

Rakesh Kumar Vs. the State

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Court : Delhi

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Judge : P.K. Bahri,; R.L. Gupta and; Y.K. Sabharwal, JJ.

Appeal No. : Crl. W. No. 679 of 1992 and Crl. M. 548 of 1992

Appellant : Rakesh Kumar

Respondent : The State

Advocate for Def. : P.S. Sharma Standing Counsel and ; Ms. Mukta Gupta, Advs.

Advocate for Pet/Ap. : A.K. Gupta, Adv

Judgement :

ORDER

P.K. Bahri, J.

1. On difference of opinion arising between the two Hon'ble Judges of this Court on questions of law, who heard the petition on merits, the matter has been referred to the Full Bench.

2. The legal questions which arise for decision are as to whether in view of the provisions of Section 36A to 36D of the Narcotic Drugs and Psychotropic

Substances Act 1985 (hereinafter to be called N.D.P.S. Act), was the Metropolitan Magistrate entitled to remand the petitioner in judicial custody during the investigation of the case registered against the petitioner vide F.I.R. No. 532 of 1992 dated October 30, 1992 from time to time for 15 days at a time till the challan is filed and secondly in case it were to be held that the Metropolitan Magistrate had no power to remand the petitioner in judicial custody for a period more than 15 days in all, whether the illegal detention of the petitioner under the remand orders made by the Metropolitan Magistrate from time to time entitles the petitioner to be released forthwith even though during the pendency of this writ petition after the filing of the return, the petitioner is being remanded to judicial custody validly during the trial of the case by the Additional Sessions Judge. In other words, the question to be decided is whether the validity of the detention of the petitioner is to be determined on the day of the return or even on the date of the hearing of the matter on merits.

3. On the first question, Mahinder Narain, J. has opined that Metropolitan Magistrate had no power to remand the petitioner for a period beyond 15 days. On the second question, he gave the view that validity of detention is to be judged on the date of the return and not on the date of hearing. On the other hand, Jaspal Singh, J. did not express any opinion on the first question and on the second question he held that the validity of the detention is required to be seen on the date of hearing.

4. Before dealing with these legal questions, we may give the brief facts of the case. The petitioner is stated to have been apprehended at about 5.30 p.m. near Bus Stand of route No. 883, Outer Ring Road at the crossing of Vikas Puri on October 30, 1992 and allegedly 1 Kg. of opium was recovered from his possession and thus, he was arrested and a case was registered for the offences punishable under sections 18, 61 and 85 of the N.D.P.S. Act of 1985. The petitioner, after arrest, was produced before the Metropolitan Magistrate on October 31, 1992 who remanded him to judicial custody for 14 days initially and thereafter had been remanding the petitioner in judicial custody by giving a remand of 14 days on each occasion.

5. The petition seeking writ of habeas corpus was filed by the petitioner on December 24, 1992 pleading that the Metropolitan Magistrate had no jurisdiction or power under any statute to have remanded the petitioner in detention for more than 15 days in all in view of the provisions of Section 36A of the N.D.P.S. Act and thus, the detention of the petitioner being illegal, the petitioner is entitled to be released from custody forthwith.

6. During the pendency of the writ petition admittedly, a challan has been filed and the petitioner is now being tried by a Court of Sessions for the offences under the N.D.P.S. Act and since the filing of the challan, the petitioner is being remanded to judicial custody by a competent Court having the necessary power to remand the petitioner to judicial custody during the trial of the case.

7. There is no dispute raised before us that presently, the detention of the petitioner is valid and he is being tried by a competent Court having jurisdiction to try the petitioner in the transit period till the Special Courts, as envisaged in the amended provisions of the N.D.P.S. Act, are constituted but the contention raised is that as the detention of the petitioner was invalid up to the date of the filing of the return by the respondents, the petitioner is entitled to be released forthwith despite his subsequent detention in judicial custody having become valid because of happening of subsequent events.

