

(2023) 02 DEL CK 0161

In the Delhi High Court

Case No : Criminal Writ Petition No. 388 Of 2023

Surender Kumar Bansal

APPELLANT

Vs

Directorate Of Enforcement & Anr.

RESPONDENT

Date of Decision : 28-02-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 167, 167(2), 309

Citation : (2023) 02 DEL CK 0161

Hon'ble Judges : Mukta Gupta, J;Sudhir Kumar Jain, J

Bench : Division Bench

Advocate : Dayan Krishnan, Lalit Gupta, Adit Pujari, Sidharth Arora, Anupam S. Sharrma, Harpreet Kalsi, Ripudaman Sharma, Prakarsh Airan, Abhishek Batra, Sanjay Lao, Priyam Agarwal, Abhinav Arya

Final Decision : Dismissed

Judgement

Mukta Gupta, J

1. The present petition has been filed by the petitioner seeking a writ of Habeas Corpus to forthwith release the petitioner from illegal custody in a criminal case pending before the learned Special Judge, P.C.Act-CBI-03, Rouse Avenue District Courts, titled as 'Asstt. Director PMLA Vs. SSK Trading Pvt. Ltd. and Ors.' in ECIR No. 06/DLZO-1/2018 dated 8th May 2018 recorded by the Directorate of Enforcement as also setting aside of the order dated 24th January 2023 passed by the learned Special Judge and the consequent remand of the petitioner herein till 21st February 2023.

2. The brief background resulting in filing of the present writ petition is that the petitioner was arrayed as an accused in the above-noted ECIR and was arrested on 15th November 2022. The petitioner was remanded to judicial custody for 6 days on 16th November 2022 and thereafter, for 6 days till 22nd November 2022, following which, the petitioner was remanded to judicial custody which order of remand was extended by the learned Special Judge from time to time

under Section 167 CrPC. On 13th January 2023, the respondent filed the complaint and the matter was adjourned by the learned Special Judge to 24th January 2023 for consideration on the complaint. On 24th January 2023, learned Special Judge without taking cognizance of the complaint adjourned the proceedings by almost a month i.e. till 21st February 2023 and in the meantime, no remand order was passed. Thus, the petitioner approached this Court by way of the present petition filed on 8th February 2023 which came up before this Court for the first time on 9th February 2023 when notice was accepted on behalf of the Enforcement Directorate as also the State, the respondent No. 2 herein. Vide said order dated 9th February 2023, reply was directed to be filed before the next date with advance copy to the learned counsel for the petitioner and the writ petition was listed for 20th January 2023. When the matter came up before the Court on 20th February 2023, it was transferred to another Bench and was listed before this Bench today. In the meantime, the respondent No. 1 filed its affidavit on 18th February 2023 with advance copy to the petitioner.

3. Mr. Dayan Krishnan, learned Senior Counsel appearing on behalf of the petitioner contends that on the filing of the complaint on 13th January 2023, though the petitioner was not entitled to default bail as the complaint was filed within 60 days, however, since no cognizance was taken by the learned Special Court, the procedure as envisaged under Section 309 CrPC did not commence and the proceedings being still under Section 167 CrPC, the petitioner was required to be remanded to judicial custody for which, an application was also filed by the respondent-Directorate of Enforcement. However, the learned Special Court specifically dismissed the said application as infructuous in view of the complaint having been filed. He states that the custody of an accused cannot be a vacuum and there should be specific order for remand to judicial custody and in the absence thereof, the custody of the petitioner is illegal and thus, he is entitled to be released forthwith.

4. Learned Senior Counsel for the petitioner further points out that after the petitioner filed this petition on 8th February 2023, the learned Special Judge on the request of the Reader and not any of the parties, took up the matter suo-moto on 13th February 2023 and noted that the matter was fixed for consideration on 24th January 2023 from which date, it has been adjourned to 21st February 2023 as the Enforcement Directorate has sought time to file detailed synopsis and complete chart of money trail, however, while adjourning the matter, fixing the date of Rehnumai skipped notice of the Court as well as both the parties. It is stated that this finding of the learned Special Judge is wholly incorrect in view of the order passed on 13th January 2023, whereby, an application of the Enforcement Directorate seeking judicial remand of the petitioner was specifically dismissed by the learned Special Judge as infructuous. He further states that the order dated 13th February 2023 which listed the matter for 14th February 2023 with notice to the learned counsel for the accused and directions to Jail Superintendent to produce the petitioner for Rehnumai on 14th February 2023 and the petitioner being remanded till 17th February 2023 to

be produced through video conferencing on the said date, is without jurisdiction and non-est in law.

