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Court : Allahabad

Decided On : Jul-25-1977

Reported in : 1977CriLJ1783

Judge : V.N. Varma, J.

Appellant : Ram Chandra

Respondent : State of Uttar Pradesh

Judgement :
ORDER

V.N. Varma, J.

1.This is an application for bail Under Section 439 of the Cr. P. C., filed by one Ram Chandra.

2. The learned Counsel for the applicant has not argued this application for bail on merits. The main burden of his argument is that the detention of the applicant has all along been unlawful and as such he is entitled to bail.

3. The applicant surrendered himself in the Court of a magistrate at Basti. The Magistrate took him into custody and sent him to jail. The contention of the learned Counsel for the applicant is that the custody of the applicant was not lawful at any stage and so he should be released on bail. In this connection he drew my

attention to the ruling reported in Kedar v. State 1977 All WC 205 : 1977 Cri LJ 1230. In this case also the accused had surrendered in the Court of a magistrate and the Magistrate had remanded him to jail custody. It was held in that case that the order passed by the Magistrate remanding the accused to jail custody could not be an order Under Section 167 Cr. P. C., because Section 167 Cr. P. C. applies only when a person is arrested and detained in custody by the police, and as such the order of the Magistrate remanding the accused to jail custody was illegal and not in accordance with law.

4. The learned Counsel for the State assailed the correctness of the ratio laid down in Kedar's case. 1977 Cri LJ 1230 (All) (supra) and contended that even though the applicant had surrendered in the Court of the Magistrate, the Magistrate had full power to arrest him and to remand him to jail custody.

5. In the circumstances, therefore, the first question that calls for answer is whether or not the Magistrate was legally competent to arrest the applicant.

6. The learned Counsel for the applicant contended that there is only one provision in the Code of Criminal Procedure under which a Magistrate himself can arrest an accused. That provision is contained in Section 44 of the Code of Criminal Procedure. Under Section 44(1) a magistrate can arrest a person if any offence is committed in his presence. Under Section 44(2) also he can arrest a person for whose arrest he is competent to issue a warrant. But for Section 44 there is no other provision in the Code under which a magistrate himself can arrest an offender. It is averred that such being the position of law the Magistrate had no power to arrest the applicant and remand him to jail custody when he surrendered himself before him.

7. It is true that but for Section 44 there is no other provision in the Code of Criminal Procedure authorizing a magistrate to arrest a person who has committed an offence in his presence or a person suspected of having committed an offence Still I do not think that anybody can dispute that the Magistrate has no power to arrest a (person suspected of having committed an offence. In L. Ramnarain Singh v. A. Sen : AIR1958 All758 a Division Bench of our High Court has observed that it will be anomalous that a police officer should have the power to arrest a person

reasonably suspected of having committed a cognizable offence but the Magistrate should have no such power. The learned Judges considered Section 54 of the old Code and came to the conclusion that a magistrate has also power to arrest a person suspected of having committed an offence. In Velu Vishwanathan v. State 1971 Cri LJ 725 (Ker) a Division Bench of Kerala High Court has also taken the same view. Therefore, as it is, it is clear that a magistrate has got full power to arrest a person suspected of having committed an offence. In the instant case, therefore, the Magistrate was legally competent to arrest the applicant when he surrendered before him. And if he was competent to arrest him, then, according to the learned, counsel for the State, he can also by implication remand him to custody.

8. The learned Counsel for the applicant contended that even if it be taken that the Magistrate has power to arrest a person suspected of having committed an offence, he cannot remand him to jail custody. In this connection he drew my attention to the relevant provisions of the old (Section 344) and the new (Section 309) Code, Under Section 344 a magistrate certainly had power to remand an accused to custody, but the position Under Section 309 is, however, different. Under Section 309 a magistrate can remand an accused to custody only after he has taken cognizance of the offence committed by him. In the instant case the Magistrate had not taken cognizance of the offence committed by the applicant at the time when the latter surrendered before him. In view of this it was argued that it was not open to the Magistrate to remand the applicant to custody. The learned Counsel for the State, on the other hand, contended that even though the Magistrate had not taken cognizance of the case, it was still open to him to remand the applicant to custody, and his order remanding the applicant to custody should be deemed to be an order having been passed Under Section 167 Cr. P. C. In other words, his contention is that the scope of Section 167 is not as narrow as it has been held to be in the case of Kedar (supra). In support of this contention he drew my attention to certain provisions of the new Code. The first provision referred to by him was Section 44(2). It reads as follows :

Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for Whose arrest

he is competent at the time and in the circumstances to issue a warrant.