8. The narcotic drugs and psychotropic substances being easily made available to the vulnerable sections of humanity throughout this universe have been ruining the society comprehensively by making the young people addicted to such drugs and their losing all sense of purpose of living. The menace to the civilized way of life had led international initiative to require the countries to enact stringent laws to curb the production, sale and distribution of such narcotic drugs and psychotropic substances. The hazardous evil effects of the narcotic drugs and psychotropic substances on the health of the human society are well known. Our Parliament had put on the statute book the present Act with a view to strongly deal with such persons who deal in such nefarious activities of producing, distributing and selling such substances or drugs. The punishments provided in the Act are now quite different and drastic and it had made difficult for the accused who are

apprehended committing such offences to get themselves released on bail and Realizing the objects and the reasons of this statute and particularly, the stringent punishments envisaged in this statute, the Parliament vide Act 2 of 1989 introduced Section 36A to 36D in this statute for Constitution of Special Courts for expeditious trial of the cases under this Act. Before the introduction of these amendments, the accused being apprehended for committing offences under this statute were being dealt with and tried under ordinary provisions of Criminal Procedure Code and some offences of more grave nature being tried by a Court of Sessions.

9. Under the Code of Criminal Procedure 1973, the Metropolitan Magistrate, before whom any accused is produced, is entitled to remand such accused to police custody for 15 days as a whole and to judicial custody for 15 days at a time till the challan is filed and after the filing of the challan, if the offence is triable by the Court of Sessions, then after holding the committal proceedings, the Magistrate commits such accused for trial before the Court of Sessions.

10. Under Section 36 of the Amended Act of N.D.P.S. the Government had been authorised to constitute as many Special Courts for the purpose of providing speedy trial of the offences under the Act as may be necessary for such areas as may be specified in the notification. A Special Court is to consist of a single Judge who is to be appointed by the Government with the concurrence of the Chief Justice of the High Court and a person shall not be qualified to be appointed as a Judge of the Special Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge.

11. Section 36A lays down that notwithstanding anything contained in the Code of Criminal Procedure 1973, all offences under this Act shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area by such one of them as may be specified in this behalf by the Government. Clause (b) of this Section reads as follows :-

'Where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate Under sub-section 2 or sub-section 2A of

Section 167 of the Code of Criminal Procedure, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is Judicial Magistrate and seven days in the whole such Magistrate is an Executive Magistrate :

Provided that where such Magistrate considers -

(i) when such persons is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him.

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction.'

12. Clause (c) of this Section empowers the Special Court, to whom the accused is forwarded by the Magistrates under clause (b), to have the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, meaning thereby the powers which a Magistrate had under section 167 of the Code of Criminal Procedure for remanding the accused to judicial custody for 15 days at a time had been now conferred on the Special Court. Clause (d) of this Section makes it clear that the challan, after investigation, which is in legal terms called a police report, is to be now filed before such a Special Court and the proceedings for committal as envisaged in Criminal Procedure Code 1973 have been abrogated by this special provision.

Section 36D reads as follows :-

'36D Transitional provisions - (1) Any offence committed under this act on or after the commencement of the Narcotic Drugs and psychotropic Substances (Amendment) Act 1988, until a Special Court is constituted under section 36, shall, notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974) be tried by a Court of Session :

Provided that offences punishable under sections 26, 27 and 32 may be tried summarily.

(2) Nothing in sub-section (i) shall be construed to require the transfer to a Special Court of any proceedings in relation to an offence taken cognizance of by a Court of Sessions under the said sub-section (1) and the same be heard and disposed of by the Court or Session.'

13. The Parliament was very much aware that it will take some time for constituting the Special Courts in the country. It was, however, anxious that as the offences under the Act are very serious and grave and call for heavy dose of punishments, so it, in its wisdom provided that till the Special Courts are constituted during the transit period, all the offences under the Act be tried by the Court of Session immediately on the enforcement of the provisions of Sections 36 and 36A onwards. The Parliament has deliberately used the words 'be tried by a Court of Session'. The Parliament had not used the word that till the Special Courts are constituted, the offences 'be dealt with by a Court of Session' or 'the Courts of Session already existing and dealing with the cases under the N.D.P.S. Act, be deemed to be the Special Courts for the purpose of provisions of the Act till Special Courts are constituted under section 36 of the Act.

