the Court's responsibility and power whether he is to be remanded to further custody or granted bail or released altogether. By no stretch of imagination can this power of the Court be whittled down and be indeed passed on to the mere discretion of the investigating agency alone. If an authority is needed for something so basic, it is available in the observation of the Full Bench in *Kuli Singh and others v. The State of Bihar and others* (1978 Bihar Bar Council Journal 400 : 1978 PLJR 500.) which is as under:

Before considering the submissions, urged on behalf of the petitioners, it will be useful to remember that a magistrate has ultimate control over police investigation. That is a basic concept. If this is forgotten, we are bound to go astray. The ultimate jurisdiction of deciding who will be put on trial is to a magistrate and not in the police. In that sense it would not be inapt to say that a magistrate has ultimate control over investigation.

6. It remains to advert to the two judgments relied upon by the Learned Counsel for the petitioner. There is no gainsaying the fact that the Observations in *Mohan v. State of Rajasthan* (supra) do tend to buttress the stand of the Learned Counsel. However a perusal of the said judgment would show that without either citing principle or referring to the statutory provisions or any earlier precedent, the learned Judge straightway entered the thicket of the production of the accused and bail orders in the context, and thereafter made observations indicative of the view that an application for remand or a request therefor by the

prosecution was the sheet-anchor of the Magistrate's power to do so. With the deepest respect and for the detailed reasons recorded above, it is not possible to subscribe to any such view. I must, therefore, record a clear dissent therefrom.

7. Mr. Sharma had then projected the observations in paragraph 6 of the Report in 1978 B.B.C.J. 84 (*Asia Pasa and others v The State of Bihar*) (*supra*) as a warrant for the proposition that in the absence of a formal petition for remand the same cannot be granted. I am unable to read the said observations to any such effect or co-relate the direction to release therein for the said reason, as the ratio of the case. There is, however, no gainsaying the fact that the observations are somewhat nebulous and if they are projected as a foundation for any such abstruse proposition as is canvassed by the Learned Counsel for the petitioner, then they appear to me as wholly untenable both on principle and precedent and are hereby overruled.

8. To conclude on this aspect, the answer to question (i) is rendered in the negative and it is held that a Magistrate has jurisdiction to pass an order of remand despite the absence of any formal written application or a request for such remand being made by the Police or the prosecution.

9. Adverting now to question (ii), Mr. Sharma yet again took the extreme stand that the sine qua non for the validity of a remand is first the physical production of the accused before the Magistrate. It was submitted that unless the accused person is personally present before the Court, the latter is denuded of any power to remand further. On that premises, Counsel referred to the order sheet in the case wherein the petitioner had been remanded to further custody without being actually produced before the Court. Particular reliance was sought to be placed on the insertion of the provisions of clause (b) in section 167 (2) of the Code in 1974 (quoted in extenso in paragraph 16 hereafter) to this effect. Basic reliance was again placed on the single Bench judgments of the Rajasthan High Court in 1983(1) Crimes 299 (*Rati Ram and others v. State of Rajasthan*) and 1983 (II) Crimes 616 (*Mohan v. State of Rajasthan*). Support was also sought from AIR 1980 S. C. 847 (*Mantoo Majumdar and another v. The State of Bihar*), 1981 Criminal Law Journal 470 (*Khatri and others v. State of Bihar and others*) and 1976 Criminal Law Journal 1782 (*Raghavendra Singh v. State of U. P. and others.*)

10. Mr. J.P. Shukla, the Learned Counsel for the respondent State, in order to meet the aforesaid contention, sought to take up a somewhat ingenious and, perhaps, an extreme stand. Whilst fairly conceding that the physical production of an accused before a Magistrate is necessary immediately after the arrest, it was contended that this was so with regard to the first production only and not to the subsequent ones. Mr. Shukla highlighted that no great rationale or principle required physical production of every accused after every fifteen days or less before the Magistrate merely for presentation if no meaningful legal proceedings are as yet to be taken up against him. This was contended to be particularly so in the case when the trial has not as yet commenced. Particular reference was sought to be made to cases of terrorists and dangerous criminals

whose carriage from jail custody to court and back is not free from the hazards of attacks by their accomplices for breaking them away from lawful custody. It was pointed out that during the course of the trial there was ample power in the Court u/s 309 of the Code to require the presence of the accused which necessarily has to be conducted in his presence. The practical difficulties and the limitations of the respondent State in the physical production of under-trial prisoners at short intervals and sometimes at long distances from jail to the Court, were forcefully highlighted.

10A. It is apt and indeed necessary to first deal with the aforesaid contention on behalf of the respondent State with regard to the supposed distinction between the first production before the Magistrate and the subsequent ones. The submission of Mr. Shukla, rested as it is on the ground of ab-inconvenienri and the practical difficulties of the intermittant physical production of the accused persons at short intervals nevertheless appears to me as running patently counter to the clear mandate of both the letter and the spirit of the law in this context What first deserves notice herein is that apart from the Code, Article 22(2) of the Constitution provides as under :

22 (1) xx xx xx

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

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It is manifest from the above that the Constitution itself mandates the physical production of an accused person before a Magistrate and all further custody thereafter must be under the orders and authority of the said Magistrate. Yet again the meaningful and the deliberate insertion of clause (b) to sub-section (2) of section 167 in the Code in 1973 is not to be easily lost sight of. It is common ground that this was specifically so mandated in the old Code and was designedly added in the new one apparently to insist on the physical production of the accused at all stages of farther remand. The legislative mandate that the remand of an accused is not to extend beyond fifteen days and on its expiry ordinarily he should be produced before the Magistrate physically, seems to be clear and unequivocal. Learned Counsel for the respondent State's stand that merely information should be laid before the Magistrate and orders of further remand be secured, is not tenable because what the spirit and the letter of the law require is the production of the accused before Magistrate and not the mere placing of information before him. There is nothing in clause (b) of sub-section (2) of section 167 which can possibly divide by a line or draw a distinction with regard to first production and the subsequent ones. Indeed there are contrary indications in the said section all through. Explanation II to section 167(2) is

then in the following terms :

If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention."