9. Now the question posed is what would the Magistrate do after getting a person arrested under the aforesaid section. According to the learned Counsel for the State, if the Magistrate has no power to send to jail then the provision would be redundant and will not promote the object for which it has been legislated. In this connection he drew my attention to certain observations made in Broom's 'Legal Maxims' and Maxwell's 'Interpretation of Statutes'. In Broom's 'Legal Maxims', 9th Edition at page 311, it is observed :

When the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command : quando aliquid mandatur at omne per quod pervenitur ad illud.

10. Likewise in Maxwell's 'Interprtation of Statutes, llth Edition at page 350, it is observed :

Where an Act confers a jurisdiction, it impliedly also grants the power of do ing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdictio data est, eaquoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.

11. On the strengh of these observations, the learned Counsel contended that when a statute gives a magistrate jurisdiction over an offence, it impliedly gives him power not only to apprehend forthwith any person charged with such offence but also to send him to jail. Therefore, in view of this, the Magistrate must be deemed to be possessing full power to send a person to jail after he has been arrested Under Section 44(2) Cr. P. C. I am afraid I cannot persuade myself to agree with this contention of the learned Counsel. The well-established rule of interpretation is that the words of statute must prima facie be given their ordinary meaning. In other words, meaning and intention of a statute must be collected from the plain and unambiguous expression used therein. The words of Section 44(2) are very plain and admit of no ambiguity. Under this section a magistrate has power to get a person' arrested in certain circumstances but he has no power to commit him to custody. To say that power must be deemed to be existing by

implication is not correct. On the face of it, the framers of the Code never intended to give that power to the Magistrate. Section 44 consists of two els. (1) and (2), In Sub-clause (I), the Magistrate has been given power to commit a person after he has been arrested to custody. In Sub-clause (2) the power to commit the offender to custody is not there. The omission of the power to commit the offender to custody is not accidental but deliberate. In the old Code also, the Magistrate had no such power. Section 65 of the old Code is equivalent to Section 44(2) of the new Code. Under Section 65 also, the Magistrate was not given any power to commit the offender to custody. That being so, it cannot be said that the omission to give power to the Magistrate to give the offender to custody was just accidental. If it would have been an accidental mistake, that mistake would not have been carried forward in the new Code.

12. The reason why Under Section 44(1) the Magistrate has been given power to commit the offender to custody, and not Under Section 44(2), is not far to seek. Under Section 44(1) the offence is committed before the magistrate himself. He is sure about the guilt of the person committing the offence and, therefore, he has been given the power to commit him to custody. Under Section 44(2) the position is different ; the offence has not been committed in his presence and he is not sure whether the person brought before him under arrest has really committed offence or not. It is obviously because of this reason that he has not been given the power to commit the offender to custody. He cart just arrest him or get him arrested and possibly can even search his person to find out whether he is possessed of any incriminating article or not. Beyond this he is not permitted to do anything else.

13. The learned Counsel for the State next submitted that the provisions of Section 42(2) should not be read in isolation from the provisions of Section 44(1) and by putting a harmonious construction on them the Court should hold that Under Section 44(2) the Magistrate should be taken to be possessed of the power to commit the offender to custody. I am afraid I cannot persuade myself to accept this submission of the learned Counsel. The question of harmonious construction can arise, only in those cases where the words used in different clauses of an enactment are incoherent and carry different meanings. Those words are then harmonized in such a manner that they may project the object for which the

enactment was made. In the instant case, there is no conflict in the meaning of the words used in the provisions of Sections 44(1) and 44(2). Under Section 44(2), as stated above, the legislature has deliberately taken away the power of the Magistrate to commit the offender to custody. The provisions of Section 44(1) and 44(2) were made for different situations and they cannot be said to be in conflict with each other. Therefore, after seeing everything as a whole, I have no doubt in my mind that Under Section 44(2) the Magistrate has no power to commit an offender to custody.