14. It is no doubt true that the provisions of Sections 36, 36A to 37 have come into force w.e.f. May 29, 1989. The learned counsel for the petitioner has vehemently argued that in view of the fact that these provisions have come into force and the Government in its discretion had not postponed the enforcement of provisions of Section 36A for any future date till the Special Courts are constituted, the resultant effect of enforcement of all these provisions is that under section 36A(b) of the Act any person accused or suspected of committing of an offence under the Act, if forwarded to a Magistrate, under the provisions of sub-section (2) or sub-section 2A of Section 167 of the Code of Criminal Procedure, such Magistrate has authority to order detention of such person in custody for a period not exceeding 15 days in the whole where such Magistrate is a Judicial Magistrate and 7 days in whole where such Magistrate is an Executive Magistrate. So, it is urged that as the petitioner has been detained for more than 15 days by a Metropolitan Magistrate, the said detention has become invalid as a Metropolitan Magistrate had no authority to order detention of a person for a period exceeding 15 days as a whole.

15. It is contended by learned counsel for the petitioner that on the expiry of period of 15 days, the Metropolitan Magistrate having lost the jurisdiction to order any further detention, the Metropolitan Magistrate should have either released the accused or should have forwarded the accused to the competent Court which could try such an accused, that Court being Court of Sessions in view of Section 36D till the Special Courts were to be constituted. He has urged that after expiry of 15 days, it is the Sessions court only which has to be deemed to be Special Court for purposes of Section 36A(1)(c).

16. There is a fallacy in these contentions of learned counsel for the petitioner. There is a complete scheme carved out by the Parliament when it incorporated Sections 36, 36A to 36D and Section 37. The perusal of these provisions makes it amply clear that on enforcement of these provisions, the Government for purposes of providing speedy trial of the offences under this Act, have to, by notification in the official gazette, constitute as many Special Courts as may be necessary for such areas as may be specified in the notification. It is quite clear to us that unless and until the Special Courts are constituted under Section 36 of the Statute, there could arise no occasion for giving effect to the provisions of Section 36A to Section 36C inasmuch as Section 36D itself takes care of the transitional period of laying down that till the Special Courts are constituted, the offences under the Act shall be tried by a Court of Session.

17. Section 36A(1)(b) itself contemplates that after the expiry of the 15 days of detention initially given by a Magistrate, the Magistrate who has no jurisdiction either to deal with such an accused or to try such an accused has to forward such an accused to the Special Court having jurisdiction. If there is no Special Court in existence for one reason or the other, the provisions of Section 36A(a)(b) as a whole could not be given effect to and that was not the intention of the Parliament that even in the transitional period till the Special Courts are constituted, the provisions of Section 36A to 36D could become operative.

18. The learned counsel for the petitioner has argued that if the Government intended that these provisions should not be in operation, the Government could have kept these provisions of abeyance and could have enforced the provisions of

Sections 36 and 37 only. It is true that all the provisions mentioned above have come into operation because the Government in its wisdom had thought it fit to enforce all these provisions on a particular date. But that would not lead to any interpretation that despite the fact that no Special Courts have been constituted under section 36 of the Act, the Magistrate is to exercise his powers only under section 36A(1)(b) of the Act. Section 36A itself contemplates the forwarding of the suspect on the accused to a Special Court on the expiry of 15 days of detention as a whole authorised by a Magistrate. There being no Special Courts in existence, evidently this provision cannot be invoked by anyone.

19. During the transaction period till the Special Courts are constituted, Section 36D clearly contemplates that the offences shall be tried by Court of Sessions meaning thereby that a Court of Sessions shall try the offences in accordance with the provisions of the Code of Criminal Procedure and till the special Courts are constituted, the trial before the Court of Session can take place in accordance with the provisions of Code of Criminal Procedure which contemplate committal proceedings before the Session Court is seized of the case for trial. These amended provisions in the Statute have not made inapplicable provisions of Code of Criminal Procedure regarding committal proceedings during the transitory period. It is quite clear that the accused or the suspected persons, who are arrested for commission of any offences under the Act, have to be dealt with in accordance with the provisions of Code of Criminal Procedure till the Special Courts are constituted. If that is so, the Magistrate under the provisions of Section 167 of the Code of Criminal Procedure has ample powers to order detention of the accused or the suspected person for 15 days at a time in judicial custody and for 15 days as a whole in police custody.

20. It is not possible to agree with the contention of the learned counsel for the respondent that the words appearing as a whole in Section 36A(1)(b) would mean 15 days detention at a time.

21. Similarly words appearing in Section 167 with regard to detention to police custody for a period not exceeding 15 days have come up for interpretation before the Supreme Court in the case of Central Bureau of Investigation v. Anupam J.

