Kedar Vs. State

Kedar Vs. State

SooperKanoon Citation : sooperkanoon.com/468702

Court : Allahabad

Decided On : Feb-22-1977

Reported in : 1977CriLJ1230

Judge : J.M.L. Sinha, J.

Appellant : Kedar

Respondent : State

Judgement :
ORDER

J.M.L. Sinha, J.

1. This is an application for bail Under Section 439 of the Code of Criminal Procedure.

2. Sri Virendra Saran, who has argued this bail application, has not said anything touching the merits of the case in order to canvass for bail. His argument was that the detention of the applicant has all along been unlawful and consequently, the applicant should be released on bail. In order to appreciate the contention raised by Sri Virendra Saran, it will be necessary to mention a few dates.

3. The applicant surrendered himself in the court of the Munsif Magistrate, Budaun on 10th of January, 1976. The Magistrate took him into custody and sent him to

jail. On 24th of January, 1976, the investigating officer applied for, and was granted, fourteen days remand. On 6-2-1976 the investigating officer obtained a further remand of fourteen days. A charge-sheet was submitted on 20th of February, 1976, and on 7th of April, 1976, the applicant was committed to the Court of Session. Sometime during the pendency of the case in the court of the First Additional Sessions Judge, Budaun, the applicant was released on parole. On the expiry of the period of parole, he surrendered himself in the Court of the Additional Sessions Judge on 9th of October, 1976, on which date he was remanded to jail custody by a warrant signed by the Additional Sessions Judge.

4. Now, the contention raised by Sri Virendra Saran is :

(i) that the custody of the applicant at no stage was lawful, and

(ii) that even if any valid order remanding the applicant to custody at some later stage was passed, that would not render the custody of the applicant lawful unless the applicant was in lawful custody on the date on which the subsequent order was passed.

5. As already indicated earlier, the applicant had not been arrested by the police. He surrendered in the Court of the Munsif Magistrate by himself on 10th of January, 1976 and the Magistrate remanded him to jail custody. The order passed by the Magistrate on 10th of January, 1976 remanding him to jail custody could not. be an order Under Section 167, Cr. P. C. because Section 167 applies only when a person is arrested and detained in custody by the police. No other provision of law could be cited under which the Magistrate could remand the applicant to jail custody on 10th of January, 1976. It was for the first time on 24th of January, 1976, that the police asked for a remand and the Magistrate granted the same for a period of fourteen days. This remand order could as well not be an order Under Section 167 of the Code of Criminal Procedure, for, on 24th of January, 1976, when the police applied for remand, the applicant was not in police custody. The point whether such a remand could fall Under Section 167, Cr. P. C. came in for consideration in the case of Hari Bansh Sahai v. State Government of U. P. (Habeas Corpus Writ Petition No 10652 of 1975, decided by Hon'ble H. N. Seth and G. D. Srivastava, JJ. on 15-12-1975) (All) and it was observed :

Now, as regards the subsequent production of the petitioner, the difficulty is that at the time of his subsequent production, the petitioner was not in police custody. On the contrary, he had been brought from jail. A plain reading of the opening words of Sub-section (i) will indicate that this sub-section comes into play only when a person has been arrested and is detained in police custody. It cannot apply to a case where the person is already confined in jail.

It is, therefore, obvious that the order dated 24th January, 1971 passed by the Magistrate at the instance of the investigation officer remanding the applicant to custody was not a valid order.

6. According to the supplementary counter-affidavit filed today, the applicant was further granted a remand for fourteen days on 6th of February, 1976. For the same reason for which the order dated 24th January, 1976 was not a valid order, I hold that the order dated 6th February, 1976 sanctioning remand of the applicant to jail custody for fourteen days, was too not a valid order. The resuit is that the custody of the applicant under the remand orders dated 24th January 1976 and 6th February, 1976 was not a valid custody.

7. On the last date when the case came up for hearing, I called upon the learned Counsel for the State to inform the Court whether any order had been passed Under Section 209 of the Code of Criminal Procedure remanding the applicant to custody while committing the case to the Court of Session, I called for this information because I was of the view that, if a valid order Under Section 209 was passed by the Magistrate remanding the applicant to jail custody, the fact that the previous orders were invalid would have no bearing and the applicant cannot be granted bail on account of his previous detention being unlawful. Sri Goswami, who has appeared on behalf of the State, however, conceded before me that there was no order remanding the applicant to jail custody on 7-4-1076 when the applicant was committed to the Court of Session. Sri Goswami, however, urged that some time during the pendency of the case in the court of the Additional Sessions Judge the applicant was granted parole and on the expiry of the period of parole, the applicant surrendered himself (on 9-10-1976) and was then remanded to jail custody under a warrant issued by the Sessions Judge. It was

stressed by Sri Goswami that, regardless of the fact whether the detention prior to 9-10-1976 was valid or invalid, the detention subsequent to 9-10-1976 can, by no means, be held to be invalid. It was pointed out by Sri Goswami that this application having been presented on 24th November, 1976. the detention of the applicant on that date was not invalid and. consequently, the applicant cannot be granted the relief asked for in the present application. I have given my careful thought to the argument raised, but I am unable to accept the same.

