



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment in W.P.(CRL) 3641/2023 reserved on: December 11, 2023*
Judgment in W.P.(CRL) 3657/2023 & 3662/2023 reserved on: December 12, 2023
Judgment pronounced on: December 19, 2023

+ W.P.(CRL) 3641/2023, CRL. M.A.33843/2023

NITIN GARG

..... Petitioner

Through: Mr. Sidharth Aggarwal, Senior Advocate with Mr. Aman Sharma, Mr. Samarth K. Luthra, Mr. Ankit Bhatia, Mr. Tarun Nehra, Mr. Vishwajeet Singh Bhati, Ms. Rudrali Patil and Ms. Arshiya Gosh, Advocates

versus

UNION OF INDIA & ANR.

.... Respondents

Through: Mr. Anurag Ahluwalia, CGSC with Mr. Shivam Sachdeva, GP for UOI Mr. Zoheb Hossain, Special Counsel with Mr. Simon Benjamin, SPP, Mr. Manish Jain, SPP, Mr. Vivek Gurnani, Mr. Kartik Sabharwal and Mr. Baibhav, Advocates for ED

AND

+ W.P.(CRL) 3657/2023, CRL. M.A. 34028/2023, CRL. M.A. 34029/2023

GUANGWEN KUANG ALIAS ANDREW

..... Petitioner

Through: Mr. Hariharan N. Sr. Adv. with Mr. Priyank Ladoia, Mr. Tanmay Sharma, Mr. Kshitiz Rao, Mr. Sharian Mukherji, Mr. Mueed Shah, Mr. Prateek Bhalia and Ms. Rekha Angara, Advs.

versus

DIRECTORATE OF ENFORCEMENT DEPARTMENT OF



REVENUE & ORS.

..... Respondents

Through: Mr. Zoheb Hossain, Special Counsel with Mr. Vivek Gurnani, Mr. Manish Jain, Mr. Simon Benzamin, Mr. Sougata Ganguly, Mr. Amit Jain, Mr. Ishaan Baisla, Mr. Kartik Sabharwal, Mr. Baibhav and Mr. Vinod Tiwari, Advs. for R-1.

AND

+ W.P.(CRL) 3662/2023, CRL. M.A. 34061/2023, CRL. M.A. 34062/2023

PRANAY RAI

..... Petitioner

Through: Mr. Vikram Chaudhri, Sr. Adv. with Mr. Abhay Raj Varma, Mr. Nitesh Rana, Mr. Arjun Rekhi, Mr. Rishi Sehgal, Ms. Arveen Sekhon, Ms. Nikita Gill and Ms. Muskaan Khurana, Advs.

versus

DIRECTORATE OF ENFORCEMENT & ANR. Respondents

Through: Mr. Zoheb Hossain, Special Counsel with Mr. Vivek Gurnani, Mr. Manish Jain, Mr. Simon Benzamin, Mr. Sougata Ganguly, Mr. Amit Jain, Mr. Ishaan Baisla, Mr. Kartik Sabharwal, Mr. Baibhav and Mr. Vinod Tiwari, Advs. for R-1.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE SHALINDER KAUR

JUDGMENT

SHALINDER KAUR, J.

1. The three habeas corpus petitions i.e., W.P.(CRL) 3641/2023, W.P.(CRL) 3657/2023 and W.P.(CRL) 3662/2023 are being taken up to be disposed of together vide this common judgment as they pertain to the same



Enforcement Case Information Report bearing No. **ECIR/STF/02/2022** [hereinafter referred to as “ECIR”] and involve the same question with respect to the illegal detention of the petitioners in Tihar Jail for want of judicial order remanding them to judicial custody. The petitioners pray for issuance of writ of habeas corpus or any other appropriate direction to the respondents, inasmuch as the fundamental rights of the petitioners as guaranteed under Articles 14, 21 and 22 of the Constitution of India have been violated by the respondents. Their continued illegal detention suffers from the vice of being in vacuum, as that there is no judicial order remanding them to judicial custody as mandated under Section 167 of the **Code of Criminal Procedure, 1973** [hereinafter referred to as “Cr.P.C”] or even otherwise under any provision of Cr.P.C. In absence of any judicial order remanding them to custody of Jail Superintendent, Tihar Jail, their detention has become patently illegal. The petitioners are seeking direction to the respondents to produce the petitioners and direct the forthwith release of the petitioners from illegal detention of the respondents thereby declaring the custody of the petitioners arbitrary and illegal.