Kulkarni, : 1991(1)KarLJ490 and it was held by the Supreme Court that maximum period of police custody could be only 15 days. We agree with the interpretation of law given in the judgment by Mahinder Narain, J. that the words 15 days in whole would not mean that the Magistrate can order detention 15 days at a time. But we do not agree with the view expressed by Mahinder Narain, J. that even though the Special Courts have not been constituted still the provisions of Section 36A(1)(b) and (c) could be invoked and could become applicable. It appears that the learned Judge failed to notice that in the transition period, the Parliament in Section 36D has used the words to be by a Court of Session and not the words that the Court of Session would be a Special Court or the accused would be dealt with by a Court of Session.

22. It is well laid down by the Supreme Court in Union of India v. Deoki Nandan Aggarwal 1992 suppl (1) S.C.C. 323 : AIR 1992 SC 96 that the Courts have no power to substitute the words used in the Statute by any other words.

23. The learned counsel for the petitioner has referred to a few judgments where contrary view has been taken. The first judgment given regarding interpretation of these provisions was by a single Judge of Bombay High Court in Suryakant Ramdas Moare v. State of Maharashtra, 1989 Cri LJ 2422. The contention was raised before that Court that the words to be tried by a Court a Session' have to be given some meaning but the contention appears to have not appealed to the learned Judge and it was held that the words can be supplied by the Court and the Court of Session could be deemed to be Special Court for purposes of said special provision.

24. With all respects to the learned Judge, we are not able to agree with the said view as we are of the firm view that question of supplying any words by the Court could not arise in the case the whole scheme of the said provisions and particularly the specific provision made for transitional period in Section 36D are kept in view.

25. The intention of the Parliament was very clear that till the Special Courts are constituted, all the offences under the Act are to be tried by a Court of Session. The applicability of the provisions of the Code of Criminal Procedure, particularly

the provisions of S. 167 were not made unenforceable during the transit period. There could not have been any difficulty in Parliament making its intention clear by using clear words that accused would be dealt with by Court of Session till the Special Courts are constituted and Court of Session shall have power of Special Courts during the transitional period. The deliberate omission to use these words makes the mind of the Parliament clear that during the transitional period, only the offences under the Act are to be tried by the Court of Session and till Special Courts are constituted, obviously the accused or the persons suspected of commission of such offences are to be dealt with by the provisions of Code of Criminal Procedure and as soon as Special Courts are constituted. The accused and the persons suspected of having committed the offences under the Act are to be dealt with under the provisions of Section 36A(1)(b) and (c) of the Act.

26. A Division Bench of Kerala High Court in the case of State of Kerala v. Balakrishnan, (1991) 2 KLT 323 has taken the same opinion as expressed in the Bombay High Court judgment without referring to that judgment.

27. Another Division Bench of the Kerala High Court in (1992) 1 Crimes 1030 follows the decision given in the case of Balkrishnan (supra).

28. Another Division Bench of Kerala High Court in the matter of State Circle Inspector of Excise, Cannur, has taken similar view.

29. A Division Bench of the Bombay High Court in (1992) 3 CCR 2671 has also expressed the same view that a Court of Session would be deemed to be Special Court, till proper Special Courts are constituted, during the transitional period and they have followed a Division Bench judgment of the Kerala High Court in case of State Circle Inspector of Excise (supra).

30. A single Judge of the Madras Court in the case of P. R. Muthu v. State 1992 (1) Crimes 1038 has also taken the same view.

31. A Full Bench of the Orissa High Court in the case of Banka Das v. State of Orissa : 1992(II)OLR395 has held that the words 'exceeding fifteen days' appearing in Section 36A(1)(b) would mean fifteen days at a time. We are afraid

that this view is not in consonance with law. When the Parliament has used the words 'not exceeding fifteen days in whole', there could arise no occasion for giving any other interpretation to such clear words used by the Parliament. We are also not to agree with the view taken in this judgment that during the transaction period, a Court of Session shall be deemed to be Special Court for purposes of Section 36A(1)(b) and (c).

32. Counsel for the petitioner also made reference to *Narcotics Control Bureau v. Kishan Lal*, : 1991 CriLJ654 . The points arising for consideration before us have not arisen in the said judgment. Rather the only question which came up for consideration before the Supreme Court was whether the High Court has the power to enlarge on bail without being constrained by the provisions of Section 37 of the N.D.P.S. Act and it was held that for enlarging on bail for the offences under the said Act. Special Court and the High Courts have to keep in view the provisions of Section 37 of the Act. Nothing said in this judgment is of any help in deciding the point arising for consideration before us.

