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Court : Allahabad

Decided On : Apr-28-1992

Reported in : 1993CriLJ1814

Judge : Palok Basu and ;U.K. Varma, JJ.

Acts : Customs Act - Sections 104, 111 and 135; Foreign Exchange Regulations Act - Sections 13; Conservation of Foreign Exchange and Prevention of Smuggling Activities Act - Sections 3; Code of Criminal Procedure (CrPC) , 1974 - Sections 167, 167(1) and 167(2); [Constitution of India](#) - Article 226

Appeal No. : Habeas Corpus Petition No. 7642 of 1992

Appellant : Anil Kumar

Respondent : Superintendent, Central Jail and ors.

Advocate for Def. : Shivaji Misra, A.G.A.

Advocate for Pet/Ap. : D.S. Misra, Adv.

Disposition : Petition dismissed

Judgement :

Palok Basu, J.

1. Anil Kumar has filed the present Habeas Corpus petition under Article 226 of the [Constitution of India](#) praying that the detention of the petitioner in case No. Nil of 1990 under Sections 104/111 and 135 of the Customs Act and Section 13 of the Foreign Exchange Regulations Act pending in the court of the special Chief Judicial Magistrate, Allahabad, be declared illegal and the petitioner be set at liberty forthwith.

2. Along with this habeas corpus petition, Habeas Corpus Petition No. 7642 of 1992 between the same parties which Anil Kumar had preferred challenging his detention under the COFEPOSA was also heard. In that petition the petitioner's release was directed on the short technical ground that only about 2 weeks remained in the period of detention and, therefore, the merits of the matter were not gone into.

3. It may only be relevant to state here that the petitioner was arrested on 6-11-1990 at 5-30 hrs. with contraband gold in his possession in Behraich. Since cases under the Customs Act are triable at Allahabad by special C.J.M. he was lawfully produced before him.

4. Sri D. S. Misra, learned counsel for the petitioner and Sri Shivaji Misra, learned A.G.A. for the State have been heard and the entire material has been examined. Affidavits were exchanged at the admission stage in both the petitions and just as the earlier one, this petition is also decided finally at the admission stage.

5. The undisputed facts are as follows:--

23-11-1990:

The petitioner was produced before the Special C.J.M. Allahabad who granted remand till 1-12-1990 under the aforesaid sections under which the case was registered.

18-4-1991 :

The petitioner Anil Kumar was directed to be released on bail by the special C.J.M., Allahabad.

29-4-1991 :

The State of Uttar Pradesh has passed the order under Section 3 of the COFEPOSA.

1-5-1991:

The order of COFEPOSA was served on the petitioner in Naini Central Jail, Allahabad.

27-5-1991:

The magistrate noted in the order sheet that the petitioner had been granted bail but had not till then furnished the bail bonds. Hence, he directed the accused to be produced on 10-6-1991.

9-5-1991 :

The magistrate wrote a letter to the Superintendent, Naini Central Jail that since in the meantime the State Government has directed transfer of the petitioner to Bareilly Jail permission to give effect to the said transfer of the detenu is granted subject to the condition that the petitioner will not be released after the completion of the COFEPOSA period, without prior orders of the court of the said CJM and shall have to be produced in his court.

31-5-1991:

The petitioner was transferred from Naini Central Jail Allahabad to Central Jail, Bareilly.

Sri D. S. Misra, learned counsel for the petitioner argued that from 27-5-1991 till the present date there is no order of remand and, therefore, the detention of the petitioner in that case without a valid order of remand is illegal and thus the petitioner should be set at liberty. His alternative argument was that since Section 167, Cr. P.C. would not be attracted in terms, therefore, there could be no remand order and the direction contained in the letter dated 9-5-1991, referred to above, cannot be given effect to and further, the initial order of remand dated 23-11-1990

being illegal, had continued to remain illegal till this date and, therefore, merits the petitioner's release forthwith.

6. To start with, the second point may be disposed of first. It is not disputed that the petitioner's production had to be made before a magistrate having jurisdiction within the specified time permissible under the law. Consequently, it has to be held that the petitioner was to be produced before the Special Chief Judicial Magistrate, Allahabad. A combined reading of Sub-sections (1) and (2) of Section 167, Cr. P.C. makes it abundantly clear that any person arrested has to be produced under either of the two sub-sections before a magistrate. It may be noted that where investigation is to follow the arrest Sub-section (1) of Section 167, Cr. P.C. may apply and the provisions contained in Sub-section (2) may be attracted to other cases of arrests where investigation does not proceed in accordance with Section 167(1) of the Cr. P.C. This being the legal position, the magistrate was duty-bound to pass orders under Sub-section (2) of Section 167, Cr. P.C. in the case of the petitioner. Therefore, the argument of the learned counsel for the petitioner that the provisions of Section 167, Cr. P.C. was not to be attracted to the facts of the present case is not sustainable and is rejected.