Factual Background

2. The narration of the basic facts to decide the present petitions is that the Directorate registered an ECIR under the provisions of **Prevention of Money Laundering Act, 2002** [hereinafter referred to as “PMLA”] for the alleged offence of money laundering under Section 3 of PMLA, punishable under Section 4 of PMLA, based on a scheduled offence allegedly committed under the provisions of the **Indian Penal Code, 1860** [hereinafter referred to as “IPC”] and more specifically alleged in FIR bearing no. 807 of 2021, dated 05.12.2021, registered at PS Kalkaji, South



East District, New Delhi and FIR bearing no. 190 of 2021, dated 13.12.2021, registered at PS Economic Offence Wing, New Delhi.

Submission of Petitioners

3. It is submitted by learned senior counsels appearing on behalf of the petitioners that as part of investigation in the ECIR, the petitioners and the fourth co-accused namely Rajan Malik were arrested on 10.10.2023 but at different times. Post arrest, as mandated under Section 167 Cr.P.C, the petitioners were produced before the learned **Additional Sessions Judge – 05, Patiala House Courts, New Delhi** [hereinafter referred to as “ASJ-05”] on 10.10.2023 and upon the application of **Directorate of Enforcement** [hereinafter referred to as “ED”] seeking custody of ten days of the petitioners, accordingly the learned ASJ- 05 was pleased to grant three days custody till 13.10.2023. Thereafter, further custody of three days till 16.10.2023 was granted in favour of ED on the application moved on 13.10.2023. Finally, the custody was again extended for two days till 18.10.2023, though sought for 10 days by ED.

4. It was submitted after having suffered arduous custody of ED for eight days, on 18.10.2023, ED filed an application before the learned ASJ-05 seeking remand of the petitioners to judicial custody which was granted for a period up to 30.10.2023. Lastly on 23.11.2023, on a fresh application filed by ED for remand of the petitioners to judicial custody for period of fourteen days and the same was granted by remanding the petitioners to judicial custody till 07.12.2023.

5. It is submitted that since the statutory period of sixty days as provided for completion of investigation under Section 167 Cr.P.C was set to expire on 08.12.2023, however, ED on 06.12.2023 filed a prosecution complaint



bearing case number 102/2023, titled 'Enforcement Directorate v. M/s Vivo Mobile Communication Co. Ltd. (PC) in the ECIR, under Section 44 read with Section 45 of PMLA, arraying the petitioners and the fourth co-accused namely Rajan Malik as accused persons. On 07.12.2023, the SPPs informed to learned ASJ-05, that the prosecution complaint was filed by ED which came up for hearing in the Court of learned **Additional Sessions Judge, Special Fast Track Court (ASJ-SFTC)** on 06.12.2023 itself and the learned ASJ-SFTC did not take cognizance of the prosecution complaint.

6. Mr. Sidharth Aggarwal, learned senior counsel further submitted that on 07.12.2023, the petitioners were produced before the learned ASJ-05 through video conferencing. However, ED did not file any application seeking extension of judicial custody of petitioner. On the contrary, ED informed the Court that the prosecution complaint had been assigned to the Court of learned ASJ-04 by learned Principal District and Sessions Judge, Patiala House Courts, New Delhi through an administrative order and ED requested the learned ASJ-05 that the file be transferred to the Court of learned ASJ-04 on the same day to be taken at 2 PM. Therefore, no order came to be passed by learned ASJ-05 on 07.12.2023. Upon appearance before the learned ASJ-04 on behalf of the petitioners by their counsels and the SPPs along with ED, the learned ASJ-04 adjourned the matter for consideration on the aspect of cognizance on 13.12.2023 post lunch and issued production warrants against the petitioners for the said date of hearing.