It seems to be plain from the above that the Code even envisages the mode, of proof for establishing the presence of the accused person by his signature on the order sheet and this cannot possibly be so unless he is physically produced. Reference may yet again be made to sub-section (2A) of section 167 inserted by the Amendment Act of 1978. This again seems to highlight the necessity of physical production by even providing that in the absence of the Judicial Magistrate the accused must be produced before an Executive Magistrate whose power of such remand is, however, cut down to a term not exceeding seven days in the aggregate. It is further provided that on the expiry of" the period of the detention o authorised the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such an order and the aforesaid period ordered by the Executive Magistrate is to be taken into consideration for computing the period u/s 167(2).

11. It seems to me that viewed from whichever angle, either from the Constitutional or the statutory, it appears that the mandate of the law herein is that the accused person is to be physically produced before the Magistrate though it may turn out to be somewhat burdensome for the State. This on principle appears to be intended as a primal guarantee against any infraction of the valuable right of liberty even though curtailed by the criminal process so as to ensure that the accused has always access in person to the judicial authorities. The somewhat ingenious submission on behalf of the respondent State that subsequent to the first production the physical presence of the accused person for further remand is unnecessary, must, therefore, fail and is hereby rejected.

12. However, whilst holding so one cannot possibly go to the other extreme and accept the doctrinaire stand that the absence of the physical production of an accused person would vitiate the order of remand incurably. If it is physically impossible to produce the accused in person, then his mere non-production would not render his remand to further custody illegal. The wholesome provisions of the Code requiring physical production have to be viewed reasonably and not to an impossibly logical extreme. One example which inevitably comes to one's mind is where the accused person himself may be not in a position to be produced before the Magistrate--he may be mortally injured or grievously ill and lying in hospital. The law would not and cannot possibly require that he must nevertheless be produced in person before the Magistrate even to his detriment and danger to his very life. Cases are not lacking where an accused person charged with many offences may have to be produced on a particular date in two different courts at two different places. It is obvious that by no magic can he be

physically produced at both the places at the same time. There may be many other factors which may hinder or even bar the actual physical production of the accused. In the somewhat turbulent times through which we are passing a patent one is where a curfew is imposed and the accused person cannot possibly be carried to the venue of the Magistrate's court without infracting the law. Examples of this nature can be multiplied ad infinitum and it is somewhat unnecessary to labour the obvious.

13. Principle apart, it appears to me that numerous earlier binding precedents are indicative of the fact that though required by the Code that the accused should be produced in person, the law nevertheless does not and cannot command the impossible. In AIR 1971 S.C. 178 (Raj Narain v. Superintendent, Central Jail, New Delhi and another) a Constitution Bench of seven Judges by majority rejected the identical stand as taken on behalf of the present petitioner, in the following words; -

To expect the Magistrate to do more under Sec. 344 of the Code in such circumstances is to expect an impossibility from him and the law does not contemplate an impossibility. Indeed, similarly courts trying cases may find it necessary to order a remand in the absence of an accused, e.g. when an accused is so seriously ill that the trial has to be adjourned and he cannot be brought to court and in such case the order made without production of accused in court will not be invalid."

The aforesaid view was followed and reiterated in AIR 1971 S.C. 186 (A. Lakshmanrao v. Judicial Magistrate; First Class, parvatipuram and others), AIR 1972 S.C. 711 (Gauri Shankar Jha v. State of Bihar and others), AIR 1973 S.C. 850 (M. Sambasiva Rao v. The Union of India and others) and AIR 1974 S.C. 871 (Sandip Kumar Dey v. The Officer in charge, Sakchi P.S., Jamshedpur and others).

14. Faced with the stone-wall of aforesaid precedents against him, Learned Counsel for the petitioner attempted to sidetrack them by contending that these were rendered under the old Code and were, therefore, no longer applicable to the present one. It was sought to be contended that section 167 of the Code is no longer in pari materia with the earlier one and particular reliance was placed on section 167(2) (b) which is in the terms following : --

no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him."

Reference was also made to sub-section (2A) inserted in 1978 and the other sub-sections of section 167 of the present Code.

15. It is true that the aforesaid binding decisions of their Lordships were rendered under the old Code and the provisions of the present section 167 are not in pari materia with section 167 of the old Code. However, this, to my mind is a distinction without any difference. The core of the rationale of the judgment aforesaid is that the law does not contemplate an impossibility and it is vain to

expect the impossible from the Police or the prosecution by producing the accused in person if the circumstances for his non-production are beyond their control. That logic and reasoning, to my mind, is equally applicable and attracted to the provisions of section 167 of the present Code. Equally it has to be borne in mind that some, if not all, of the aforesaid judgments were rendered u/s 344 of the old Code which corresponds to section 309 of the present one. Therein no significant change has been made with regard to this issue in the law. I am, therefore, of the view that the judgments of the Supreme Court rendered under the old Code on this point continue to be applicable *mutatis mutandis* under the present Code as well and the attempt to distinguish them is vain and untenable. It must also be recalled that within this jurisdiction the Division Bench in 1986 P.L.J.R. 854 (*Mishri Singh v. The State of Bihar*) had already taken the same view. It is true that the specific point regarding the provision of the old Code was not raised and considered but the ratio of the said judgment was applied in the context of the new Code and the same is hereby affirmed.