5. It is further contended by the learned counsel for the petitioner that in any case, the date of return of the present writ petition being 9th February 2023, on which, no order of Rehnumai had been passed, the petitioner was in illegal custody and thus, entitled to be released. Relying upon the decision of the Three Judges' Bench of the Hon'ble Supreme Court reported as (2013) 3 SCC 77 Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and Another, it is contended that even after the charge sheet or complaint is filed and no cognizance is taken since the stage as contemplated under Section 309 CrPC does not start, the order of remand is required to be passed by the Court concerned. Referring to the decision of the Hon'ble Supreme Court reported as (2022) SCC OnLine SC 153 Serious Fraud Investigation Office Vs. Rahul Modi and Others, it is claimed that from the day the accused is produced before the Magistrate, accused is under the custody of the Court whether by way of a police custody and/or judicial custody and continues to remain in such custody till such time as cognizance is taken by the Court trying offence when the said Court assumes the custody of the accused for the purpose of remand during the trial in terms of Section 309 CrPC and that the continuity of the custody of the accused with the Court during these two stages has to be maintained. Referring to the decision reported as (2019) 17 SCC 326 Pradeep Ram Vs. The State of Jharkhand and Ors. that accused can be remanded under Section 167 CrPC during investigation till cognizance is not taken by the Court, learned counsel states that since no remand order was passed on 13th January 2023 and 24th January 2023, the petitioner is entitled to be released forthwith. Referring to the decision of the Hon'ble Supreme Court in the decision reported as (2013) 1 SCC 314 Manubhai Ratilal Patel Tr.Ushaben vs. State of Gujarat and Ors. it is contended that every order of remand has to be on judicial application of mind. Even in the decision reported as (2021) SCC OnLine SC 382 Gautam Navlakha Vs. National Investigation Agency, it was held that no remand can be said to be granted where remand order was passed mechanically or it suffers from lack of jurisdiction and thus, a writ of Habeas Corpus would lie. Relying on the Constitution Bench decision of the Hon'ble Supreme Court in AIR (1953) SC 277 Ram Narayan Singh Vs. The State of Delhi and Ors., it is contended that an order merely adjourning the case till next date, containing no direction to remand the accused till that date, does not amount to a remand order.

6. Countering the arguments made above, learned counsel for the respondent No. 1 Mr.Anupam S.Sharma, Advocate contends that the arguments now being taken by the learned counsel for the petitioner are not borne out from the writ petition as in the pleadings, the grounds seeking release from illegal detention are, an order of remand having been admitted and passed on 13th January 2023, however, it is claimed that whether remand under Section 167 CrPC or under Section 309 CrPC, the same cannot be permitted beyond a period of over 15 days at stretch and since without taking cognizance, the learned Special

Judge on 13th January 2023 adjourned the matter to 24th January 2023 and thereafter for almost a month i.e. upto 21st February 2023, it is contended that since a judicial order has been challenged, no writ of Habeas Corpus is maintainable. He further contends that be that as it may, if on 13th January 2023 and 24th January 2023, no order of remand was passed before return of the date in the present petition, which would be today since the matter is being heard today, a proper order of remand has been passed by the learned Special Court on 14th February 2023 and hence, the illegality, if any, having been cured, the present petition is liable to be dismissed. Reliance is placed on the decisions reported as AIR 1974 SC 510 Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, Full Bench decision of this Court reported as 1994 Cri.L.J. 1942 Rakesh Kumar Vs. The State and the decision of the Division Bench of this Court in W.P. (Crl.) 824/2020 titled as Aqil Hussain Vs. State of NCT of Delhi & Ors.