7. It was further submitted that the Directorate did not bother to file any application seeking extension of judicial custody of the petitioners as mandated under law and also having been done religiously for all the past



occasions while seeking extension of judicial custody of the petitioners. It was emphatically submitted in light of the above, it is abundantly clear that there is no order passed by the learned ASJ-04, remanding the petitioners to further judicial custody as is mandated under Section 167 Cr.P.C beyond 07.12.2023.

8. It is submitted by Mr. Hariharan N., learned senior counsel that he conducted an inspection of the remand files before the learned ASJ-05 to ascertain if any application for remand was filed without informing the counsels and if any order was passed by the learned ASJ-05 extending a remand. The inspection has made it clear that no application seeking extension of remand or any order recording the same was passed by the learned ASJ-05. Detention/custody can only be done in accordance with express provisions of a statute and passing of a valid judicial order extending judicial custody is needed to validate the custody of a person.

9. It was next submitted that ED has filed the prosecution complaint in the Court on 06.12.2023 which further shows that the remand under Section 167(2) Cr.P.C became co-terminus with the filing of the said prosecution complaint/charge sheet by ED. However, on 07.12.2023, the learned ASJ-04 did not take cognizance on the aforesaid prosecution complaint and could not remand the petitioners to judicial custody under Section 309 Cr.P.C, therefore, the stage as contemplated under Section 309 Cr.P.C did not start. In cases, where though chargesheet is filed, however, cognizance is not taken for any reason by the Court, the accused will have no right to bail as per the provision under Section 167(2)(b) Cr.P.C, thus his remand under Section 167 Cr.P.C will be required to be continued. Reliance was placed on the judgment **Suresh Kumar Bhikamchand Jain v. State of**



Maharashtra [(2013) 3 SCC 77] and **Serious Fraud Investigation Office v. Rahul Modi [2022 SCC OnLine SC 153]**. It was submitted that hence, apart from extending remand for judicial custody under Section 167(2) Cr.P.C or Section 309 Cr.P.C, the learned ASJ-04 has no power to remand the petitioners to judicial custody, therefore, the judicial custody of petitioners since 07.12.2023 is not backed by judicial order is patently illegal.

10. While relying on the case of **Ram Narayan Singh v. State of Delhi & Ors. [(1953) 1 SCC 389]**, it was submitted that an order merely adjourning the case till next date, containing no direction to remand the accused till that date, does not amount to a remand order. Therefore, by no way of interpretation can the order dated 07.12.2023 passed by the learned ASJ-04, be perceived or understood to be one of granting judicial custody. To the contrary, the order dated 07.12.2022 further proceeds to issue production warrants qua the petitioners which amply make it clear that as on 07.12.2022, the petitioners were not in custody in pursuant to any judicial order granting judicial custody.

11. It was further submitted that issuance of production warrant cannot be equated with an order of remand as is being suggested on behalf of ED, since the order of production warrant is passed under Section 267 Cr.P.C whereas the remand order is given under Section 167 Cr.P.C or under Section 309 Cr.P.C which operate differently and the aforesaid provisions are placed under different Chapters in the Cr.P.C.

12. While concurring with the above submissions, Mr. Vikram Chaudhri, learned senior counsel contended that passing of remand order is a judicial function which cannot be performed mechanically or in a casual manner.



The said order is to be passed with due application of mind by the Judicial Officer. Therefore, the custody of petitioners cannot be extended vide order dated 07.12.2023 as petitioners were not produced before the learned ASJ-04 in contravention to Section 167(2)(b) Cr.P.C which requires the production of accused person either in person or through video conferencing at the time of extension of custody remand. Reliance was placed on **Ramesh Kumar Ravi alias Ram Prasad and etc. v. State of Bihar & Ors. etc.** [1987 SCC Online Pat 83]; **Raj Narain v. Superintendent, Central Jail, New Delhi** [1970 (2) SCC 750]; **Rajesh Mishra v. State of U.P.** [1994 SCC OnLine All 1085]; **Madhu Limaye and Others** [1969 (1) SCC 292]. It was voraciously contended that remand order necessarily has to be a legal order which can be passed by a competent Judicial Officer. An administrative order by Reader of Court cannot extend judicial custody. [**Yogesh Mittal v State of NCT of Delhi**; Judgment dated 09.01.2018 in W.P.(Crl.) No.3464/2017].