16. It remains to advert to the judgments relied upon on behalf of the Learned Counsel for the petitioner. AIR 1980 S.C. 847 (*Mantoo Majumdar and another v The State of Bihar*) is plainly distinguishable. It is obvious that it turns on its own facts where the petitioners had remained in detention for more than six or seven years and the Police had defaulted in not completing the investigation and not filing even a single charge sheet whilst the Magistracy had authorised detention without at all applying its mind to the case. It was in those circumstances that their Lordships directed the release of the petitioners on their own bonds in the sum of rupees one thousand each. The case is of little and indeed no aid to the petitioner. Similarly reliance on the orders passed in the Bhagalpur blinding case (1981 Criminal Law Journal 470 : *Khatri and others v. State of Bihar and others*) has no relevance to the issue before us. 1976 Criminal Law Journal 1782 (*Raghavendra Singh v. State of U.P. and others*) was a case in which no order of remand beyond the 23rd of August, 1975 was on record and, therefore, the accused persons were directed to be released on an undertaking to appear before the trial court. Plainly enough, this case also does not in the least advance the stand taken on behalf of the petitioner, 1983 (1) Crimes 299 Rati (*Ram and others v. State of Rajasthan*) is wholly wide of the mark and does not merit any individual reference. It is however a fact that the observations of the learned single Judge in 1983(II) Crimes 616 (*Mohan v. State of Rajasthan*) go substantially in the aid of the Learned Counsel for the petitioner. However, a perusal of the judgment would indicate that neither principle nor precedent has been soundly relied upon for the somewhat wide ranging observations made. Even a bare reference has not been made to the long line of Supreme Court judgments which have been earlier referred to above in paragraph 15. The view expressed runs plainly counter to them. For the detailed reasons recorded earlier and with the deepest reverence to the learned single Judge, I feel constrained to record a strong dissent therefrom.

17. To finally conclude on this aspect the answer under question no. (ii) is

rendered in the negative. It is held that though physical production of the accused before the Magistrate is desirable, yet the failure to do so would not per se vitiate the order of remand if the circumstances for non-production were beyond the control of the prosecution or the Police.

18. I may now take up question no. (iii) whereunder the basic stand of the Learned Counsel for the petitioner is that the original order of remand being defective, the subsequent valid orders of remand cannot cure the alleged illegality. Mr. Sharma had contended that the petitioner not having been produced before the Magistrate within twentyfour hours and no specific request for his further remand having been made on one date and having not been physically produced before the Magistrate on another, were fatal defects for which there was no subsequent cure by passing valid orders of remand. Basic reliance herein was on 1983(1) Crimes 299 (Rati Ram and others v. State of Rajasthan).

19. The doctrinaire contention aforesaid has to be viewed in the context of virtually admitted facts. Learned Counsel for the respondent State highlighted that whatever be the infirmities in the earlier orders of remand, it is not in dispute that the petitioner was later physically produced in court on the 13th of January, 25th of January, 6th of February and 19th of February, 1986 whereafter the case was adjourned to the 2nd of March, 1986. On behalf of the respondents it was thus contended that the remand of the petitioner on the date of the return or the date of the hearing was beyond the pale of challenge and the earlier infirmities, if any, were of little or no relevance.

20. In the light of the aforesaid admitted facts and the forceful contention raised on behalf of the respondents, it is somewhat well settled that the true test in a challenge against detention is with regard to the date of hearing and not the infirmities of any earlier order or action for such detention. In AIR 1971 S.C. 62 (Talib Hussain v. State of Jammu and Kashmir) this was held to be axiomatic with the undermentioned observations :

that in habeas corpus proceedings the Court has to consider the legality of the detention on the date of hearing. 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."

Yet again in AIR 1971 S.C. 2197 (Col. Dr B. Ramachandra Rao v. The State of Orissa and others) it was held as under :

As observed by this Court in Naranjan Singh Nathawan v. The State of Punjab, 1952 SCR 395 : (AIR 1952 SC 106) and reaffirmed in Ram Narayan Singh v. The State of Delhi, 1953 SCR 652 : (AIR 1953 SC 277) in habeas corpus proceedings 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. A fortiori the Court would not be concerned with a date prior to the initiation of the proceedings for a writ of habeas corpus. We accordingly dismiss writ petition no.

601 of 1970."

22A. Within this jurisdiction even a more categorical view has been taken by the Full Bench in Babu Nandan Mallah v. The State (1972 Cri. L.J. 423) in the terms following :

I am of the opinion that even though there be an earlier order remanding an accused person to custody for a term exceeding 15 days but if on the date of the hearing it is found that he is in custody in pursuance of the last Order which was not for a term exceeding 15 days the custody cannot be held to be illegal and no writ of habeas corpus can issue directing the release of the person in custody. It is not a condition precedent for a valid order u/s 344 (1-A) that the accused must at the time of the order, be in valid custody under a valid order. If it were to be held that it is a condition precedent for an order of remand u/s 344 that the accused is in proper and legal custody otherwise such an order is not possible : it will lead to absurdity and impossibility in many cases. I find no warrant for the proposition that once an invalid order has been made remanding the accused person to custody for a term exceeding 15 days at a time, the subsequent order of remand for a term not exceeding 15 days will be bad on that account."