7. Refuting the contention of the learned counsel for the respondent that in the petition, the only ground urged for seeking a writ of habeas corpus is that the learned Special Judge granted remand of more than 15 days in one go and not there was no valid remand order, learned Senior Counsel for the petitioner points out to Ground (P) in the petition wherein, it is specifically averred that there was no valid remand order.

8. Before dealing with the contentions raised, it would be appropriate to note the relevant orders dated 13th January 2023, 24th January 2023, 13th February 2023, 14th February 2023 and 17th February 2023 to ascertain, whether an order of remand was passed by the learned Special Judge or not on 13th January 2023 and 24th January 2023 as also whether the subsequent orders of learned Special Judge render this writ petition as infructuous. The said orders noted as under:-

"13.01.2023

Proceedings have been conducted through VC as well as in physical mode.

Fresh complaint filed by ED received on assignment by the order of Ld. District & Sessions Judge, RADC. It be checked and registered.

Present: XXX XXX XXX

It is submitted by the Ld. SPP that he has also filed the relied upon documents today. Ahlmad is directed to check and take the same on record.

An application on behalf of ED seeking 14 days JC remand of accused has been fixed. Heard.

It is submitted by the Ld. SPP for ED that the investigation is going on and thus, it is requested that the accused may be remanded to JC till the next date. However, complaint has already been received today by this Court and thus, the application has become infructuous.

Put up for consideration on 24.01.2023.

Today, an application seeking default bail has been filed on behalf of accused. At this stage, it is submitted by the Ld. Counsel for the accused that he wish to withdraw the said application due to some technical reasons. At request, the present application is hereby dismissed as withdrawn."

"24.01.2023

Proceedings have been conducted through VC as well as in physical mode.

Pr. : XXX XXX XXX

Matter is listed for consideration on the point of cognizance. It is submitted that further investigation is going on. Certain queries have been put to the IO regarding money trail and other relevant aspects of the matter. Ld.Sr.PP submits that he will file the detailed synopsis and complete chart of the money trail as well as the specifications of case property seized in this matter till date. He requests that four weeks time may be given for making further submissions on the point of cognizance.

At request, put up on 21.02.2023 at 12.00 noon for taking cognizance."

"13.02.2023

File has been put up before the undersigned by the Reader of the Court.

Present : XXX XXX XXX

It is submitted by the Reader of the Court that the present matter has been fixed for 21.02.2023 but the date for rehnumai of accused Surender Kumar Bansal has not been fixed.

Keeping in view of the submissions of Reader, order dated 24.01.2023 has been perused. In the present matter, ED had filed the complaint on 13.01.2023 and the matter was fixed for consideration on 24.01.2023. On 24.01.2023, when the matter was fixed for taking cognizance, certain queries were put to the IO regarding money trail and other relevant aspects of the matter and Ld. Sr.PP for ED requested four weeks time for filing detailed synopsis and complete chart of the money trail as well as the specifications of the case property seized in this matter and thus, keeping in view of the submissions made by Ld. Sr.PP for ED, time was granted for filing the written synopsis and the matter was adjourned to 21.02.2023. It seems that while adjourning the matter, fixing the date of rehnumai of accused Surender Kumar Bansal has been skipped of the notice of the Court as well as both the parties.

Perusal of the file also shows that after 24.01.2023, Ld. Counsel for the accused has inspected the case file on three dates i.e. on 27.01.2023, 31.01.2023 and 04.02.2023 but it seems that the factum of fixing the date for rehnumai also skipped of the notice of the Ld. Counsel for the accused and therefore, he also could not bring this fact to the notice of this Court.

Keeping in view of these facts and circumstances, let the notice be issued to the

Jail Superintendent with the directions to produce the accused Surender Kumar Bansal for rehnumai on 14.02.2023.

Perusal of the ordersheet dated 03.01.2023 shows that on an application moved by the Ld. Counsel for accused, accused has been directed to be produced from jail through VC in this matter. Thus, concerned Jail Superintendent is directed to produce the accused through VC on the date fixed i.e. 14.02.2023.