13. It was contended that in the case of **Harshad S. Mehta v. Central Bureau of Investigation** [Crl. M(M) 2508/1992] and **Amarjeet Sharma v. Special Fraud Investigation Office** [2022 SCC OnLine Del 3633], the Hon'ble Supreme Court has categorically observed that in case of illegal custody, the legal remedy is not bail but a writ petition in the nature of Habeas Corpus or to move an application under Section 482 Cr.P.C. Since in the present case, there is no judicial order, granting extension of judicial custody on 07.12.2023, the detention itself is ex-facie illegal requiring immediate release of the petitioners as deprivation of personal liberty due to illegal custody is a violation of Article 21 of Constitution of India. Reliance in this regard was placed upon the judgment of the Hon'ble Supreme Court



in **Gautam Navlakha v. National Investigation Agency** [(2022) 13 SCC 542]. Reliance was also placed on the judgment of **Manubhai Ratilal Patel Tr. Ushaben vs. State of Gujarat and Ors** [AIR 2013 SC 313] and submitted that the entire object of proceedings for a writ of habeas corpus is to make the proceedings expeditious and free from technicality since liberty is at stake and requires the immediate determination of the petitioners' right to freedom. It was submitted that aggrieved by the aforesaid, the petitioners are constrained to file the present petitions.

Submissions of Respondents

14. While refuting the above submissions, Mr. Zoheb Hossain, learned special counsel appearing on behalf of ED submitted that the petitioners were produced through video conferencing and not physically on 07.12.2023 before learned ASJ-05 in pursuance to the order dated 30.10.2023 as it was submitted on behalf of the petitioner Hari Om Rai before the learned ASJ-05 that the petitioner Hari Om Rai and his counsel had requested the Jail Superintendent for allowing petitioner Hari Om Rai to be produced through video conferencing in the Court. In view of the same, learned ASJ-05 allowed the oral request/application moved on behalf of the petitioners for their production through video conferencing till further orders. It was submitted that the case of the petitioners was transferred to the Court of learned ASJ-04 on the same day at 2 PM. However, inadvertently post lunch till the case was adjourned for next date of hearing, the petitioners were not produced even through video conferencing before the learned ASJ-04. In those circumstances, the learned ASJ-04 directed for issuance of production warrants of the petitioners and was pleased to adjourn the matter to 13.12.2023 for the purpose of taking cognizance. He further submitted



that ED had already filed the prosecution complaint after culmination of the investigations in the present case on 06.12.2023, therefore, ED did not file any application seeking extension of remand.

15. It was submitted by Mr. Hossain that as the petitioners were not in the custody of ED, however, they were in the judicial custody, therefore, their custody is perfectly lawful and not illegal as claimed by the petitioners. The order for production of all the petitioners by issuance of production warrants in itself is sufficient to establish that the remand of the petitioners since 07.12.2023 is not illegal. Therefore, an order for production of the petitioners for the next date can only be treated as extension of judicial custody, when the request for remand is made by the prosecutor and is not opposed on behalf of the accused persons or no bail application is moved on their behalf. Reliance was placed on the judgment in the case of **Manohari vs. State of Rajasthan** [MANU/RH/0084/1982].

16. Mr. Hossain further submitted that on 07.12.2023, all the petitioners were represented before the learned ASJ-04 through their respective counsels at the time of passing of the order of issuance of production warrants against the accused persons for the next date of hearing. None of the counsels took an exception to passing of the said order of production of the petitioners or requested for their bail by learned ASJ-04. To this effect, reliance placed on the judgment of the Hon'ble Supreme Court in the case of **Raghunandan Chauhan v. State** [1980 SCC OnLine Del 103]. It was submitted an order for production of the accused for a particular date of hearing clearly indicates that till the date accused was to be kept in custody and to be produced in the Court on the date as per production warrant.

