

Bishwanath Ram Vs. the State of Bihar

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Court : Patna

Decided On : May-03-2000

Judge : Anil Kumar Sinha, J.

Appeal No. : Criminal Miscellaneous No. 4359 of 1999 (R)

Appellant : Bishwanath Ram

Respondent : The State of Bihar

Disposition : Application Allowed

Judgement :

Anil Kumar Sinha, J.

1. Heard the learned Counsel for the petitioner and the A.P.P. for the State.
2. In the instant application, a prayer has been made to release the petitioner, namely, Bishwanath Ram on bail who is in jail custody in connection with Meral P.S. Case No. 32 of 1998, corresponding to G.R. Case No. 271 of 1998, under Sections 121/121A/122/216 of the Indian Penal Code read with Section 17 of the Criminal Law Amendment Act and is in jail custody since 3.5.1998.
3. The admitted position is that the petitioner was arrested in the aforesaid case on 3.5.1998 and the police took up the investigation in the case and submitted charge-sheet against the petitioner under Sections 121/121A/122/124A/384/216 of

the Indian Penal Code along with Section 17 of the Criminal Law Amendment Act, on 3.8.1998, i.e. on the 9th date from the date of first remand of the petitioner. The learned Chief Judicial Magistrate, Garhwa, did not take cognizance of the offences on the basis of the charge-sheet submitted by the police for want of sanction as the offences were covered under Chapter-VI of the Indian Penal Code and the provisions of Section 196 of the Code of Criminal Procedure (hereinafter referred to as the Code)) made it mandatory for the Court to take cognizance of the offences punishable under Chapter-VI of the I.P.C. with the previous sanction of the Central Government or of the State Government as the case may be.

4. A report was called for from the learned Chief Judicial Magistrate, Garhwa, which shows that till 3.4.2000 the cognizance has not been taken by him in the case for want of sanction order of the District Magistrate. The learned Chief Judicial Magistrate, Garhwa, has annexed the certified copy of the order-sheet as called for, from him with his report, which also bears testimony to this effect that he has not taken cognizance in the case for want of the sanction order as envisaged under Section 196 of the Code relating to the offences committed under Chapter-VI of the Indian Penal Code. It may be pointed out that the petitioner moved for his bail before the learned Chief Judicial Magistrate, Garhwa, on the ground that his detention is illegal, but his prayer for bail was rejected on the ground that since the police has submitted the charge-sheet he is not entitled to be released on bail under the provisions of Section 167(2) of the Code. The petitioner moved for his bail before the learned Sessions Judge, Palamau at Daltonganj, which was rejected and he also moved for his bail before this Hon'ble Court in Cr. Misc. No. 7965 of 1998 (R), which was rejected vide order dated 28.10.1998 and in Cri. Misc. No. 2518 of 1999 (R) which was rejected vide order dated 16.4.1999, while disposing of the Cr. Misc. No. 2118 of 1999 (R) on 16.4.1999, a Bench of this Court had observed that the petitioner may approach the Chief Judicial Magistrate, Garhwa and pray for bail. Thereafter, the petitioner again filed a bail petition before the learned Chief Judicial Magistrate, Garhwa, on 12.5.1999 under Section 167(2) of the Code, which was rejected by the learned Chief Judicial Magistrate, on the ground that the petitioner is not entitled for bail under Section 167(2) of the Code because charge-sheet had been submitted by the police within 90 days. Against that order, the petitioner moved for bail before the learned Sessions Judge,

Palamau who also rejected his prayer and consequently, the instant application has been filed.

5. From the above narration of the admitted facts, it is apparent that although the police has submitted charge-sheet against the petitioner under the aforesaid counts, but no cognizance has been taken by the learned Chief Judicial Magistrate, Garhwa, on the basis of that charge-sheet and the petitioner is being remanded to custody.

6. The learned Counsel appearing for the petitioner submitted that since the learned Chief Judicial Magistrate, Garhwa, has not taken cognizance on the basis of the charge-sheet submitted by the police, which is an incomplete charge-sheet within the meaning of Section 163(5) of the Code, he had no authority to remand the accused either under Section 167(2) of the Code or under Section 309(2) of the Code and the learned Chief Judicial Magistrate should have released the petitioner on bail under the provisions of Section 167(2) of the Code. In support of his contention, the learned Counsel for the petitioner has relied upon a decision in the case of Pawan Kumar Jaiswal v. State of Bihar 1999 (1) East Cr. C. 1188 (Pat), in which it has been held that the remand of accused to custody without taking cognizance is not permissible under Section 309(2) of the Code and, accordingly, their Lordships issued direction to release the petitioner on bail, if not needed in any other case. their Lordships discussed the judgment of this Court in the case of S.K. Lal v. Lalu Prasad 1998 1 PLJR 782, as also the case of Ravindra Rai v. State of Bihar 1984 PLJR 701, and were of the view that the case of Ravindra Rai (supra), was not applicable to the facts of the case before their Lordships and by relying upon the decision rendered by a Division Bench of this Court in the case of S.K. Lal v. Lalu Prasad (supra), it was held that the remand of the accused would be illegal and in the teeth of provisions, of Section 309(2) of the Code, where cognizance has not been taken., The learned Counsel also referred to an unreported decision of this Court in the case of Md. Faisal Khan v. The State of Bihar in Cr. W.J.C. No. 166 of 1999 (R), where also it was held that unless cognizance is taken, no remand order can be passed and the petitioner was directed to be released from custody.