14. The next provision to which my attention was invited was Section 88 Cr.P.C. This section deals with the power of a magistrate to take bond for appearance of a person. It says that if that person is present in the Court of a magistrate who has power to issue a summons or warrant for his arrest, he can require that person to execute a bond with or without surety for his appearance in his court or in any court to which the case would be transferred for trial. Again the question posed is what would the Magistrate do if the person concerned refused to execute a bond for his appearance incourt. According to the learned Counsel for the State even though there is no provision for the Magistrate to arrest the person on his failure to execute the required bond, the Magistrate would be deemed to be possessed of power to remand him to custody. In support of this ; contention, the learned Counsel drew ray attention to the ruling reported in Vasu. Deo v. State of Uttar Pradesh : AIR1958 All578 . In the aforesaid case, certain persons were arrested by the police Under Section 151 Cr. P. C. and were produced before a Magistrate who drew up an order purporting to be Under Section 112 Cr. P. C. He then called upon those persons to furnish security for their appearance at the next date fixed for enquiry. They failed to furnish the required security whereupon the Magistrate committed them to jail custody. It was contended that Section 91 did not make any express provision for the arrest of the person upon his refusal to furnish a bond asked for from him and as such the order of the Magistrate remanding the persons concerned to jail was illegal. The learned Judges held that it was true that Under Section 91, no express provision existed for sending a person to jail on his refusal to furnish a bond required from him. That power must be deemed to be existing by necessary implication as otherwise the very power to ask security for appearance and even the purpose for which this , power is conferred will be entirely defeated.

This ruling does go to support the learned Counsel for the State but I do not think that it continues to be good law as it runs counter to the Supreme Court ruling reported in Natabar Parida v. State of Orissa : AIR 1975 SC1465 . In this ruling, it has been clearly laid down that no court has inherent power of remanding an accused to custody unless the power is conferred by law.

15. The learned Counsel for the State contended that when a Magistrate commits a person to custody in the absence of any express provision of law to that effect, he does so not on the strength of his inherent power but on the strength of ancillary power, a power to do a thing for which there is no express provision provided under law. This contention at the learned Counsel to my mind is bereft of substance. In essence there is no difference between inherent power and ancillary power. They connote the same thing couched in different words. Therefore, in view of the Supreme Court ruling referred to above, there can be no question of a Magistrate having power by necessary implication to remand a person to custody. The Magistrate can remand a person to custody only when he has express power to do so. No Magistrate can create jurisdiction in himself to do a thing which the law does not permit him to do. Therefore, as the law exists no Magistrate has power to commit a person to custody in the event of his refusing to execute a bond as contemplated by Section 83 Cr. P. C.

16. Lastly, the learned - counsel for the State drew my attention to the provisions of Section 437 Cr. P. C. According to this section, if any person accused of or suspected of the commission of any non-bailable offence appears before a Court, he may be released on bail but not in those cases where reasonable grounds exist for believing that he has been guilty of an offence punishable with death or imprisonment for life. The question posed is what would the Court do in the absence of any power to commit that person to custody in case he refuses to furnish the required bail-bonds. It is averred that even though in Section 437 Cr. P. C. there is no provision for the Court to commit the person concerned to custody, the Court would be well within its power to commit him to custody in ease he refuses to furnish bail bonds. Under Section 437 a person always appears in Court in pursuance of a judicial process issued against him. A judicial process is issued only when the Court takes cognizance of the offence. Therefore, if a person

appears before a Court in pursuance of a judicial process issued against him and he refuses to execute bail-bonds, the Court has full power to commit him to custody Under Section 309 Cr. P. C.

17. Thus, from a perusal of the discussion made above, it is clear that even though a magistrate may have power to arrest a person, he has no power to commit him to custody in every case. He can commit him to custody only in those cases where he has been expressly given power by the Code to do so. Under Section 344 of the old Code, the Magistrate could remand an accused to custody even at the investigation stage, but now, as stated above, the position is quite different under the new Code. Under Section 309 of the new Code, a magistrate can remand an accused to custody only after he has taken cognizance of the offence committed by him.