17. It was next submitted that although as far as possible an accused



should be produced before the Magistrate for remand but it will depend upon facts and circumstances of each case whether physical presence of accused was necessary or not, thus, a fresh order of remand of the accused person by Magistrate in absentia would not render the remand to be illegal. To justify said view, reliance placed on **M. Sambasiva Rao v. The Union of India (UOI) and Ors.** [MANU/SC/0697/1972], **Raj Narain v. Superintendent, Central Jail, New Delhi** [1970 (2) SCC 750], **Gouri Shankar Jha v. State of Bihar &Ors** [(1972) 1 SCC 564] and **Sandip Kumar Dey v. The Officer-in-charge, Sakchi Jamshedpur and Others** [(1974) 4 SCC 273].

18. It was also submitted that the requirement of passing fresh remand orders for remanding an accused for not more than 15 days does not apply to Court of Sessions whose powers are not restricted under Section 309 Cr.P.C to grant remand up to 15 days only. In support of his submission, the learned counsel has relied upon the case of **Koomar Indraneel v. State of Bihar**, [2000 SCC OnLine Pat 847].

19. It was further submitted by relying on the judgments in the case of **Kanu Sanyal v. Distt. Magistrate**, [(1974) 4 SCC 141], **Serious Fraud Investigation Office v. Rahul Modi** [2022 SCC OnLine SC 153], **State of Maharashtra v Tasneem Rizwan Siddique** [(2018) 9 SCC 745] that in Habeas Corpus proceedings the Court is to have regard to the legality of detention on the date return. Finally, it was contended that the maxim *Actus Curiae neminem gravabit* is applicable in the present case which validates the custody of petitioners from 07.12.2023 till 13.12.2023 [**V. Senthil Balaji vs The State represented by Deputy Directors and Ors; SLP(Crl)** No. 2284-2285/2023].



20. It is to be noted that on 14.12.2023, Mr. Zoheb Hossain, learned Special Counsel for ED appeared physically and Mr. Hariharan N., learned Senior Counsel for petitioner Andrew, appeared through video conferencing along with other counsels for the petitioners, and mentioned before this Court that learned ASJ-04 had extended the judicial remand of the petitioners on 13.12.2023 till 20.12.2023 (2 PM). Copy of the order dated 13.12.2023 was handed over across the board and is placed on the record.

Analysis and Findings

21. Taking note of the submissions which were made at length, pertinently, a writ of habeas corpus is an extraordinary remedy, when there is illegal confinement violating the personal liberty of a person. Ordinarily, an order of remand by a competent court is essentially a judicial function and cannot be challenged by way of writ of habeas corpus unless and until the remand order lacks jurisdiction or is absolutely illegal resulting in unlawful “custody”. It is true that an order of remand can be challenged in a Habeas Corpus petition if such an order is passed in an absolutely mechanical or casual manner. The contention of learned Senior Counsels for the petitioners cannot be brushed aside that a valid custody remand can be made in accordance with express provisions of law, when the custody of an arrested person is illegal, such a person is entitled to be released forthwith.

22. We are also conscious of the fact that an arrested person can be kept in “custody” only in accordance with law. Article 21 of the Constitution provides “no person shall be deprived of his life or personal liberty except according to procedure established by law”. The Hon’ble Supreme Court in the case of **Uday Mohanlal Acharya v. State of Maharashtra** [2001 SCC



(Cri.) 760] considered the concept of personal liberty under Article 21 and observed “....personal liberty is one of the cherished objects of Indian Constitution and deprivation of the same can only in accordance with law and in conformity with the provisions thereof”.

23. In light of the above, to appreciate the issue raised in present petitions, concerning with the power of the Judicial Officer to pass order of remand in terms of Section 167 (2) Cr.P.C. and Section 309 Cr.P.C, the aforesaid provisions are relevant for understanding the issue involved in these petition. The same are extracted hereinbelow:-

“Section 167. Procedure when investigation cannot be completed in twenty-four hours.