Notice be also issued to the Ld. Sr.PP for ED as well as Ld. Counsel for accused Surender Kumar Bansal through IO as well as whatsapp for the date fixed."

"14.02.2023

The present case file has been placed before the undersigned being Ist Link Special Judge (PC Act) of the Court of Sh. Ajay Gupta, Ld. Special Judge (PC Act), who is stated to be on leave today.

Present : XXX XXX XXX

Today, the matter is listed for extending the rehnumai of accused Surender Kumar Bansal. Ld. Counsel for accused has filed two applications i.e. one application seeking default bail u/s 167(2) Cr.P.C and second application for opposing further rehnumai of the accused. Copies of both the applications supplied to the Ld. Counsel for ED who seeks time to file the reply.

It is stated by the Ld. Counsel for the accused that further extension of rehnumai shall be illegal as no rehnumai was extended to the accused on 24.01.2023. Submissions heard. It is clarified that the rehnumai today has been extended subject to the decision of the second application filed for accused today.

Put up for reply and arguments on both the applications on 17.02.2023.

Accused is remanded till 17.02.2023 and be produced through VC on the said date."

"17.02.2023

The present case file has been placed before the undersigned being 1st Link Special Judge (PC Act) of the court of Sh. Ajay Gupta, Ld. Special Judge (PC Act), who is stated to be on leave today.

Present : XXX XXX XXX

Reply filed by ED to the application of accused S. K. Bansal opposing further proceedings / purported rehnumai /remand. Copy supplied.

Reply also filed by ED to the application of accused S. K. Bansal seeking default bail under Section 167(2) Cr. P. C. Copy supplied.

Part arguments heard on the default bail application.

Some submissions have been made by Ld. Counsel for applicant which are

contrary to the record. I am of the opinion that the default bail application should be heard by the concerned court on date already fixed i.e. on 21.02.2023.

Accused is remanded to JC till 21.02.2023 and be produced through VC on the said date and rehnumai is extended till 21.02.2023. It is clarified that the rehnumai today has been extended subject to the outcome of the application opposing further rehnumai of accused."

9. Learned counsel for the respondent strenuously contended that a remand having been admitted in the petition by petitioner and the only grievance being that it was for more than 15 days at a stretch, it cannot be held that on 13th January 2023 and 24th January 2023, the learned Special Judge did not remand the accused to judicial custody. As noted above, in the order dated 13th January 2023, a fresh complaint filed by the respondent No. 1 was assigned to the Special Court which was checked and registered. However, no cognizance on the said complaint was taken on the said date. Further an application was separately filed by the Enforcement Directorate seeking 14 days' judicial custody remand of the petitioner on which the learned Special Judge noted that since the complaint has already been received on that day by the Court, the said application seeking remand of the accused to judicial custody till the next date has become infructuous. Even on 24th January 2023, when the matter was listed on the point of cognizance, the Court raised certain queries to the Investigating Officer regarding money trail and other relevant aspects and on the request of the learned Sr.P.P. for E.D. that he wants to file a detailed synopsis and complete chart of money trail as well as specifications of the case property seized in the matter till that date, the matter was simply adjourned on the point of cognizance and no cognizance thereon was taken nor any order of remand was passed. Thus, till 9th February 2023 when the present petition came up before this Court and notice was accepted by the respondents seeking time to file reply affidavits(s), no order of remand was passed by the learned Special Judge after 13th January 2023. The finding of the learned Special Judge vide order dated 13th February 2023 that on the file being put up before him on 24th January 2023, while adjourning the matter, fixing the date of Rehnumai of the petitioner skipped notice of the Court as well as both the parties, is totally incorrect.