33. The interpretation which we have given would lead to a harmonious construction of the provisions without doing any violence to the language used by the Parliament in various provisions referred above. Hence, we hold that till the Special Courts are constituted, the accused or the suspected persons arrested for commission of the offences under the Act are to be dealt with under the provisions of the Code of Criminal Procedure but they are to be tried by a Court of Session. Under the provisions of Code of Criminal Procedure, the Metropolitan Magistrate has the jurisdiction and power under section 167 to order detention of such accused to judicial custody for 15 days at a time till the challan is filed and the accused are committed to the Court of Session. In this view of the matter, the orders of detention of the petitioner passed by the Metropolitan Magistrate for detaining him for 15 days at a time in judicial custody are not vitiated with any illegality. However, we hold that as soon as the Special Courts are constituted, the Magistrate under section 36A(1)(b) would have only authority to order detention for 15 days as a whole and thereafter only Special Court shall have power to order detention of such accused or persons in custody by taking resort to provisions of Section 167 as contemplated by Section 36A(1)(c).

34. Now coming to the second legal issue arising for decision in this case, Mahinder Narain, J. has come to the conclusion that in case the detention of a person is not valid up to the date of the filing of the return in a habeas corpus petition a person is liable to be released even though by subsequent events the detention of such person may have become valid. He has held that this ratio of law has been exclusively laid down by the Supreme Court in two of its judgments namely, Naranjan Singh Nathawan v. The State of Punjab, : 1952 CriLJ656 and Ram Narayan Singh v. The State of Delhi, : 1953 CriLJ113 and as these two judgments are given by Constitutional Benches of the Supreme Court, they are binding on the Court and the judgment given by a Vacation single Judge of the Supreme Court sitting singly in case of Talib Hussain v. State of Jammu and Kashmir, : AIR 1971 SC62 which has not taken into consideration the previous judgments of the Supreme Court is per inquires in taking the view that in case the detention of the detenu is justifiable even up to the date of hearing of the habeas corpus petition, the same can be taken into consideration. It was not held by Mahinder Narain, J. that judgment given in Col. Dr. B. Ramachandra Rao v. The State of Orissa, : AIR 1971 SC2197 has again reiterated the well-known legal position that detention is to be justified up to the date of filing of the return in a habeas corpus petition.

35. Reference is made to the law appearing in England, as is culled out from Halsbury's Laws of England, Fourth Edition Volume II at page 971. Some quotation has also been taken from the Third Edition At the outset, we may mention that the very perusal of the law with regard to the date of return, time of making of return and the contents of the return, as mentioned in Halsbury's Laws of England of Fourth Edition Volume II at page 791 make it evident that a return can be modified later on with the permission of the Court even up to the date of the hearing of the habeas corpus petition. If a return can be allowed to be amended and filed, then it is not understanding as to how it can be said that in England, the legal position is that detention of a person is to be justified only up to the date of filing of the return.

36. In a book The Law of Habeas Corpus by R. J. Sharpe, 1976 Edition from pages 174 to 181, the legal position has been summarised by the learned author

and he has opined as follows :

'It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the Court, unless by reason of some special consideration arising from the particular proceedings The general rule is that unless prior illegality vitiates the present cause of detention, it will not matter what has happened to the prisoner so long as his detention is now justified A prisoner may apply for a writ from the very moment of his arrest and in that sense, he may challenge the legality of his arrest. However, where there have been valid proceedings subsequent to the arrest, which are offered in justification of the detention, the prisoner will not usually be able to get redress. The reason for this is twofold. First, there is the rule that habeas corpus only calls for justification of detention at present. The second is to be found in the law of criminal procedure. It is a general principle that where an accused person has been illegally arrested and brought before a Court for trial, the Court will not lack jurisdiction to deal with him on account of the illegal arrest The rule that it is only the present circumstances of the restraint which are relevant has meant that the Courts are always prepared to allow for a substituted warrant which corrects a defect in the first committal. It will be permissible for there to be a substituted warrant even after the writ is issued and served. Indeed, it has been held that it is possible to amend the return to the writ or to supply a new and better cause for the detention as the court commences the hearing. It would seem that so long as the material proffered tends to show present justification, it will be accepted by the Court at any stage of the proceedings'.