The recent Full Bench judgment in 1984 BBCJ 1 (Jethsur Surangbhai v. State of Gujarat), has come to an identical conclusion. Since the issue appears to me as well settled on binding precedents, it is unnecessary if not wasteful to launch on any further dissertation on the point.

21. As against the consistent stream of binding precedent above, the solitary discordant note struck in two single Bench judgments in Narayan and Others Vs. The State of Rajasthan, and Rati Ram and others v. State of Rajasthan, 1983 (1) Crimes 299 seems to be of no value. Therein almost as a dictum, it has been said that by a subsequent order of remand for later period the previous orders of detention, if illegal, cannot be cured, thereafter. A perusal of the judgments would indicate that no principle has been cited nor any meaningful reasoning has been given for this somewhat cryptic observation given on first impression. Learned Counsel for the parties appear to be somewhat remiss in not bringing to the notice of the learned Judges the binding precedents of the Supreme Court and the persuasive precedents of other High Courts. It appears to me that the observations run in the teeth of what has been authoritatively enunciated by the final Court itself. With the deepest respect. I would wish to record a dissent therefrom.

22. To sum up on question no. (iii), the answer thereto is rendered in the negative. It is held that the true test for the legality or otherwise of the detention is on the date of the hearing itself. A defect in an earlier order of remand of an accused person is not incurable and he cannot claim a writ of habeas corpus on that score alone if on the date of hearing he is in custody under a valid order of remand.

23. This brings us to the last and obviously not the least of the issues before this

Full Bench, namely, question (iv), viz whether the judicial orders of a criminal court (*stricto sensu*) under the Code of Criminal Procedure, are amenable to quashing by a writ of certiorari ? It seems somewhat patent that this issue is of seminal significance and thus impelled us to call upon Mr. Tara Kant Jha to assist the Full Bench *amicus* (*sic*) thereon. I must at the very outset record my appreciation of the erudite and pains taking assistance which he rendered to the Court on this question. This, however, in no way detracts from the very competent submission which the Learned Counsel for the petitioner had already addressed earlier on the point.

24. Herein the roles are somewhat reversed and it was the Learned Counsel for the respondent State who strenuously challenged the very maintainability of this criminal writ petition seeking, in essence, the quashing of the judicial order of the Magistrate and the revisional judicial order of the learned Sessions Judge refusing to release the petitioner on bail. Mr. Shukla, the Learned Counsel for the respondent State, forcefully pointed out that barring a routine and solitary marginal reference to habeas corpus, in the whole of the petition the sum and substance of the present criminal writ was for quashing of the orders of the learned Chief Judicial Magistrate, Darbhanga. (Annexure 4) and the order of the First Additional Sessions Judge, Darbhanga, (Annexure 5), On the petitioner's own averments in paragraph 9 of the petition, he had filed an application for bail on the 1st of February, 1986 before the learned Chief Judicial Magistrate, Darbhanga, on the grounds raised in this writ petition, which was finally heard and disposed of on the 4th of February, 1986 rejecting the same vide Annexure 4. Thereafter, on the petitioner's own showing in paragraph 10 of the petition, he himself preferred another application before the learned Sessions Judge, Darbhanga, on the aforesaid grounds, who by his detailed judicial order dated the 6th of February, 1986 (Annexure 5) was pleased to reject the prayer for bail of the petitioner. In paragraph 12 of the petition it has been averred in terms that the petitioner deserves to be released on bail and the twin orders of the Chief Judicial Magistrate and the learned Sessions Judge (Annexures 4 and 5) should be quashed and set aside. In the ultimate relief it has been further prayed that till the final disposal of the application the petitioner should be released on bail. In fact as an interim relief, vide order no. 6, dated the 2nd of April, 1986, the petitioner requested for and was granted bail in the sum of Rs. 5,000/- with one surety of the like amount at the stage of the reference of the matter to the Full Bench,

25. On the basis of the aforesaid undisputed and indeed admitted facts, Learned Counsel for the respondents challenged the very maintainability of the present writ petition for quashing the judicial orders (Annexures 4 and 5). The sheet anchor of the respondent State's stand herein is the well known and celebrated judgment of a Constitution Bench of nine Judges in *Naresh Shridhar Mirajkar and others v. State of Maharashtra and another* (A.I.R- 1967 S.C. 1). Basically relying thereon" it has been strenuously contended that no writ of certiorari is competent against the judicial process of the Courts established by law under the

Code of Criminal Procedure. In sum, the stand is that even if such judicial orders are erroneous they are not amenable to correction or quashing by way of certiorari. Such an order or judgment of the criminal court can only be assailed by the judicial remedies expressly provided by way of a revision to the High Court or under its inherent jurisdiction and finally by way of SLP to their Lordships of the Supreme Court.