(1) xxxx

xxxx

xxxx

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;



(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.--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.

Explanation II.-If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.

“Section 309 –Power to postpone and adjourn proceedings”

1. In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded;

Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376AB, section 376B, section 376C or section 376D, section 376DA, section 376DB of the Indian Penal Code, the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet.

2. If the Court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:



Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that -

1. no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;
2. the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;
3. where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

Explanations

1. If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.
 2. The terms on which an adjournment or postponement may be granted in include, in appropriate cases, the payment of costs by the prosecution or the accused.”
24. As would be manifest from a reading of above provisions, the power of remand is vested in the Court, firstly, at the stage of investigation, when the arrested person can be remanded initially either to police custody or judicial custody. Whereas, custody remand under Section 309 Cr.P.C operates only at post cognizance stage after conclusion of investigation



when chargesheet is laid before the Court. In the present petitions, in fact, initially after being remanded to police custody, the petitioners were being remanded to judicial custody from time to time under Section 167(2) Cr.P.C by the court of learned ASJ-05 till 07.12.2003.

25. Pertinently, it is the order passed on 07.12.2023 by learned ASJ-04 which is in issue, as according to the petitioners, the order cannot be termed to validate the judicial custody of the petitioners as petitioners were not produced before learned ASJ-04 at the time of passing of the order which is contrary to Section 167(2)(b) and the post cognizance stage did not commence as learned ASJ-04 did not take cognizance of the prosecution complaint, therefore, the custody remand of the petitioners was not extended by learned ASJ-04 as per law, thus, resulting in illegal custody of the petitioners since thereafter. To appreciate the submissions, it would be relevant to reproduce the order dated 07.12.2023 passed by learned ASJ-04, which is herein below:-

“07.12.2023

Present complaint received by way of transfer. It be checked and registered.

Present: Sh. Simon Benjamin and Sh. Manish Jain, Id. Special PP for Enforcement Directorate.

Sh. Vikram Chaudhari, Sr. Advocate (through VC) alongwith SH. Abhayraj, on behalf of accused Hari Om Rai (at S. No. 20).

Sh. Ankit Bhatia and Samar, Id. counsel for accused Nitin Garg (st S No. 21).

Sh. Priyank alongwith Sh. Tanmay Sharma and Shitj Id. counsels for accused Guangwen Kuang @ Andrew. (at S. No. 4).

Sh. Harsh Yadav, Id. counsel for accused Rajan Malik (at S No. 15). (fresh Vakalatnama filed)

All the four accused persons are stated to be in JC at Tihar Jail. They are not produced today.



The remaining accused persons are the companies and individuals and are stated to be not arrested till date.

Asst. Director (PMLA), Tarun Kumar Bhardwaj alongwith Arun Khatri, Enforcement Officer.

It is submitted by the respective Id. Defence Counsels that they have not received the copy of the complaint and the allied documents. It is submitted by the Special PP appearing on behalf of ED that the complaint and documents can be supplied to the accused persons once the cognizance is taken on the complainant by the court.

It is submitted by Id. counsel for ED that documents in this case are voluminous in 16 trunks. He seeks instructions as to when the documents be handed over to the Ahlmad for scrutiny. Let the documents be handed over to the Ahlmad for scrutiny on 09.12.2023.

The Ahlmad shall identify the place in the Ahlmad room where the said 16 trunks can be kept.

Put up for consideration on the aspect of cognizance on 13.12.2023 at 2 pm.

Issue production warrants against accused persons for NDOH.

Let accused persons be produced through VC on 13.12.2023 at 2 pm.

Copy of the order be given dasti as prayed for.”

26. It is amply clear from the above order passed by the learned ASJ-04 that petitioners were not produced in the Court, even though earlier in the day, they were produced through video conferencing before learned ASJ-05 but no order in writing was passed by the Court. Also, learned ASJ-04 did not take cognizance of the prosecution complaint and deferred it to the next date of hearing, thereby issuing production warrants against the petitioners. The question that remains to be answered is regarding the nature of “custody” of the petitioners, whether legal or illegal in view of the order above.