7. I have carefully gone through the decision of S.K. Lal's case (supra). In that case, the Special Judge (CBI), Patna, had made a reference to the High Court under Section 395 of the Code for a decision on two questions of law. Those two questions of law were as follows:

(1) whether the proceeding in between filing of charge-sheet and commencement of trial in a warrant case is an inquiry?

(2) whether the under trial can be remanded to custody after submission of charge-sheet even before taking cognizance during such inquiry?

Their Lordships answered the reference after considering the decisions reported in AIR 1983 SC 439 : 1984 Cr.L.J. 1412 : 1984 PLJR 701 : 1978 Cr.L.J. 1074 : (1996) 4 SCC 495 :1996 (1) PLJR 123 and (1972) 1 SCC 564 in the following terms:

(1) After a police report under Section 170 is received by the Special Judge under Section 173 of the Code, he must proceed under Section 190 of the Code and take cognizance, or refuse to take cognizance, having regard to the provisions of Sections 195 to 199 of the Code. If he decides not to take cognizance, no case is instituted before him on a police report. If he decides to take cognizance and the accused appears before him, or is produced before him, the stage of commencement of trial is reached. He must then, as required by Section 238, satisfy himself that the provisions of Section 207 have been complied with. After he is satisfied that Section 207 is complied with, he must proceed to consider the relevant material required to be placed before him and either discharge the accused under Section 239 of the Code or proceed to frame charge under Section 240. After he decides to frame charge, he must . proceed with the trial of the accused in accordance with the relevant provisions of Chapter-XIX of the Code prescribing the procedure for trial of warrant cases by Magistrates.

(2) After a police report under Section 170 of the Code is received by the Special Judge under Section 173 of the Code, no case can be said to be instituted before him on a police report unless he takes cognizance of the offence mentioned in such report. If he is unable to take cognizance under Section 190 of the Code for

any reason whatsoever, or refuses to take cognizance, he will have no authority to remand the accused, if in custody, in view of the clear language of Section 309(2) of the Code, which makes the taking of cognizance, condition precedent for the exercise of power of remand in a pending inquiry or trial

8. In my considered view, the ratio of the decisions in the case of S.K. Lal v. Lalu Prasad as also in the case of Pawan Kumar Jaiswal v. State of Bihar (supra) are fully applicable in the facts and circumstances of the present case, inasmuch as it is admitted position that the learned Chief Judicial Magistrate, Garhwa, did not take cognizance in the case against the petitioner even after the submission of charge-sheet against him for the want of sanction which was mandatory under Section 196 of the Code for taking cognizance of the offences covered under Chapter-VI of the Indian Penal Code, under which charge-sheet was submitted by the police. It is also admitted position that he learned Chief Judicial Magistrate, Garhwa, continued to remand the accused-petitioner without taking cognizance and waited for sanction order for a long period and still the position is same. In my view, the learned Chief Judicial Magistrate, Garhwa, had no authority to remand the accused without taking cognizance because after the submission of the charge-sheet and the period of 90 days already completed and in view of the fact that Section 209 of the Code has no application to the case, the only Section under which remand of the accused petitioner was possible was 309(2) of the Code, but the accused could be remanded under Section 309(2) of the Code only after taking cognizance of the offences in the case which has not been taken by the learned Chief Judicial Magistrate, Garhwa, and as such, the remand of accused-petitioner after completion of 9 days was not only illegal, rather it was under the teeth of Section 309(2) of the Code. It was for this reason that in an unreported decision rendered by this Court in Cr. W.J.C. No. 166 of 1999 (R), to which I was also a party, it was observed that it is well settled principle of law by now that unless cognizance is taken, no remand order can be passed and the petitioner of that case was ordered to be released on bail.

9. For the reasons stated above and in view of the decisions rendered by a Division Bench of this Court in the case of S.K. Lal v. Lalu Prasad (supra) and Pawan Kumar Jaiswal (supra), I hold that the detention of the petitioner in jail

custody is illegal and, therefore, I direct the learned Chief Judicial Magistrate, Garhwa, to release the petitioner on bail forthwith on receipt/production of a copy of this order if not wanted in any other case, in connection with Meral P.S. Case No. 32 of 1998 (G.R. No. 271 of 1998)).

10. In the result, therefore, this application is allowed.

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