10. The issue whether an order of remand is required to be passed under Section 167 CrPC even if the accused is not entitled to default bail, when no cognizance is taken despite filing of chargesheet has been considered in Suresh Kumar Bhikamchand Jain (supra). Hon'ble Supreme Court noted that from the provisions of Section 167 CrPC, it would be amply clear that the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that there are adequate grounds for doing so, but no Magistrate is authorized to detain the accused person in custody for a total period exceeding 90 days. The power of remand is vested in the Court at the very initial stage before taking cognizance under Section 167(2) Cr.P.C and once cognizance is taken, power to remand

shifts to the provisions of Section 309 Cr.P.C. It was thus categorically held that in case, on the filing of the charge sheet, cognizance is not taken, the Magistrate may postpone the commencement of, or adjourn, any inquiry or trial, for reasons to be recorded and may by a warrant, remand the accused if in custody for a period of 15 days at a time. Thus, in cases, where though charge sheet is filed, however, sanction is not received, the accused will have no right to bail, however, his remand under Section 167 CrPC will be required to be continued if necessary. In the decisions reported as AIR 1975 SC 1465 Natabar Parida Bisnu Charan Parida Batakrushnaparida Babaji Vs. State of Orissa and (1994) 5 SCC 410 Sanjay Dutt Vs. State Through CBI, Bombay, it was held that before the Court proceeds to the next stage of Section 309 CrPC, the accused has to be remanded in custody of some Court. The two stages i.e. one under Section 167 CrPC and the other under Section 309 CrPC though different but one follows the other so as to maintain a continuity of the custody of the accused with the Court. Thus, it is clear that on 13th January 2023 or even on the adjourned date i.e. 24th January 2023 after the complaint was filed on 13th January 2023, no order of judicial remand was passed against the petitioner.

11. Even in Serious Fraud Investigation Office Vs. Rahul Modi (supra), the Hon'ble Supreme Court emphasized the need of a remand beyond the period of 60 days under Section 167 CrPC when after the charge sheet is filed though no cognizance is taken. It was held that the conclusion of the High Court that the accused cannot be remanded beyond the period of 60 days under Section 167 CrPC and that after remand could only be at the post cognizance stage, is not the correct view in view of the decision rendered in Suresh Kumar Bhikamchand Jain (supra).

12. Though learned counsel for the petitioner had disputed the order dated 14th February 2023 of grant of Rehnumai remand on the file being moved by the Reader after the present petitioner filed the petition before this Court, however, on 14th February 2023, an order of remand has been passed. Thus, it is now required to be seen whether the date of return of the writ petition was 9th February 2023 when notice was accepted in this petition or 20th February 2023 when the matter was listed for the returnable date and filing of the reply affidavit(s).

13. In the decision reported as 1966 AIR 816 A.K.Gopalan Vs. The Government of India, Hon'ble Supreme Court held that while dealing with a petition of Habeas Corpus, the Court has to see whether the detention on the date on which the application is made to the Court is legal if nothing more has intervened between the date of the application and the date of hearing. In Ram Narayan Singh (supra), Hon'ble Supreme Court held that in a 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.

14. It was further held in Rakesh Kumar (supra), Full Bench of this Court held that if up to the date of the hearing of the writ petition, it is shown that the

detention of a particular person is valid presently, mere fact that his detention had been invalid earlier would not entitle such a petitioner to have any redress in Habeas Corpus petition.

15. Though learned counsel for the petitioner has seriously challenged that the learned Special Judge could not have taken up the file suo-moto on the request of the Reader on 13th February 2023. Be that as it may, passing of a remand order is a judicial act and realizing the error committed, the learned Special Judge corrected the mistake and vide order dated 14th February 2023, directed the Rehnumai remand of the petitioner. Thus, even if on the date of filing of the petition, the custody of the petitioner was illegal in the absence of an order of remand, however, before the date of return which was 20th February 2023, when the matter was to be heard, the said defect had been rectified and the custody of the petitioner was no more illegal.

16. There is no dispute to the proposition raised by the learned counsel for the petitioner that an order of remand is a judicial remand and the same cannot be passed on chits of paper. However, in the present case, the learned Special Judge took up the file, issued notice to the parties and thereafter, directed the Rehnumai remand.

17. In view of the discussion aforesaid, we find no ground to issue a writ of Habeas Corpus releasing the petitioner from the custody.

18. Petition is dismissed.

19. Order be uploaded on the website of this Court.

CRLM.A.4505/2023 (Addl. doc by P)

CRL.M.A.4506/2023 (Exemption)

CRL.M.A. 3553/2023 (interim relief)

In view of the orders passed in the writ petition, the applications are disposed of as infructuous.