26. Since the very foundation of the weighty objection raised on behalf of the respondent State is rested on Mirajkar's case (supra) it becomes necessary to advert to its facts and ratio in some detail. Therein, as I well recall, a sensational libel suit on the original side of the High Court of Bombay was under trial between a well known industrialist Mr. Krishnaraj M.D. Thackersey and Mr. R.K. Karanjia the editor of the "Blitz" Weekly. In the said case one Bhaichand Goda was cited as a witness for the defence. He duly appeared and was cross examined at length on behalf of Mr. Karanjia. Later another request was made on his behalf that he be called for further cross-examination. On his second appearance Bhaichand Goda prayed to the Presiding Judge Mr. Justice Tarkunde to withhold his evidence from publication in the newspapers on the ground that the earlier reports therein had caused him an immense business loss and financial embarrassment. After hearing arguments of both sides the learned Judge directed that the proceeding should not be reported by the press in order to save his business from harm. Against the said direction the petitioner moved a writ petition in the Bombay High Court itself which was peremptorily dismissed on the short ground that the impugned order was a judicial order of the High Court and was not amenable to a writ under Article 226 of the Constitution of India. It was there after that the petitioner Naresh Shridhar Mirajkar moved the Supreme Court under Article 32 of the Constitution of India for the enforcement of his fundamental right under Article 19 (1) (a) & (g) of the Constitution and along with him three other petitions were moved on behalf of the persons who claimed them selves to be journalists and sought the enforcement of their fundamental right to publish the proceedings in their respective papers.

27. On the aforesaid facts, Gajendragadkar, the learned Chief Justice, speaking for the majority (barring a solitary dissent in a Bench of nine Judges), noticed that the basic issue before the Court was as under :

On these facts the question which arises for our decision is whether a judicial order passed by the High Court prohibiting the publication in newspapers of evidence given by a witness pending the hearing of a suit, is amenable to be corrected by a writ of certiorari issued by this Court under Art. 32 (2). This question has two broad facets : does the impugned order violate the fundamental rights of the petitioners under Art 19 (1) (a), (d) and (g), and if it does, is it amenable to the writ jurisdiction of this Court under Art. 32 (2) ?"

After an elaborate consideration of principle and precedent Gajendragadkar, C.J., held that the impugned order of Tarkunde, J. was passed by the High Court in its inherent jurisdiction in the advancement of the interest of justice and was,

therefore, judicial in nature and consequently could not be violative of the fundamental right. It was observed as follows:

The argument that the impugned order affects the fundamental rights of the petitioners Under Art. 19 (1), is based on a complete misconception about the true nature and character of judicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate Court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental right of the citizens under Art 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the Court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by Court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental right of citizens under Art. 19 (1). The character of the judicial order remains the same whether it is passed in a matter directly in issue between the parties or is passed incidentally to make the adjudication of the dispute between the parties fair and effective. On this view of the matter it seems to us that the whole attack against the impugned order based on the assumption that it infringes the petitioners' fundamental rights under Art. 19(1), must fail"

The learned Chief Justice then proceeded further to consider that assuming entirely for the sake of argument that even such a judicial order may be said incidentally and indirectly to affect the fundamental rights of the petitioner, could such incidental and indirect effect of the order justify the conclusion that the order itself would infringe Article 19 (1) of the Constitution ? He answered this question in the negative to hold that any incidental consequence which may flow from the order would not introduce any constitutional infirmity in it. Coming to the basic question whether such a judicial order was amenable to a writ of certiorari, it was concluded as follows :

The order, no doubt binds the strangers : but nevertheless, it is a judicial order and a person aggrieved by it though a stranger, can move this Court by appeal under Art. 136 of the Constitution. Principles of res judicata have been applied by this Court in dealing with petitions filed before this Court under Art. 32 in *Daryo v. State of U.P.* (A.I.R. 1961 S.C. 1457). We apprehend that somewhat similar considerations would apply to the present proceedings, if a judicial order like the one with which we are concerned in the present proceedings made by the High Court, binds strangers, the strangers may challenge the order by taking appropriate proceedings in appeal under Art. 136. It would, however not be open

to them to invoke the jurisdiction of this Court under Art. 32 and contend that a writ of certiorari should be issued in respect of it. The impugned order is passed in exercise of the inherent jurisdiction of the Court and its validity is not open to be challenged by writ proceedings,"

In view of the aforesaid underlined categoric observations I am unable to find any meaningful point of distinction from the ratio of the aforesaid case and its plain application by way of analogy to the present one. The essence of the matter is whether the order is that of a Court established by law and the character of the said order is judicial in nature. Once it is so, such an order may be challenged by way of an appeal or revision provided by law, but its validity is not open to be challenged and quashed by certiorari writ proceedings. In *Mirajkar's* case (supra) the violation alleged was that of the fundamental right under Article 19 of the Constitution and it was sought to be remedied by way of a writ of certiorari under Article 226 or 32 of the Constitution. In the present case at the highest the petitioner claims an alleged violation of the fundamental right under Article 21 of the Constitution, which is sought to be remedied by a writ of certiorari for quashing the judicial orders of the learned Chief Judicial Magistrate and of the Additional Sessions Judge. If, as it has been categorically held by their Lordships in *Mirajkar's* case (supra), no writ was competent against a judicial order even on the assumption that it violated Article 19 of the Constitution, then one fails to see how a writ of certiorari would lie against the considered judicial orders or judgments of the criminal Courts created and established by the Code of Criminal Procedure on the alleged tenuous ground of an infraction of Article 21 of the Constitution.

