

Pushpendra Singh Vs. Superintendent, District Jail and ors.

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Court : Allahabad

Decided On : Jan-12-1984

Reported in : 1984CriLJ838

Judge : H.N. Seth and ;R.A. Misra, JJ.

Appellant : Pushpendra Singh

Respondent : Superintendent, District Jail and ors.

Judgement :

R.A. Misra, J.

1. In this petition under Article 226 of the Constitution of India the petitioner complains against his detention,

2. The relevant facts are these :

The petitioner Pushpendra Singh is involved in a crime punishable under Section 396/412/120B of I. P. C. He appears to have been arrested on 26th of September, 1982 and remanded to jail custody under Section 167 of the Code of Criminal Procedure. The learned Magistrate continued to remand him to jail custody on subsequent dates to wit, 10th of Oct. and 23rd of Oct., 1982, 5th and 18th of Nov., 1982, 1st and 14th of Dec, 1982 and lastly on 5th of Jan. 1983. The learned Magistrate committed the case to the Sessions Court on 11th of Jan. 1983. The

accused was present in custody before the court when the aforesaid committal order was passed. The learned Magistrate directed that subject to any order which may be passed by the Sessions Court, the accused shall remain in custody until the conclusion of the trial and further directed that the petitioner shall be produced before the Sessions Court on 24th of Jan. 1983. The petitioner was produced before the Sessions Judge on 24th of Jan. 1983 in compliance to the aforesaid order dated 11-1-1983. The learned Sessions Judge directed the record to be put up for fixing a date in near future. It was produced before him on 14-4-1983 on which date he transferred the case to the court of II Additional Sessions Judge, Nainital. 20th of May, 1983 was fixed for appearance of the accused in the court of the II Additional Sessions Judge. It so appears that the petitioner was released on parole and did not personally appear in the court of II Additional Sessions Judge on 20th of May, 1983. An application for the exemption of personal attendance was allowed and the case was adjourned to 20th June, 1983 for framing of charges. The petitioner Pushpendra Singh was produced in custody before the Court on 20th of June, 1983 but as Nirankar a co-accused was on parole, so the case was again adjourned to 7th of July, 1983 for framing of charges and the accused Pushpendra Singh was remanded by a warrant to jail custody till the aforesaid date. Again on 7th of July, 1983 the case was adjourned to 8th of Aug. 1983 on the same ground and the accused who was present in custody was directed to be produced on the next date. The case was again adjourned to 17-9-1983 due to the absence of co-accused Nirankar on 8-8-1983. The accused was present in custody and was directed to be produced on the next date. The orders dated 7th of July and 8th of August directing the petitioner to be produced on the next date fixed, have been passed on the warrant for intermediate custody dated 20th June, 1983. It so appears that on 17th September, 1983 the case was again adjourned to 22nd of October, 1983 and the accused who was present in custody was directed to be produced before the court on the next date. This order has also been passed on the aforesaid custody warrant. The accused was produced before the court of II Additional Sessions Judge on 22nd of Oct. 1983 but the case was adjourned to 17th of Nov. 1983. The learned Sessions Judge on this date prepared a fresh warrant for intermediate custody directing the Jailor of District Jail, Nainital to receive and keep the petitioner in custody till the aforesaid date to

wit, 17th of November, 1983 and produce him before the court on that date. On 17th of November, 1983 the case was adjourned to 25th of November and the accused who was present in custody was directed to be produced on 25th of November, 1983. Again on 25th of November, 1983 the case was adjourned to 26th of November, 1983 and the accused who was in custody, before the court was directed to be produced on the next date. Similarly on 26th November, 1983 the accused who was in custody before the court was directed to be produced on 16th of January, 1984 because the case was adjourned for the date. All these three orders dated 17th, 25th and 26th of November, 1983 have been passed on the custody warrant dated 22nd of October, 1983.

3. The learned Counsel for the petitioner has challenged the validity of the petitioner's detention in pursuance of the order passed under Section 209(b) of the Code of Criminal Procedure by the learned Magistrate on two grounds -- firstly, that the order passed by the learned Magistrate is not a proper order and does not fulfil the requirements of the provisions contained in Section 209(b) and secondly, on the ground that the order passed by the learned Magistrate has not been communicated to the jail authorities. The warrants of remand dated 7th July, 8th August, 17th September, 22nd October, 17th November and 26th November have been attacked on the ground that they do not constitute proper warrants of remand as envisaged under Section 309 of the Code of Criminal Procedure.