37. The learned author has called out these principles from various judgments of different countries. It is not necessary to burden this judgment with all those judgments because on carefully perusing the various Supreme Court judgments, we have come to the conclusion that even if detention of a particular person is not in accordance with law earlier but if by happening of subsequent events his detention presently is legally valid, then there does not arise any question of releasing such a person from custody.

38. It is no doubt true that the Courts under the Constitution are jealously inclined to protect the liberty of a person keeping in view of the mandate of Art. 21 of the Constitution of India and the remedy of taking resort to habeas corpus is the most efficacious remedy available to any aggrieved person. A writ in the nature of habeas corpus is issued requires the persons or the authorities detaining any person to show cause as to on what basis such a person is being detained and if no proper cause is shown for detaining the person in accordance with law, a command issues from the Court for releasing such a person forthwith.

39. In case of Naranjan Singh Nathawan, : 1952 CriLJ656 (supra), the Supreme Court had observed that in habeas corpus proceedings, the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceedings. Facts, in brief, were that the petitioner in that case was arrested on July 5, 1950 under an order issued by District Magistrate, Amritsar under section 3 of the Preventive Detention Act 1950. The grounds of detention were served on him on July 10, 1950. The Act was amended in 1951 and fresh order dated May 17, 1951 was issued. The only question which arose for decision was that even if the detention of the petitioner was bad on the date of the institution of the proceedings against him, whether he could be released on that basis, even though his detention becomes valid by issuance of a subsequent order and in that context, the Court held that the validity of the detention is to be seen at the time of the return and not with reference to the date of the institution of the proceedings.

40. The question which is posed before us had not come up for consideration before the learned Judges of the Supreme Court that if the detention becomes valid on the date of hearing of the writ petition, whether still such a person is entitled to be released even though his detention was invalid till before the date of hearing of the writ petition. It is the settled principle of legal interpretation that the ratio laid down by the Supreme Court must be examined in the context in which it has been laid down. The ratio of law cannot be stretched to a particular situation which was never considered by the Supreme Court and which never came up for consideration before the Supreme Court.

41. There is no dispute about the proposition of law that in case a particular ratio of law has been laid down, the same is binding on all the Courts and authorities in India and such a ratio of law cannot be whittled down on the plea that a particular point or argument was not raised before the Supreme Court. This particular principle of law is not applicable as far as the present legal issue arising for consideration before us is concerned because as mentioned above, the facts before the Supreme Court only were that first detention order passed was illegal but the second order of detention was valid, so the Supreme Court held that as the second order of detention has become valid before the date of the return, hence the detenu cannot be released on the ground that his detention was bad at the time of the initiation of the proceedings. The Supreme Court has not laid down the law that in case the detention had become valid after the date of the return, such valid order of detention is not to be taken notice of. As already mentioned such a point of law did not arise for decision before the Supreme Court in this judgment.

42. In case of Ram Narayan Singh 1953 Cri LJ 1113 (supra), same ratio was laid down that in habeas corpus proceedings, the Court is to have regard to the legality or otherwise of the detention the time of the return and not with reference to the institution of the proceedings. In this case, the facts were simple. The habeas corpus petition was filed challenging the detention of some political leaders who were arrested on March 6, 1953. In the return, their detention was sought to be justified on the basis of two remand orders, one alleged to have been passed by the Additional District Magistrate at 8 p.m. on March 6, 1953 and the other by a trial Magistrate at about 3 p.m. on March 9, 1953. The Supreme Court, on looking up the record, found that no valid order of remand had been made on March 9, 1953 at all and after the hearing was over in the case, certain documents were sought to be put on the record in order to show that in fact an order has been made remanding the said detenu to judicial custody till March 11, 1953. The Supreme Court held that they cannot take notice of the documents produced in such suspicious circumstances and they held that they were not satisfied that there was any order of remand. In that situation, the Supreme Court held that the detenus were entitled to be released forthwith. So it is evident that even up to the date of hearing the authorities had failed to satisfy the Supreme Court from the record that the detention of said persons was valid. So nothing said in this

judgment supports the contention that the Supreme Court has categorically laid down a proposition of law that detention of a particular person is to be shown valid only up to the date of the filing of the return to the shown cause notice issued in a habeas corpus petition.