28. A closer analysis of *Mirajkar's* case (supra) would show that the stand taken by the respondent State in the present one on the basis of its ratio, is even on a stronger footing than in the said case. Therein even Learned Counsel of late Mr M.C. Setalvad's (sic) and stature had conceded that if a Court of competent jurisdiction makes an order in a proceeding before it, and the order is inter partes, its validity cannot be challenged by invoking the writ jurisdiction even though the said order affects the aggrieved party's fundamental right. The basic argument, therefore, before the Court was that the impugned order affected a stranger, namely, the journalist, who claimed a right to publish the proceedings, and he being not a party to the proceeding could assail the same within the writ jurisdiction. However, as has been noticed above, even this argument on behalf of the stranger to the judgment was categorically rejected. In the present case, as already stands noticed and indeed can hardly be disputed, the orders of the criminal courts below are admittedly inter-partes. It deserves highlighting that the petitioner had himself moved the Chief Judicial Magistrate against his detention and sought to be released on bail and the learned Magistrate had directly pronounced upon and dismissed the said application. The order was thus binding on both the petitioner and the State as well. Further, the petitioner yet again approached the Court of Session himself, who in the considered judgment affirmed the order of the learned Chief Judicial Magistrate. Therefore, a judgment

of a criminal court duly established by law which is plainly inter-partes, would be all the more not amenable to a writ of certiorari.

29. Again, in *Mirajkar's* case (*supra*) it had been contended that the order of the Bombay High Court barring to publish the proceedings was collateral to the lis before the Court and was in terms not a judicial determination of the dispute before it. Even therein the Supreme Court clearly took the view that such an order was judicial in nature because it had been passed in the exercise of the Court's inherent jurisdiction to advance the interest of justice. Consequently, even such an order which was assailed as collateral was still held to be not amenable to the writ jurisdiction. Here, in the present case any such infirmity is totally lacking because there is no manner of doubt that the order of the learned Chief Judicial Magistrate which was competent to and pronounced upon the issue of the grant or otherwise of bail to the petitioner, was, in pristine essence, a judicial order under the Code. The same would hold equally true of the later order of the learned Additional Sessions Judge (Annexure 5) If the larger principle laid down in *Mirajkar's* case is that no writ would lie against the judicial process established by law, then plainly the judgments and orders of the Judicial Magistrate and the Court of Session would be totally out of the purview of a writ of certiorari and amenable only to the process of appeal, revision or the inherent jurisdiction of the High Court u/s 482 of the Code and thereafter by way of a special leave to their Lordships of the Supreme Court.

30. I may highlight and pinpoint that it is a sound rule that in adjudicating upon the significant and particularly constitutional questions the Court should focus itself on the limited issue and not ramble into collateral or analogous matters. From the frame of question no. (iv) it is manifest that we are called upon to consider the issue of the quashing of judicial orders of criminal courts (*stricto sensu*) created under the Code of Criminal Procedure. Mr. Tara Kant Jha had tempted us to stray into the scope and field of an altogether different writ of a habeas corpus, but I would firmly decline to entertain issues which do not directly arise. Nevertheless, even by way of analogy it appears to me that other judgments of the final Court are also conclusively against the stand taken on behalf of the petitioner that judicial orders and judgments of criminal courts are quashable in the certiorari jurisdiction. Even in the context of a writ of habeas corpus, *Dua, J.*, speaking for the Court in *A. Lakshmanrao v. Judicial Magistrate First Class, Parvatipuram and others* (A.I.R. 1971 S.C. 186) had observed as under : --

The order of remand is thus subject to judicial discretion and the order is also subject to review by the superior courts in accordance with law. The power conferred being judicial the absence of an express, precise standard for determination of the question would not render the section unconstitutional. Detention pursuant to an order of remand which appropriately falls within the terms of S. 344 is accordingly not open to challenge in habeas corpus."

Yet again in a later judgment in *Col. Dr. B. Ramachandra Rao v. The State of*

Orissa and others (A.I.R. 1971 S.C. 2197) Dua, J. reiterated a larger principle in the following terms: --

this Court does not, as a general rule, go into such controversies in proceedings for a writ of habeas corpus. Such a writ is not granted where a person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal and we are not satisfied that the present is not such a case We need only add that in case the petitioner is undergoing the sentence of imprisonment imposed on him by competent court then too writ of habeas corpus cannot be granted. This position is well settled."

31. In fairness to Mr. Tara Kant Jha, one must refer to his reliance on the full Bench judgment in Babu Nandan Mallah v. The State (1972 Criminal Law Journal 423 : 1971 PLJR 605). It is the admitted ground that the issue of the maintainability of the writ jurisdiction was not even raised far from being adjudicated upon. Still it may be noticed that therein the majority (Shambhu Prasad Singh, J. contra) took the view that custody in pursuance of an order of remand for a term exceeding 15 days made at a particular time, would, on the expiry of the said 15 days, stand nullified and a writ of habeas corpus may then issue to release the accused person. The said judgment is plainly distinguishable and, as I have already observed, we are not here concerned with the writ of habeas corpus but with an altogether different question, namely, whether a writ of certiorari lies for quashing the judicial orders of a criminal court stricto sensu? Thus the judgment relied upon is of no aid to the petitioner. However, even a close analysis of the judgment would indicate that an order of remand beyond 15 days directly in the teeth of the mandate of the then section 344(1) (a) of the old Code, on expiry of 15 days would exhaust itself and stand nullified with the consequent result that there is, in the eye of law, no order of remand or detention existing. Plainly enough, detention without any order of custody is something Which would almost automatically attract the writ of habeas corpus. Therefore, the judgment in Babu Nandan Mallah's case (supra) is not even remotely a warrant for the proposition that judicial order and judgments of criminal courts under the Code are quash able by certiorari. What has been said above in a way is equally applicable to Ramdeo Mahto v. State of Bihar (1978 Criminal Law Journal 1074) and is thus distinguishable. There is no quarrel with the proposition laid down there that criminal court has no inherent power of remand other than that specified by the Code and that if no provision of law whatsoever authorises such detention then a writ of habeas corpus may issue.