4. Section 209(b) of the Code of Criminal Procedure, 1973, hereinafter called 'the Code' commands the Magistrate to remand the accused to custody during and until the conclusion of the trial subject to the provisions of the Code relating to bail and leaves no option with the Magistrate. In the instant case the learned Magistrate has on 11th of Jan. 1983 committed the case to the Court of Session and has directed in the second para of the order that the accused shall remain in custody until the conclusion of the trial subject to any order which may be passed by the Sessions Court. The proper order should have been to remand the accused including the petitioner to custody during and until the conclusion of the trial subject to the provisions of the Code relating to bail. But the fact that the learned Magistrate has in his order mentioned that the order of remand is subject to any order which may be passed by the Sessions Court does not render the order

illegal. It is significant to bear in mind that the Code itself commands that the remand of the accused to custody during and until the conclusion of the trial shall be subject to the provisions of the Code relating to bail. So any order passed under Section 209(b) of the Code remanding the accused to custody during and until the conclusion of the trial, will be subject to the provisions of the Code relating to bail, irrespective of the fact that the order passed by the Magistrate does not clarify this fact. We would like to repeat that the Code itself says that the remand will be subject to the provisions of the Code relating to bail. So it is not necessary for the Magistrate to clarify this position and the order will remain subject to the provisions of the Code even if this fact is not mentioned in the order. We do not agree with the learned Counsel for the petitioner that the order of remand passed by the learned Magistrate under Section 209(b) is illegal because the learned Magistrate has mentioned that the order is subject to any order which may be passed by the Sessions Court. The order of remand passed by learned Magistrate is not at all open to two interpretations in this case. A plain reading of the order makes it abundantly clear that the accused has been remanded to custody during and until the conclusion of the trial as provided under Section 209(b) of the Code, subject to the provision of the Code relating to bail. The petitioner was in custody before the court when the aforesaid order was passed. The learned Magistrate committed the case to the Court of Session and thereafter complied with the mandatory provisions of Section 209(b) by remanding the accused to custody during and until the conclusion of the trial. It is a perfectly legal order passed under Section 209(b) of the Code, though the language of the order is not very happy. Weakness of language does not render an order illegal provided the substance fulfils the requirements of law and is not open to more than one interpretation. But we would hasten to caution the Subordinate Courts to be careful in the use of language while performing judicial functions.

5. We have given sufficient opportunity to the learned Counsel for the State to produce the documents whereby the aforesaid order of remand under Section 209(b) of the Code might have been communicated to the jail authorities but the learned Counsel for the State has failed to produce any such document before us. The only document produced is a document described as warrant Hawalati which contains the dates on which the petitioner was remanded to jail custody up to 11th

of Jan. 1983. There is a note in the aforesaid document which reads as '24-1-1983 Session Committed'. It is significant to note that in his order dated 11th of January, 1983, the learned Magistrate did direct that the accused shall be produced before the Sessions Court on 24th January, 1983 and the aforesaid date is also mentioned in the warrant Hawalati, It is the date on which the accused was required to be produced before the Court of Session. This document undoubtedly gave two informations to the jail authorities -- (1) that the case of the accused was committed to the Court of Session, and (2) that he was required to be produced before the Sessions Court on 24th of Jan. 1983. The order-sheet of Sessions Court shows that the accused was actually produced before the Sessions Court on 24th of January, 1983 and the learned Sessions Judge directed the case to be put up in near future for fixing a date, without passing any order of remand under Section 309 of the Code. The Sessions Judge simply observed in his order that the accused was produced before him in compliance of the Magistrate's order dated 11-1-1983. The Sessions Judge appears to have passed the order on 24th January, 1983 after perusing the Magistrate's order dated 11-1-1983 wherein the accused were remanded to custody during and until the conclusion of the trial. That appears to be the reason why he did not exercise his power under Section 309 of the Code to remand the petitioner to custody by a warrant. The crucial question which now arises for determination is whether non-communication of the order passed under Section 209(b) of the Code to the Jail authorities renders the petitioner's detention in pursuance of that order illegal.

6. The power to detain an accused vests in the criminal courts and the jail authorities simply carry out the orders by keeping an accused in physical custody. So the power of detention vests in the courts and not in the jail authorities. In the instant case the detaining authority is the Magistrate who has directed the petitioner's detention by virtue of the mandate under Section 209(b) of the Code. As discussed above the order of detention passed by the learned Magistrate is perfectly valid and the detention of the petitioner on the basis of the aforesaid order would continue to remain valid till the conclusion of the trial. The order so passed by the Magistrate is only subject to the provisions of the Code relating to bail. Communication of the order is no doubt necessary to inform the jail authorities about the order passed and authorise them to keep the accused in

