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Judgement Reserved on 28.08.2023

Judgement Delivered on 06.09.2023

Court No. - 67

Case :- HABEAS CORPUS WRIT PETITION No. - 655 of 2023

Petitioner :- Golu @ Arun Patel

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Chandra Prakash Tiwari, Mahesh Kumar

Counsel for Respondent :- G.A.

Hon'ble Rahul Chaturvedi, J.

Hon'ble Mohd. Azhar Husain Idrisi, J.

1. Heard Sri Yogendra Singh, learned counsel for the petitioner and Sri Satendra Tiwari, learned AGA for the State and perused the record.

2. Before hearing the arguments on merits, learned AGA have objected regarding the 'maintainability' of instant Habeas Corpus writ petition, allegedly filed by Golu @ Arun Patel, the petitioner. Thus the Court has directed the counsel for the petitioner to advance his argument with regard to the 'maintainability' of the instant Habeas Corpus writ petition, at the admission stage itself, so that the same shall be decided at the threshold stage.

3. Before appreciating the arguments advanced by learned counsel for the petitioner with regard to the 'maintainability', it is imperative to spell out the 'prayer' sought by the petitioner in the instant habeas corpus writ petition coupled with the facts of the case, which has allegedly given rise to this writ petition:-

4. The prayer sought by the petitioner is that :-

“ i) A writ, order or direction in the nature of habeas corpus to direct the respondents to produce the corpus namely, Golu @ Arun Patel before this Hon'ble Court and to set free the corpus namely Golu @ Arun Patel at his own liberty in pursuance of the F.I.R. dated 16.02.2023 registered as Case Crime No. 41 of 2023, Sessions Trial No. 385 of 2023 under

Sections 4,5 and 6 of the Prevention of Immoral Trafficking Act, Police State-Jaipura, District-Varanasi.

ii) An order or direction for compensation in favour of the petitioner and against the respondents.

iii) To pass an order of disciplinary enquiry against the erring officer.

iv) Any other writ order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

v) Award the cost of the petition in favour of the petitioner and against the respondents.”

5. Thus, from the prayer sought, it is apparent that the only prayer is sought is a direction to the respondent authorities to produce the corpus of petitioner Golu @ Arun Patel before this Court and thereafter to set free the corpus Golu @ Arun Patel at his own liberty, who is in judicial confinement pursuant to the FIR dated 16.02.2023 in case crime no. 41 of 2023 and facing the trial in S.T. No. 385 of 2023 under Sections 4, 5 and 6 of the Immoral Traffic (Prevention) Act 1956, P.S. Jaitpura, District Varanasi. There is neither any prayer nor any pleadings to this effect that the alleged judicial remand is absolutely illegal or suffers from the vice of lack of jurisdiction or has been passed in absolutely mechanical manner by the court concerned. Moreover, now the petitioner is facing the regular trial S.T. No.385 of 2023 and thus to canvass that the judicial remand is farfetched.

FACTUAL MATRIX OF THE CASE

6. On 16.02.2023 around 13.38 hours one Habiburrehman has lodged an FIR against unknown person for the incident said to have been taken place on 12.02.2023 under Section 363 IPC at P.S. Jaitpura, District Kashi (Police Commissionerate Varanasi) with the allegation that the informant is residing at adjacent lane, nearby Kohinoor Garden in a tenanted accommodation. Informant's daughter V.P. (the name of the victim has been eclipsed) on 12.02.2023 went from her home without informing anybody and since then her whereabouts were not traceable and thus prayed that the police may help in searching his daughter V.P.. After lodging of the FIR the police has inquired from the informant-

Habiburrehman but the victim was recovered after 15 days. In her 161 Cr.P.C. statement was recorded and the same is annexed as Annexure No. 2A to the petition. In this 161 Cr.P.C., dated 25.02.2023, she declares that her age is 16 years and she further states in her 161 Cr.P.C. statement that she left her home on her own, without any information or knowledge to any of the family members in order to earn money. She went to Cantt. Railway Station Varanasi and started searching out work for her. At the Station she met with one Prakash. Prakash has made an offer that he would provide service at Indore, M.P. and asked her to purchase ticket for Indore. For this purpose, she contacted with one Golu, her own old acquaintance. Golu and her father came to station and taken her to home. She remained silent when the question was put by the I.O. as there was any sexual excessive were done by Prakash or not. She further states that all during these 15 days she remained at Varanasi Station.