27. In this background, we may refer to the judgment of **Suresh Kumar Bhikamchand Jain (supra)**. A Special Leave Petition was filed before the Hon’ble Supreme Court wherein one of the issues involved was regarding



the power of Magistrate to pass orders of remand even beyond the period envisaged under Section 167(2) Cr.P.C. In the said case, despite chargesheet having been filed, no cognizance was taken on the basis thereof by the Special Court on account of failure of the prosecution to obtain 'sanction' to produce the accused under the provisions of the Prevention of Corruption Act, 1988. The learned Magistrate, however, continued to pass remand orders without apparently having proceeded to the stage contemplated under Section 309 Cr.P.C. The Hon'ble Supreme Court observed as under:-

“18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Cr.P.C. is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Cr.P.C. The scheme of the Cr.P.C. is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/ or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.”



28. In the case of **Serious Fraud Investigation Office (supra)**, while relying upon the judgment of **Suresh Kumar Bhikamchand (supra)** it was held by Hon'ble Supreme Court that "it is made clear that the accused remains in the custody of the Magistrate till the cognizance is taken by the relevant court".

29. From the above discussions, two situations have emerged when the chargesheet/prosecution complaint is filed in the Court. One is, when remand under Section 167(2) Cr.P.C has not expired and in the meanwhile chargesheet/prosecution complaint is filed by the investigating agency and the competent court takes cognizance under Section 309 Cr.P.C on the said chargesheet/prosecution complaint. On the date of taking cognizance, the accused is not produced before the Court and is not remanded to the judicial custody under Section 309 Cr.P.C. However, the Court issues production warrant against the accused for production on the next date of hearing. The validity of such remand under Section 167 Cr.P.C was challenged before this Court in case of **Sunil Kumar Sharma vs. State of NCT of Delhi ILR [(2005) II DELHI 153]**.

30. In the said case, during the period of a valid order under Section 167 Cr.P.C, accused was placed under judicial custody, his remand was to continue till 26.04.2005, however, the chargesheet was filed on 25.04.2005 and the Magistrate took cognizance on the chargesheet on the same day as the accused was in judicial custody till 26.04.2005. Production warrants were issued against him for the same date. The objection raised on behalf of the accused contemplating illegal custody on 25.04.2005 was that no valid order for remand was passed under Section 167(2) Cr.P.C or under Section 309(2) Cr.P.C on 25.04.2005 or on 26.04.2005. It was contended that the



order of remand passed on 20.04.2005 was one which was passed during the pendency of investigation and accordingly it automatically extinguished upon the Magistrate taking cognizance of the offence on 25.04.2005 under Section 309 Cr.P.C. It was held:-

“where filing of the charge-sheet is immediately followed by the Magistrate taking cognizance and just thereafter remanding the accused to judicial custody under section 309(2) CrPC, there is no problem. This is so because the lapse of one period [under section 167(2) CrPC] would "melt", as it were, into the period of remand under section 309(2) CrPC without a hiatus. However, where, upon the filing of the charge-sheet, while cognizance is taken, an order of remand under section 309(2) CrPC is not passed immediately but after a few days or so, there appears to be a chasm between a valid detention order under section 167(2) CrPC and a remand to custody order under section 309(2) CrPC. But, in reality there is no such "break". It only appears to be so because of the assumption that as soon as the Magistrate takes cognizance of the the remand order passed under section 167(2) CrPC gets extinguished. This assumption is faulty. Once the charge-sheet is filed and cognizance is taken, it is true, the investigation having come to an end, recourse to the power under section 167(2) cannot be taken. But, that does not mean that an order validly made under section 167(2) terminates the instant the charge-sheet is filed and cognizance is taken. Such an order would be valid till the duration for which it is made does not expire or till it is by a remand order under section 309(2) CrPC, whichever is earlier in point of time.”