8. As already stated, earlier, the applicant was not in valid custody when he was awaiting commitment in the court of the Magistrate. His custody continued to be invalid even after the commitment of the case to the Court of Session, because no order Under Section 209 of the Code of Criminal Procedure was passed. A person continues to be in custody even if he is granted bail. It would, therefore, follow that he was not in valid custody till 9th of October, 1976, on which date he surrendered himself in the court on the expiry of the period of parole. It is true that on 9th of October, 1976, the Additional Sessions Judge passed an order remanding him to jail custody. According to Sri Goswami, this is an order Under Section 309(2) of the Code of Criminal Procedure. There are, however, two difficulties in my accepting the argument raised by Sri Goswami.

(i) In the case of Hari Prasad Dutaey Tyagi v. District Magistrate, Farrukhahad 1976 All LJ 62 (at p. 65) a Division Bench of this Court held :

The custody contemplated by Section 309(2), must, in the circumstances, mean legal custody. The power Under Section 309(2) Cr.P.C. to remand an under-trial in custody cannot be exercised if at the time of making of the order the under-trial is not in legal custody.

The same view was reiterated by this Court again in Habeas Corpus Writ Petition No. 10652 of 1975 decided on 15-12-1975 (All). It will be of use to quote the following observation contained in that judgment.

So far as various remands, which may have been granted by the trying Magistrate Under Section 309, Cr. P. C. are concerned, a Division Bench of this Court has already decided that a valid remand can be granted by the Magistrate under this

decision if the accused is in legal custody.

Now, since the custody of the applicant in the instant case was not a valid custody till 9th of October, 1976, when the applicant surrendered himself on the expiry of the period of parole and was remanded to the jail custoty by the Additional Sessions Judge, the order passed by the learned Sessions Judge, even if it fell within the four corners of Section 309(2) of the Code of Criminal Procedure, could not legalise the custody of the applicant, (ii) What is, however, further material is that the order passed by the learned Additional Sessions Judge on 9th of October, 1976 itself does not appear to be a valid order. According to Sri Goswami, that order was passed by the learned Additional Sessions Judge'Under Section 309(2) of the Code of Criminal Procedure. Indeed there can be no other section which such an order could at all be passed. Sub-section (2) of Section 309, Cr. P. C. reads as follows :

If the Court, after taking cognizance of an offence of 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.' A perusal of the above would show that a sessions court can remand an accused to custody only if it has taken cognisance of the offence or if the trial has commenced, Now, neither in the counter affidavit nor in the supplementary counter affidavit there is any averment to the effect that the learned Additional Sessions Judge had taken cognizance ; of the case before 9th of October, 1976 on which date he passed the order remanding the applicant to jail custody. The learned Additional Sessions Judge, therefore did not have any jurisdiction under Sub-section (2) of Section 309 to remand the accused to jail custody.

9. Sri Goswami tried to urge that the mere fact that the sessions case was transferred to the file of the Additional Sessions Judge should be sufficient to hold that the learned Sessions Judge had taken cognizance of the case. I regret my inability to accept this argument. A court takes cognizance of an offence when it applies its mind to the facts of the case. Mere transfer of case file from the court of

the Sessions Judge to the file of the Additional Sessions Judge is, by no means evidence of the fact that the Sessions Judge applied his mind to the facts of the case and took cognizance of the case, The argument raised by Sri Goswami in that regard cannot therefore, be accepted.

10. The result, therefore, is that till today the applicant is not in valid custody.

11. The question that next arises for consideration is whether the applicant can ask for bail on the ground of his detention being invalid and contrary to law, In fact it was urged by Sri Goswami that the proper remedy for the applicant in that case is to move a petition of habeas corpus, Sri Virendra Saran, however, referred me to the case of Lakshmi Brahman v. State 1976 All. L. J. 65 : 1976 Cri. L. J. 118 decided by a Division Bench this Court. In that case bail was granted by this Court to the accused after recording a conclusion to the effect that the custody of the applicant was not lawful. In view of the decision of this Court in the case of Lakshmi Brahman v. State (supra) I think that the applicant can ask for bail on the ground that he is not in lawful custody.

12. It is accordingly directed that the applicant shall be released on bail on his furnishing personal and surety bonds to the satisfaction of the Chief Judicial Magistrate, Budaun.