32. It remains to examine the correctness of the view in Baban Lal Yadav & ors v. State of Bihar (supra) which was raised at the very threshold stage of admission, Therein a learned single Judge has taken the view that if the detention of the petitioner is illegal an application for a writ in the nature of a habeas corpus alone would lie and not an application for bail u/s 439 of the Code. It is not easy to subscribe to this somewhat doctrinaire and hyper technical proposition.

Section 439 of the Code clearly lays down that the High Court or a Court of Session may direct that any person accused of an offence and in custody be released on bail. The two conditions in section 439 clearly are that the person must be accused of an offence and should be in custody. In Baban Lal Yadav's case (supra) the Court proceeded on the unwarranted proposition and merely as a dictum that the word "custody" in section 439 must mean meticulously legal and proper custody and, therefore, an application for bail u/s 439 could lie only in such a case and not if there was any infirmity in the custody of the person. I find no adequate reason for this hyper-technical view that despite the fact that an accused may be under arrest and detention by the police, he is nevertheless not to be deemed in custody for the purposes of sections 439. To my mind, the word "custody" in the said section has been used in the larger sense in contradistinction to freedom. Therefore, under the said provision "custody" is in the shape of arrest and detention by the police but whether such custody is *stricto sensu* legal, or otherwise, would always be a most question which may be determined one way or the other by the Court. At the threshold stage the legality or otherwise of custody is a matter of opinion and, indeed, the issue for adjudication by the Court. Therefore, to bar and shut the door of the plain remedy of seeking release by an accused by way of an application for bail on the ground that the custody assailed by him is illegal appears to me as both doctrinaire and pointlessly harsh. The view expressed in Baban Lal Yadav and others v. State of Bihar (1981 BBCJ 171) that if there is any infirmity in the lawfulness of such custody then a bail application is not maintainable, appears to be as warranted neither by principle nor by any other precedent. The assumption that for moving an application for bail, one must allege that the custody, is a legal one is, to my mind, an erroneous assumption. It is open to an accused person seeking to assail the custody as unwarranted by law and on that ground to ask for the relief of being released on his bond or on bail. Indeed, invariably application for bail the challenge to custody may well be raised on one or the other ground including that of innocence, false implication and innumerable other illegalities. The view in Baban Lal Yadav's case (supra), if carried to its logical length, would lead to the absurdity that where a man is in custody and seeks to get his release and is willing to do so on security and bail, he is nevertheless barred from seeking such remedy from the Magistracy or the Court of Session. Indeed, as noticed in the judgment by virtue of the deletion of section 491 of the Code a person alleging illegality of his custody would be barred from all remedies under the Code for procuring bail, but must seek it in the High Court alone, by way of habeas corpus. No such anomalous result is to be easily visualised or countenanced by precedent alone. Bail and challenge to the legality of the custody is not only permissible but proper in either case where such custody may be *stricto sensu* legal or suffering from some infirmity or illegality. Merely because the alleged custody can be labelled as illegal is no reason for jumping to the conclusion that the remedy by way of release on bail and furnishing security should be lost to such a person and he can only come to the High Court by way of habeas corpus. It appears to me that the doctrinaire view in Baban Lal

Yadav's case (supra) is unsound and there is no bar to a person accused of an offence and in custody to seek his remedy either by way of bail or in the somewhat limited jurisdiction of habeas corpus. In *Jageshwar Singh v. State of Bihar* (Cr. Misc. No. 2166 of 1979 -disposed of on 11.7.1979) it has been earlier held that even though the custody may be illegal, the accused person may still be enlarged on bail. Affirming that view, I would overrule what appears to me as an erroneously technical stand in *Baban Lal Yadav's* case (supra).

33. Before parting with this aspect of the case I must notice in fairness to the Learned Counsel for the petitioner that some lament was made by him that barring the remedy of a writ of certiorari against the judicial orders and judgments of the criminal courts may sometimes render an error or mistake as incurable. I am unable to subscribe to this line of approach. The High Court both by the relevant statutory provisions as also by virtue of its inherent power u/s 482 has ample power to prevent any flagrant abuse or failure of the process of law. In a proper case as against the decisions of the subordinate criminal courts the High Court can entertain an appeal by condoning even an inordinate delay. It has then equally wide powers by way of revision under the Criminal Procedure Code. Yet again as regards the High Court's judgments in such matters, appeals against the same are provided in the Constitution itself under Article 134 on certificate and by special leave to appeal under Article 136. The final Court has obviously equal if not more wide ranging powers to correct any abuse or failure of law. Again, apart from the judicial process the Code has not denuded the executive wing also from interfering in a proper case and equally this power is wide-ranging. u/s 430 of the Code the State Government has power to suspend or remit sentence and direct the release of a convict on a wide variety of considerations provided in the said section. Again, there is no dearth of precedent that where courts of law were unable to give adequate relief within the strict four corners of a judicial process, they can make a recommendation to the Executive to exercise the powers vested in it which has invariably been acceded to. Consequently the apprehension of the Learned Counsel for the petitioner that the marginal limitation placed on a writ of certiorari against the judicial process created by an exhaustive statute like the Code of Criminal Procedure and other similar legislation, would result in any grave failure of justice, appears to me as imaginary and hallucinatory..