31. The second situation is, when the chargesheet/prosecution complaint is filed before the competent court and cognizance is not taken by the Court under Section 309 Cr.P.C. However, the remand of said accused continues under the orders of the Magistrate. The Hon’ble Supreme Court, in the case of **Suresh Kumar Bhikamchand Jain (supra)** has observed that such remand granted by the Magistrate was valid and the accused remained in the custody of the Magistrate till cognizance is taken by the concerned court. It is also held that in such a situation the accused has to remain in custody for “some court”.



32. Noticeably, some of the courts of Additional Sessions Judges are designated courts dealing with the Special Statutes and such courts are empowered to grant remand during investigation conducted by any specialised investigating agency under Section 167 Cr.P.C up to a prescribed maximum period and also to take cognizance of chargesheet/prosecution complaint and to conduct trial as contemplated by the law and thus to grant remand under Section 309 Cr.P.C. In the present case, the court of learned ASJ-04 is one such court.

33. Mr. Hossain had contended that the investigation with respect to ECIR had concluded, therefore, the prosecution complaint was filed in the court on 06.12.2023. The order of issuance of production warrants of the petitioners by the learned ASJ-04 on 07.12.2023 is sufficient and as the petitioners were not produced before the Court, it validates the extended custody of the petitioners from 07.12.2023 to 13.12.2023.

34. In the present writ petitions, no cognizance was taken on 07.12.2023 as required under Section 309 Cr.P.C as ED had submitted before the learned ASJ-04 that the documents in the case were voluminous, kept in 16 trunks. The documents had to be scrutinised by the Ahlmad of the court and the learned ASJ-04 directed ED to hand over the documents to the Ahlmad for scrutiny on 09.12.2023 and adjourned the case for consideration on the aspect of cognizance on 13.12.2023 at 2 pm. The judicial custody of the petitioners was expiring on 07.12.2023, however, the peculiar and distinct facts and circumstances as emerging from present writs are that **the petitioners were not produced before the learned ASJ-04**. All the petitioners were represented through their respective counsels and no objection was raised by any of the counsels regarding order for production



warrants of the petitioners. It is also not the case of the petitioners that prosecution complaint was filed by ED beyond the stipulated period thereby entitling the petitioners for “default bail”. Also no bail application was moved on behalf of any of the petitioners at that time. In such a situation, the petitioners have to remain in “custody of court”. Thus, the learned ASJ-04 rightly directed for issuance of production warrants for the petitioners to be produced in the Court on the next date of hearing. As per record, the said production warrants were issued on 09.12.2023 for production of the petitioners for 13.12.2023

35. A question, we pose to ourselves, assuming a competent court has taken cognizance of chargesheet/prosecution complaint and posts the case at a particular stage of proceedings/trial, however, on the said date of hearing, the accused in that case is not produced from judicial custody, due to some unavoidable reason. In such a situation, the court issues production warrant against the said accused and the case is posted for the next date of hearing. Can it be said, during the period, when the accused was produced on the last date of hearing and is to be produced before the court on the next date of hearing in execution of production warrants, his judicial custody is illegal. To our mind, the answer is in negative, as in such a situation, the custody of accused is continuum and there is no “break” in the custody of such an accused. The position, however, will be different when, the accused is not produced before such a Court on the date of hearing and no production warrant is issued for the said accused on the same date of hearing but is issued subsequently. In such a situation, the custody of the accused will not be in continuum and for the break period, it may be illegal.

36. We, thus, find ourselves unable to sustain the submissions made on



behalf of the petitioners that the petitioners are suffering illegal custody since 07.12.2023. The learned ASJ-04 has rightly issued production warrants against the petitioners on 07.12.2023 for production of the petitioners and the petitioners remain in lawful custody of learned ASJ-04.

37. The submissions and views expressed merit no substance in the writ petitions. The same shall, accordingly, stand dismissed. Pending applications also stand dismissed.

SHALINDER KAUR, J.

SURESH KUMAR KAIT, J.

DECEMBER 19, 2023

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