detention but its non-communication does not render the order of detention illegal. Non-communication of the order of detention ' to the authorities is a grave irregularity and the jail authorities are also guilty of culpable negligence in not requiring the Court concerned to send the order of detention, but the detention cannot be said to be illegal if it is actually in pursuance of a perfectly legal order passed under Section 209(b) of the Code. The officers responsible for the irregularity and negligence should be severely dealt with and suitable steps should be taken to avoid repetition of such irregularities but on that score the detention which is based on a perfectly valid order cannot be held to be illegal. It is to be borne in mind that the detention under the provisions of Section 209(b) and Section 309 of the Code is neither punitive nor preventive. The main object on the other hand is to secure the attendance of the accused during the trial and at the time of the pronouncement of the judgment. The cause of justice should not be made to suffer on account of some negligence on the part of the officers. In the instant case there is a valid order of detention passed under Section 209(b) of the Code which cannot be rendered illegal due to its non-communication to the jail authorities, though as observed above the non-communication amounts to grave irregularity and culpable negligence, In the result the detention of the petitioner during and until the conclusion of the trial by virtue of the order passed under Section 209(b) of the Code would continue to be legal, till the conclusion of the trial subject to the provisions of the Code relating to bail,

7. The provision contained in Section 209(b) of the Code is mandatory and shall be followed by a Magistrate while committing the case to the Court of Session. It is a special provision not only empowering the Magistrate to remand the accused to custody during and until the conclusion of the trial but commanding him to do so. Section 209(b) of the Code does not say that the Magistrate is required to remand the accused to custody by means of a warrant. The provisions contained in Section 309 of the Code empowering a Magistrate to remand the accused if in custody is a general provision and says that the trial court may remand the accused by means of a warrant if he be in custody. The trial court has thus been empowered under Section 309(2) of the Code to remand the accused by means of a warrant if he is in custody. The trial court has not been precluded from exercising his powers under Section 309(2) in case the accused has been remanded to

custody during and until conclusion of the trial under Section 209(b) of the Code. This power has been given to trial courts after the Code directed the Committing Magistrate to remand the accused to custody during and until the conclusion of the trial so the trial court can exercise its power under Section 309(2) of the Code irrespective of the fact that the learned Magistrate while committing the accused remanded him to custody during and until the conclusion of the trial as provided under Section 209(b) of the Code. So an order remanding the accused to custody by means of a warrant under Section 309(2) would not render the previous order under Section 209(b) of the Code illegal. Similarly the order passed under Section 309(2) of the Code would not be rendered illegal simply because of a previous order under Section 209(b) of the Code. The Sessions Judge has in this case passed orders of remand under Section 309 of the Code in spite of the fact that there was an order under Section 209(b) of the Code. But as discussed above that does not invalidate the order passed under Section 209(b) of the Code. The Sessions Court was competent to pass an order of remand under Section 309 of the Code though it was not necessary as there was already an order of detention under Section 209(b) of the Code. The order of remand passed on 20th June, 1983 fulfils all the requirements of a valid warrant of remand under Section 309 of the Code and has not been attacked by the learned Counsel for the petitioner. In Criminal Misc. Bail Appln. No. 3122 of 1983 : reported in 1984 All LJ 375 *Surjeet Singh v. State of U.P.* decided by a Full Bench of this Court, it has been decided that 'custody' under Section 309 of the Code includes illegal custody. So even if the custody of the petitioner was illegal up to 20th of June, 1983 it was validated by virtue of the order of remand passed on 20th of June, 1983 under Section 309 of the Code. Subsequent orders of remand passed on 7th of June, 8th of August and 17th of September, 1983 have been written on the warrant of intermediate custody dated 20th of June, 1983. Wherein it has been mentioned that the accused is present in custody before the Court and as the case has been adjourned so he shall be produced on the next date. On 22nd of October, 1983 a fresh warrant of intermediate custody was prepared and that also fulfils the requirements of a valid warrant of remand under Section 309 of the Code though a few words 'till the conclusion of the trial' have been inserted in the last line without carrying any meaning. They appear to be redundant and meaningless. The