43. In *A. K. Gopalan v. Government of India*, : 1966 CriLJ602 , the Supreme Court has categorically laid down that it is well settled that in dealing with a petition of habeas corpus the Court has to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the date of hearing. The previous two judgments of the Supreme Court had not laid down any proposition of law which is in contradiction with or at variance of the proposition of law laid down in this case of *A. K. Gopalan* (supra).

44. Another judgment relied upon by learned counsel for the petitioner is *Pranab Chatterjee v. State of Bihar*, : (1970)3SCC926 . The petitioner in the said case had challenged his detention. He was arrested on 9th August 1970 and was not produced before the Magistrate within 24 hours nor was he informed of the grounds. A contention was raised before the Court that the petitioner was arrested not only under section 151 but also under sections 151, 107, 117(3) Criminal Procedure Code on August 9, 1970 on warrant issued by Sub-Divisional Magistrate followed by subsequent warrants of August 11, 1970. Those warrants were disputed as subsequently manufactured. The Court held that there has been no violation of Art. 22 of the Constitution and also held that in a habeas corpus petition, the Court is to have regard to legality or otherwise of the detention of a person at the time of the return not with reference to the institution of the proceedings and it was held that the petitioner's detention on September 4, 1970 cannot be considered to be illegal because he was kept in detention under proper orders of remand as under trial prisoner. This judgment also does not deal with the legal question arising for decision before us that if the detention of a particular person is justifiable even after a return is filed, could such a person be released even though his detention was illegal for any earlier period

45. In case of Talib Hussain : AIR 1971 SC62 (supra), as learned single Hon'ble Judge sitting in a vacation has held that in a habeas corpus proceedings, the Court has to consider the legality of the detention on the date of hearing and no writ can be issued if detention on that date is lawful. This Judgment is not in conflict with the judgments of the Supreme Court which are referred above. So, it cannot be said that this judgment is per incurium.

46. In case of Col. Dr. B. Ramachandran Rao : AIR 1971 SC2197 (supra), to which same learned single Judge was also a party, it was held that in proceedings of a writ of habeas corpus, the Court is to have regard to the legality or otherwise of the detention at time of the return and not with reference to the institution of the proceedings. A fortiori the Court would not be concerned with a date prior to the initiation of the proceedings for a writ a habeas corpus. The earlier two Supreme Court judgments in cases of Ram Narayan Singh 1953 Cri LJ 1113 (supra) and Naranjan Singh Nathawan, : 1952 CriLJ656 (supra) were followed. Again, this judgment does not deal with the legal proposition which has arisen for decision before us. So, we need not say anything more on this point.

47. In Kanu Sanyal v. District Magistrate : 1974 CriLJ465 , the learned Judges did refer to the question whether detention can be justified up to the date of hearing or not but the question was left open for decision in any other appropriate case which may come for consideration. So, nothing said in this judgment support the contention that even though the detention of a particular person becomes valid due to subsequent happenings even up to the date of hearing of the writ petition, still such a person is to be released by issuance of writ of habeas corpus if his detention was invalid up to the date of the filing of the return.

48. In case the contention of the learned counsel for the petitioner were to be accepted, it would lead to a very anomalous and drastic result. In the present case, assuming for the sake of argument, the petitioner who is facing regular trial before a competent Court in the same Proceedings in which he had been arrested and remanded in custody from time to time is ultimately convicted of the charges and sentenced, could it be said that because his detention was invalid at the time of filing of the return, such a person is entitled to be released in a habeas corpus

proceedings Supposing he has been convicted and sentenced after the filing of the return and at the time of the hearing of the writ petition, this fact is brought to the notice of the Court, it is too much to say that the Court would not take note of such a future happening. So, we hold that if up to the date of the hearing of the writ petition, it is shown that the detention of a particular person is valid presently, mere fact that his detention had been invalid earlier would not entitle such a petitioner to have any redress in habeas corpus petition.

49. In the present case, however, we have already held that the detention of the petitioner at no point of time was invalid and in case his detention was invalid for some period when the matter was being dealt with by the Metropolitan Magistrate, his detention became valid after he was committed to face trial before a Court of Session admittedly during the trial Court of Session under the Criminal Procedure Code has the competency and the power to keep such an accused in judicial custody till the trial is over.

50. In view of the above discussion and the law laid down by us on both the legal points, we find no merit in this petition which is hereby dismissed but in view of the legal questions involved, we leave the parties to bear their own costs.

51. Petition dismissed.