7. Coming to the first point that there was no valid order of remand beginning with 27-5-1991. It may be said that the said argument is also devoid of any merit. From the facts noted above, it is apparent that the magistrate had directed by his order dated 27-5-1991 that in spite of the fact that the petitioner has been granted bail he has not filed his bail bonds. Consequently, he directed that the accused should be produced before him on 10-6-1991. It is already noted above that the petitioner stood transferred from the Naini Central Jail on 31-5-1991 to Central Jail, Bareilly. It is, therefore, apparent that the magistrate at Allahabad ceased to have territorial jurisdiction on the petitioner with effect from 31-5-1991.

8. It must be said to the credit of the magistrate that in spite of the fact that the petitioner was being transferred to outside his jurisdiction that he had issued the letter dated 9-5-1991, referred to above.

9. On behalf of the petitioner reliance was placed on the unreported decision dated 2-12-1988 passed in habeas corpus writ petition No. 8350 of 1988 of Hon. Saghir

Ahmad and Hon. Virendra Kumar. JJ on the Lucknow Bench of this Court. In one of the paragraph it was observed by the Division Bench that on the facts and circumstances of that case remand could be granted to Amarnath, the petitioner even when he had gone outside the territorial jurisdiction of the special C.J.M. Allahabad and it was emphasised that specific order of remand should have been passed by the Special C.J.M. On these reasonings, the continued detention of Amarnath was held to be illegal.

10. The aforesaid ruling is not attracted to the facts of the present case for, it has been noted above, that the magistrate had, by his order dated 27-5-1991 directed that the petitioner should be produced before him on 10-6-1991 but before that date could come the petitioner stood transferred to the District Jail Bareilly on 31-5-1991 and detained there under Section 3 of the COFEPOSA. It is obvious, therefore, that the magistrate had granted remand to the petitioner till 10-6-1991 and by his letter dated 9-5-1991 he has directed production of the petitioner before his court as soon as he is released from detention under the orders passed in COFEPOSA. The facts of the present case, therefore, do not attract observations made in the aforesaid judgment of the Lucknow Bench.

11. There is another aspect to be looked into. It was said that the magistrate was required to pass a specific order of remand indicating definitely that the petitioner was being remanded and since the order dated 27-5-1991 does not indicate such expressions it cannot be held to be an order of remand, This argument is to be rejected for two reasons. Firstly, the purpose of remanding an accused for a limited number of days is requiring his production before the magistrate at the completion of those number of days. Since the magistrate by the order dated 27-5-1991 required production of the petitioner on 10-6-1991 before him it is nothing but an order of remand requiring physical presence of the petitioner before the court of the magistrate on that particular date i.e. 10-6-1991. Secondly, the petitioner was already granted bail. He had not submitted his bail bonds. This fact was noted in the order dated 27-5-91. In this connection it may be noted that Explanation-I added to proviso to Sub-section (2) of Section 167 Cr. P.C. says that for the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long

as he does not furnish bail'. Therefore, by the aforesaid Explanation a legal fiction is created by which authorisation of detention until the furnishing of the bail by the order of the magistrate would be valid and legal. In consideration of this view the three cases cited by the learned counsel for the petitioner, namely, Tej Bahadur v. State, 1977 ACC 273 : (1977 Cri LJ (NOC) 90), Muzaffar Husain v. Superintendent, 1981 Luck LJ 78 and Sukhdeo Singh v. Superintendent, 1984 UP Cri R 233 have no application to the facts of the present case. Similarly the two other cases cited by the petitioner's counsel i.e. Raghuvendra Singh v. State, 1983 ALJ 611 and Raj Narain v. State, AIR 1971 SC 178 : (1971 Cri LJ 244) have no relevance to the facts of the present case.

It may be observed that in the instant case the orders of the Special C.J.M. passed on 27-5-1991 and the directions contained in the letter dated 9-5-1991 fully justify the continuance of the detention of the petitioner and it cannot be interpreted as an absence of a valid remand justifying the detention of the petitioner.

In view of the aforesaid discussion there is no merit in this petition. It is accordingly dismissed.

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