subsequent orders of remand, including the last order dated 26th of Nov. 1983 have been passed on this very custody warrant. In these orders it has been mentioned that the accused is present in custody and that he shall be produced on the next date as the case was adjourned to that date. It has been urged by the learned Counsel for the petitioner that in these orders there is no direction that the accused shall be taken in custody again. The orders simply say that the accused is in custody and shall be produced on the next date. The last order is dated 26th of Nov. 1983 and has been passed on warrant for intermediate custody dated 22nd of Oct. 1983. As discussed above the order dated 22nd October, 1983 is a perfectly valid warrant, for intermediate custody. The learned Additional Sessions Judge on that date directed the Jailor, District Jail, Nainital to receive the petitioner in his custody and produce him before the Court on the next date to wit, 17th of November, 1983. No form of warrant has been prescribed by the Code. It so appears that the High Court has in exercise of its supervisory powers under Article 227 of the Constitution of India prescribed a form for intermediate custody of remand under Section 344 of the old Code but it has not been reproduced in the Appendices to General Rules Criminal for Subordinate Courts, it has been referred in the list of printed forms authorised for use in subordinate criminal courts, given in Appendix 'B' of General Rules Criminal. Rule 157 of General Rules Criminal says 'A list of printed forms authorised for use in criminal courts is given in Appendix 'B' No printed form other than an authorised form shall be used in any court.' So Rule 157 prohibits only the use of printed forms other than those which have been authorised for use and given in Appendix 'B' of the Rules. The use of a printed form not given in Appendix 'B' is prohibited. The rule does not prohibit the preparation of a warrant by getting the matter typed or handwritten, obviously because at times printed forms may not be readily available. The learned Additional Sessions Judge has not committed breach of Rule 157 of General Rules Criminal by preparing the custody warrant on 22nd of October, 1983 in his own language, which is not in a printed form but fulfils all the requirements of a valid custody warrant. The petitioner was produced before the Sessions Judge on subsequent dates in custody and the learned Sessions Judge has on the same custody warrant (dated 22nd Oct. 1983) remanded him to custody saying that the accused is present in custody, the case has been adjourned, so let him be

produced on the next date. The subsequent orders as mentioned above are on the custody warrant dated 22nd October, 1983 and are in continuation of the same. The only possible interpretation of the orders dated 17th November, 25th November and 26th November, 1983 is that the petitioner has been remanded to custody by means of the aforesaid warrants. The accused was in custody. The authority who was physically detaining him was being directed to produce him on the next date and that followed that the Sessions Judge did direct the accused to continue in the same physical custody to wit, Jail custody. No other interpretation of the aforesaid orders is possible.

8. In *Urooi Abbas v. State of Uttar Pradesh* 1973 Cri LJ 1458 (All) (FB) the form of custody warrant given in Appendix 'B' of General Rules Criminal was considered; some defects were pointed out and some amendments were suggested. The front side of the form contains on one half of it divided vertically the matter reproduced below in English and the remaining half contains a translation of the same material in Hindi :

WARRANT FOR INTERMEDIATE

CUSTODY OF REMAND (Section 344, Criminal P. C. 1898)

The Jailor of Whereas

of charged with and has been remanded to take his trial before the Court of... You are hereby required to receive the said...into your custody and

produce him before the said Court as required on the reverse.

MAGISTRATE

Date day of 19

The back side of the Form is divided into four columns with heading both in English and Hindi in general column and a note at the end. With only the English part of the heading the back side is reproduced below :

Number of Date of Date on which Magistrate's

accused order accused is to Signature

be produced

N. B. The reasons for remanding the accused must be given in the record. No

accused may be remanded to custody for a term exceeding 15 days at a time (Section 344, Code of Criminal Procedure, 1898)'

9. The Form reproduced above does not require the trial court to say on Sub-section. dates that the Jailor is again required to receive the accused in his custody. On subsequent dates the trial court has simply to fill up the columns given on the reverse. In column No. 1 'number of the accused' is to be given. In Column No. 2 'date of order' is to be given. In Column No. 3 'date on which accused is to be produced' is to be given. In spite of the defects pointed out in the aforesaid Form, the Full Bench in the case of Urooj Abbas (supra) held that the use of the aforesaid Form and entries in the columns on the reverse would amount to substantial compliance with the requirements of Section 343(1)(a) since the intention of the remand would be fairly clear. In the instant case as mentioned above the learned Sessions Judge required, the Jailor to receive the accused in his custody on 22nd of October, 1983 and on subsequent dates when the accused was produced in custody directed the Jailor to produce him on the next date. The intention of warrants of remand date 17th November, 25th November and 26th of November is very clear that the accused is remanded back and shall continue in the same custody and be produced on next date to which the case was adjourned. The last order of remand is dated 26th November, 1983 and it expires on 16th of January, 1984. It amounts to a substantial compliance with requirements of Section 309(2) of the Code and amounts to a valid warrant of remand as contemplated under Section 309(2) of the Code. The petitioner thus continues in legal custody.

10, In the result there is no substance in this petition. It shall be dismissed.

11. The petition is dismissed.

H.N. Seth, J.

12. While the judgment on behalf of the Bench was being delivered by me, learned Counsel for the petitioner made an oral request for a certificate under Article 133(1)(c) of the Constitution to enable him to go up in appeal to the Supreme Court. This oral request made by learned Counsel shall be considered by the Bench when it assembles next. List the case for considering the request made by learned Counsel for the petitioner on Tuesday, the 17th of January, 1984.

ORDER OF DIVISION BENCH

13. Having heard the learned Counsel for the petitioner we are not satisfied that this case is a fit one for appeal to the Supreme Court. We accordingly reject the oral prayer under Article 134A of the Constitution made by the petitioner on 12th January, 1984.

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