34. In the light of the foregoing discussions the answer to the question no. (iv) posed at the very outset is rendered in the negative and it is held that the judicial orders of a criminal court *stricto sensu* under the Code of Criminal Procedure are not amenable to quashing by a writ of certiorari.

35. In the light of the above, the stand of the respondent State by way of preliminary objection must also be sustained and it is held that the present writ jurisdiction case seeking primarily the quashing of the judicial orders of the Chief Judicial Magistrate and the learned Sessions Judge (Annexures 4 and 5) is not maintainable. Since all the four significant legal questions posed at the outset

have been answered against the petitioner the writ petition is dismissed both on the ground of maintainability and merits in the alternative.

36. I would, however, take a compassionate notice of the fact the case herein was registered under the relatively minor offences under sections 25 (1) (a) and 26 of the Arms Act way back on the 9th of January, 1986. In view of the significant issues raised and conflict of precedent, the matter had to be referred to a larger Bench the hearing of which was extended owing to the need of hearing eminent Counsel as amicus curie and the otherwise stalling of the work in the Court because of the N.C.E strike. We had, therefore, directed the release of the petitioner already way back on the 2nd of April, 1986 on the petitioner's furnishing a bail bond in the sum of Rs. 5,000/- with one surety of the like amount. We are informed that the said bond has been executed and the petitioner has been released on bail. I find no adequate ground whatsoever to vary that order despite the dismissal of the present writ petition.

37. The same fate of non-maintainability at the threshold must equally meet the connected case--Cr. W.J.C. 46 of 1986 (Bachan Mistry v Shatrughan Singh and others). It suffices to mention that the petitioner herein filed a complaint before the Additional Chief Judicial Magistrate, Jehanabad, under sections 341, 448, 323, 380 and 427 of the Indian Penal Code, who, after taking cognizance and examining the complainant on solemn affirmation, made it over for inquiry to the Judicial Magistrate, 1st Class Jehanabad. Before the Magistrate, three witnesses were examined on behalf of the petitioner and some documentary evidence was also tendered. However, on a consideration of all the materials before him, the learned Magistrate was of the opinion that there was no sufficient ground for proceeding and dismissed the complaint u/s 203 of the Code of Criminal Procedure, after recording detailed reasons therefor, on 24th of May, 1985 (vide annexure 2). Aggrieved thereby, the petitioner then presented a revision petition in the court of the Sessions Judge, Gaya, who, in an equally considered judgment (vide annexure 1), concurred with the trial court and held that the dispute between the parties was of a civil nature and affirmed the order of dismissal by the Magistrate.

38. Aggrieved thereby, the present writ petition was filed and at the threshold stage of admission the respondent State took up the firm stand that no writ would lie for quashing the judicial orders passed under express provisions of the Code of Criminal Procedure by a court of competent jurisdiction. Considering the significance of the issue, the application was directed to be heard by the Full Bench.

39. Learned Counsel for the petitioner, Mr. Nand Kishore Prasad, was fair enough to say that he had nothing further to add on the point of maintainability which has been exhaustively agitated and debated before the Full Bench and has been adjudicated upon in the connected case (Cr. W.J.C. No. 20 of 1986). It is plain that the answer to question no. 4 abovesaid would thus govern the present writ petition as well. Indeed, the present case is even on a weaker footing in so far as

there is not the remotest foot-hold for challenging the jurisdiction of the learned Magistrate below or of the learned Sessions Judge, Gaya, in revision which had been invoked by the petitioner himself on his own showing. The primal prayer is for quashing the said orders. It having been held that the judicial orders of the criminal courts *stricto sensu* under the Code of Criminal Procedure are not amenable to quashing by a writ of certiorari, this petition must necessarily be held as non-maintainable. Consequently, it is dismissed on that ground. However, this would not preclude the petitioner from pursuing any other remedies available to him under the Code of Criminal Procedure before the High Court or thereafter by way of SLP to their Lordships of the Supreme Court against the orders impugned.

40. M P Varma J. --I have had the privilege of going through the well written judgment of my brother Lord Chief Justice, who has taken enough of pains in settling the long pending controversy at rest in clear terms, by formulating issues covering the entire range and in answering them by reference to virtually a plethora of decisions existing till date on the subject.

41. The judgment in that view is technically, legally and substantially sound in all respect, which hardly calls for any profitable addition thereto.

42. While agreeing with the ratio-decidenti of the judgment in entirety, I would like to highlight in absolute terms that a judicial order can in no way be assailed through a writ process, and the remedy to the aggrieved party against any judicial order, is through the forum prescribed for redressal thereof under that Code itself or under enabling provisions meant for the same under Articles 132 to 136 of the Constitution of India. To conceive of thrashing the issues involved in a judicial order through writ is not tenable on the basis of the jurisprudence followed by settled precedents of the highest Court of the land which my lord has elaborately discussed in the paragraph dealing with the question no. 4.

43. Other questions including that of an order of remand of an accused have also been correctly answered with which I am in full agreement on the basis of the golden rule of interpretation, which prohibits enunciation of any law that would create an impossibility in its applicability to different situation arising out of individual set of facts in different cases. With the above observations, I once more reiterate my full agreement with the judgment given by my lord the Chief Justice,

R.N. Prasad, J

I agree.