

Mahesh Kumar Vs. the State of Bihar and ors.

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Court : Patna

Decided On : Mar-19-2008

Judge : Barin Ghosh and Chandra Mohan Prasad, JJ.

Acts : Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 - Sections 11A; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 57 and 167; [Constitution of India](#) - Article 22 and 22(2)

Appeal No. : Cr. WJC No. 190 of 2008

Appellant : Mahesh Kumar

Respondent : The State of Bihar and ors.

Advocate for Def. : Nivedita Nirvikar and Bindeshwar Sah, Adv.

Advocate for Pet/Ap. : Dilip Kumar Mishra, Adv.

Disposition : Petition allowed

Judgement :

1. In the instant case the writ petitioner was arrested in connection with a criminal case on 19th February, 2008 at 1.30 P.M. As it appears from the counter affidavit filed to the present habeas corpus application filed by the petitioner, an attempt was made to produce the petitioner before the nearest Magistrate on 20th February, 2008. As appears from the counter affidavit it is the contention of the

respondents that due to traffic jam the attempt made to produce the petitioner before the Magistrate on 20th February, 2008 did not succeed. The petitioner was thereupon admittedly produced before the Magistrate on 21st February, 2008 when he was remanded.

2. From the aforesaid facts it is crystal clear that despite efforts made with good intentions, the petitioner due to unfortunate traffic jam could not be produced before the Magistrate within 24 hours from the time of his arrest. In the instant writ petition the petitioner is contending that continuation of such arrest being contrary to law, the same is per se illegal and a remand order passed thereon is also not sustainable and, accordingly, upon declaring the same to be as such, this Court shall pass a direction for releasing the petitioner.

3. The learned Counsel for the State submitted that from the undisputed facts it would emerge that honest and sincere efforts had been made to produce the petitioner within 24 hours of his arrest before the nearest Magistrate but because of the unfortunate traffic jam he could not be produced before the Magistrate within 24 hours of his arrest when the Magistrate was in seisin of his Court and, admittedly, the petitioner was produced before the Magistrate on the next date as early as possible. It was submitted that there being no deliberate violation of the provisions of Section 57 of the Criminal Procedure Code, it cannot be held that the arrest became illegal for non production of the petitioner before a Magistrate within 24 hours from the time of his arrest.

4. Section 57 of the Criminal Procedure Code, 1973 is as follows:

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

A reading of Section 57 of the Code would amply demonstrate that the same contains a negative covenant. The learned Counsel for the State submitted that

despite the negative covenant contained therein, the word 'shall' used in the Section should be read as 'may'. For the proposition that the word 'shall' used in a statute in certain cases may be treated as 'may', the learned Counsel for the State cited a judgment of the Hon'ble Supreme Court rendered in the case of Ganesh Prasad Sah Kesari v. Laxmi Narayan reported in : [1985]3SCR825 .

5. In the case of Ganesh Prasad Sah Kesari (supra), the Hon'ble Supreme Court was considering the provisions contained in Section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 which authorized the Court to strike off the defense of a tenant upon his failure to deposit arrears of rent within 15 days of the date of the order directing deposit of such rent. The statute used the word 'shall' and the same was read as 'may' principally on the ground that when the Court is competent to direct deposit of rent, it has power to extend the time to deposit the same and the statute did not contain anything to take away of such power of the Court and, therefore, the word 'shall' used in the statute should be read as 'may'.

6. The provisions contained in Section 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, as was considered in the case of Ganesh Prasad Sah Kesari (supra), did not contain any negative covenant. It is well settled in law that a statute containing a negative covenant is always mandatory.

7. Furthermore, the provisions of Section 57 of the Code of Criminal Procedure, 1973 facilitates implementation of the directions contained in Sub-article (2) of Article 22 of the Constitution, which is as follows:

22. (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 court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

The right which has been granted by Sub-article (2) of Article 22 of the [Constitution of India](#) is a fundamental right of a citizen. Sub-article (2) of Article 22 of the Constitution has not granted any time under any circumstances beyond the

time mentioned therein for production of a person arrested and detained in custody.

8. That being the position, despite honest efforts made by a Police Officer arresting a person, if he can not produce the arrested person before a Magistrate within the time as mentioned in Sub-article (2) of Article 22 of the [Constitution of India](#), the detention of the person in police custody beyond the time mentioned in Sub-article (2) of Article 22 of the [Constitution of India](#), as repeated in Section 57 of the Code of Criminal Procedure, 1973, becomes illegal, being violative of fundamental right of a citizen.

9. The question is when by a remand order issued under Section 167 of the Code of Criminal Procedure, 1973, the detention or arrest of a citizen beyond the permissible limit prescribed by Sub-article (2) of Article 22 of the Constitution is extended, what is the effect thereof?

A Division Bench of this Court in the case of Sri Arbind Kumar v. The State of Bihar and Ors. reported in 2005 (1) PLJR 117 has held that such an order of remand is also vitiated.

10. In the circumstances the petitioner as of now detained by the police illegally be set at liberty forthwith. The habeas corpus petition thus succeeds. Let the order be communicated through FAX at the cost of the petitioner.

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