7. Thereafter, the I.O. of the case has brought her before the Magistrate for recording her statement under Section 164 Cr.P.C. dated 27.02.2023, in which, she discloses that her age is 17 years and she further states that on her own she left her home, as the condition of the home were not congenial on account of financial distress & paucity. She went to the railway station to get herself engage in some work, so that she may earn money. At the station, she met with two ladies and a man-Prakesh, the ladies did not disclose their names or identity and all of them have made an offer to accompany her to Indore, so that, they may arrange a good service for her. Consequently, she joined their company and thereafter, all of them have administered her 'Beer' and some other 'intoxicant', so that she got unconscious. Not only this, they have taken her to some nearby hotel, where Prakash got her engage in sexual activities with some unknown persons. Not only this, Prakash and his wife compulsorily making her, as an subject of the sexual activities with some unknown persons person and in flesh trading while sending her in number

of hotels and virtually they have thrown her in the “so called profession” of prostitution for 15 days.

8. In the ‘Majeed Bayan’ of Habiburrehman, after inquiring from her daughter thereby she disclose her pathetic & ordeal experience during these 15 days. She has given every minutest detail of suffering faced by her to her father. In which she has almost reiterated the 164 Cr.P.C. version with necessary details in it. Many other characters were inserted in her story as she was dumped into market of flesh trading. It is not out of place to mention here, that this shameful profession there are number of persons involved in it in the dark of secrecy. Since she was thrown in this furnace of flesh trading, she has disclosed the names of all those persons, who were engaged in it as pimp or broker, hotel owners, its managers, customers etc.. She states that Prakash used to collect the amount and never shares with her, however, she managed to come from his clutches and came to her father’s place on 25.02.2023.

9. During this investigation the police has recorded the statement of Durga Vishwakarma, yet another victim and recorded her 161 & 164 Cr.P.C. statement. She was also engaged in the same business of prostitution with V.P.. She too have shared her experience before the Magistrate by narrating pathetic saga faced buy her & V.P.. Accused Abid Khan @ Rinku, Manager of the Suyog Guest House, who have disclose the active complicity of the present petitioner Golu @ Arun Patel in this racket. These statements clearly indicates that the petitioner was actively involved in this act of prostitution and flesh trading, who was working as a pimp or a broker, who used to provide the space in the Guest House to his customer. Deepak Kumar too has recorded her statement under Section 161 Cr.P.C., one Suhani Pathak, wife of Ramesh Kumar Pathak recorded her statement under Section 161 Cr.P.C., accused Prakash Vishwakarma, Golu Jaiswal and lastly the ‘Majeed Bayan’ of the victim V.P.. In her .Majeed Bayan’ states that Prakash used to keep knife with him and extending the threats she was compelled to satisfy the customers.

The hotel owners, the Managers, the hotel waiters are all engage in the act prostitution. Not only this, the petitioner named above has also confessed his guilt and involvement in his 161 Cr.P.C. statement before the police.

10. After collecting the material during investigation and critically analysing the same, the police have submitted a supplementary “Charge Sheet” on 01.07.2023 under Section 363 and Section 5, 4 and 6 Immoral Traffic (Prevention) Act 1956 and Section 4,17 and 7 of the POCSO Act against the petitioner named above and the learned trial judge has taken the cognizance of the offence. Not only this, the learned Magistrate after committing the case to learned Sessions Judge for the trial of the petitioner and all other accused, who were facing the trial in S.T. No. 385 of 2023.

11. On these factual matrix of the case, learned counsel for the petitioner have tried to assail the confinement order of the petitioner. It is contended by the counsel that the petitioner’s incarceration into the jail is a result of the procedural fallacy. The petitioner ought not to have send to jail in connection with the offence. It is stated that petitioner’s name does not find place in the FIR and the way and the manner petitioner’s alleged complicity has shown by the police is wholly untrustworthy. In this regard number of procedural fallacy were pointed out by the learned counsel for the petitioner. In this regard, it is contended that the 161 Cr.P.C. statement of Deepak Kumar and Abid Khan, the co-accused could be read against the petitioner. Interestingly in the entire pleadings the petitioner has not made any whisper with regard to non-compliance of mandatory provisions along with a total non-applications of mind while passing the judicial remand order.

We have perused the grounds taken in which no ground was taken challenging the alleged remand order or the powers of Magistrate while passing the remand orders.