18. The learned Counsel for the State contended that even though Under Section 309 Cr. P. C, a magistrate may not have power to commit an accused to custody until and unless he has taken cognizance of the offence committed by the accused, still, it is open to him to exercise that power Under Section 167 Cr. P. C. In support of this contention, he drew my attention to the rulings reported in Empress v. Ashraf Ali (1883) ILR 6 All 129 and Velu Vishwanathan v. State 1971 Cri LJ 725 (Ker) (supra). In the first case, certain persons, including one Wajid Husain, caused the death of one Khuda Bux by beating him with lathis. On the same day on which Khuda Bux was murdered, one Talabul Haq presented a petition to the Magistrate in whose pergana the murder had taken place that Wajid Husain was present in the Magistrate's Court house and prayed that he be arrested. Upon the petition being presented, Wajid Husain was arrested and brought before the Magistrate. The Magistrate sent Wajid Husain to the District Superintendent of Police and the District Superintendent of Police sent Wajid Husain to the Thana escorted by two constables out of whom one was Ashraf Ali. After a day or so Wajid Husain was taken by the police to the place of murder in connection with the investigation of the case. After the work at the spot was over, Wajid Husain was made over to Ashraf Ali for being escorted to Thana Wajid Husain escaped from the custody of Ashraf Ali Ashraf Ali was then prosecuted for an offence Under Section 223 I.P.C. The Magistrate convicted him and sentenced

him to six months' imprisonment and some fine. On appeal the Sessions Judge affirmed his conviction and sentence whereupon he went up in appeal to the High Court. It was contended that in the absence of an order Under Section 167 Cr. P. C., the detention by the police of Wajid Husain was illegal, and Ashraf Ali, therefore, committed no offence when he released Wajid Husain. Straight, J. held that although the order passed by the Magistrate in this case was not so explicit in its terms as it should have been, yet, it should be taken that the Magistrate had passed the order detaining Wajid Husain Under Section 167 Cr. P. C. No reasons were given why the learned Judge held that the detention order which the Magistrate had passed in this case was an order Under Section 167 Cr. P. C. This ruling cannot, therefore, be taken to be an authority for the proposition that whenever a magistrate arrests a person and commits him to custody, his order must be taken to be an order passed Under Section 167 Cr. P. C.

19. In the second case 1971 Cri LJ 725 (Ker), the position is no different from the one found in the first case. Putting briefly, in this case, an accused had surrendered before a Magistrate. Shortly after the surrender, a police officer applied to the Magistrate to give custody of the accused for being questioned. The Magistrate remanded the accused to police custody. The accused filed a revision against the order remanding him to police custody. The learned Judges who decided this revision, relying on (1883) ILR 6 All 129 (supra), held that the taking of the accused into custody by the Magistrate was Under Section 167 Cr. P. C. and, therefore, the order passed by the Magistrate remanding the accused to police custody was a valid order. Again, I find that the learned Judges have not given any reasons why they held that the taking of the accused into custody by the Magistrate was Under Section 167 Cr. P.C. In the absence of any reasons having been given on this aspect of the matter, I do not think that this ruling also can be taken to be an auhority for the proposition that when an accused surrenders before a Magistrate, the order passed by the Magistrate taking him into custody is an order passed Under Section 167 Cr. P. C.

20. As against the above two rulings, the case of Kedar cited above 1977 All W. C. 205 : 1977 Cri LJ 1230 is on all fours to the facts of the case before us. In Kedar's case as stated above, the accused had surrendered in the court of a magistrate

and the Magistrate had remanded him to jail custody. Relying on the provisions of Section 167 Cr. P. C. Sinha J. held that the order passed by the Magistrate remanding the accused to custody could not be an order Under Section 167 Cr. P.C., because Section 167 Cr. P. C. applies only when a person is arrested and detained in custody by the police. With respect I am in fully agreement with this view of Sinha, J. It is only when a person arrested by the Police is forwarded to the Magistrate that the Magistrate can authorise his detention. To hold a view different from this would be doing violence to the language of Section 167 Cr. P. C.

21. Now coming to the facts of the case before us, it is not in dispute that the applicant had surrendered before the Magistrate and the Magistrate had remanded him to custody. It is also not in dispute that charge-sheet has not been submitted in this case so far. In such a situation, there can be no doubt that the applicant's detention is without the sanction of law and he must, therefore, be released on bail. Accordingly, I release the applicant (Ram Chandra) on bail on his furnishing a personal bond with two sureties each in the like amount to the satisfaction of C. J. M. Basti.

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