12. It is not disputed that after having a thread bare investigation, the police has already submitted report under Section 173(2) Cr.P.C. and the learned Magistrate has already taken the cognizance of the offence. Presently, the petitioner is under the judicial remand by an order of competent Judicial Magistrate, who is empowered to pass judicial remand order. Without any pleadings or ground taken in this petition, learned counsel for the petitioner have started taking tangent arguments, half heartedly with regard to the judicial remand, without any basis or ground taken by him.

It is also not disputed that the petitioner is facing the S.T. No. 385 of 2023 and is in behind the bars pursuant to the judicial remand. At this stage, when there is ensuing Session's Trial, in which the petitioner is facing the trial, much water has flown in the river and at this juncture we cannot put the clock back to the cognizance stage & challenge the charge sheet.

13. The second limb of the argument is that after the recording the 164 Cr.P.C. statement "majeed bayan" of the victim cannot be looked into. Thirdly, the confinement made by the State-Authority is per-se illegal and remand order is bad in eye of law and therefore, the petitioner is entitled to be released from the jail as the same is violative of Article 21 of the Constitution of India.

14. Broadly speaking aforementioned are moot issues canvassed by the learned counsel for the petitioner, in support of prayer sought by means of the present Habeas Corpus writ petition.

15. Per contra, Sri Satendra Tiwari, learned AGA has vehemently opposed the 'maintainability' aspect of the present Habeas Corpus writ petition. He has charged, the counsel for the petitioner for concealing the material fact, a deliberate and intentional attempt for hiding of the material fact that the petitioner's Bail Application No.3252 of 2023 was rejected by the court concerned on 11.07.2023 arising out of case crime

no. 41 of 2023 in S.T. No. 385 of 2023 under Sections, 4,5 and 6 of Immoral Traffic (Prevention) Act, 1956. In this regard, it is contended by learned AGA that though there is passing reference of the aforesaid bail rejection order in paragraph 2A of the petition but the learned counsel for the petitioner has purposely concealed and have not annexed the said bail rejection order by the concerned court for the reasons best known to him. Moreover, when learned court below have rejected the bail application of the petitioner, then natural outcome would be to move Bail Application before the High Court under Section 439 Cr.P.C. and not by filing the Habeas Corpus Petition.

16. Learned AGA has produced a judgment of Hon'ble Apex Court in the case of **Serious Fraud Investigation Office and Ors. Vs. Rahul Modi and Ors.** reported in **2019 (5)SCC 266** in which reads thus:-

“(21) The act of direction remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition.”

We have also noticed in paragraph 19 of the judgment :-

“(19) The law is thus clear that “in habeas corpus proceedings a 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 institution of the proceedings”.

17. In addition to above, Sri Satendra Tiwari, learned AGA also cited yet another judgement of Hon'ble Apex Court in the case of **Manubhai Ratilal Patel through Ushaben Vs. State of Gujrat and others** reported in **(2013) 1 SCC 314**, in the aforesaid judgment the Hon'ble Apex Court has an occasion to evaluate the depth and the reach and the import of Habeas Corpus Petition, since the petitioner had knocked the door of the High Court in the Habeas Corpus Petition. The writ of Habeas Corpus has always been given due signification as a effective method to ensure the release of detained person from the prison. In and old treatises

expounding the scope and ambit of Habeas Corpus Petition while defining the Habeas Corpus states as under:-

“The ancient prerogative writ of habeas corpus take its name from two mandatory word Habeas & Corpus which contain at the time when it, in common with all forms of legal process, was framed in latin. The general purpose of these writs as there name indicates, was to obtain the production of an individual.”

In the case of Secretary of Home Affairs Vs. O Brien reported in 1923 AC 603 in which it has been observed that :-

“It has been observed that it is perhaps the most important writ known to the constitutional law of England affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty third year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of liege.”

18. The whole object of proceeding for a writ of habeas corpus writ is to make them expeditious, keep them free from all the technicality as possible and keep them simple as possible.

19. In the case of Kanu Sanyal Vs. District Magistrate, Darjeeling reported in 1976(2) SCC 674, the Hon’ble Apex Court has laid down that these writ of habeas corpus deals with the machinery of justice and not a substantive law. The object of the writ is to secure the release of the person who is illegal restrain to this liberty.

20. At this juncture, we may profitably refer to the Constitutional Bench Judgement in the case of Sanjay Dutt (2) Vs. State reported in 1994 (5)SCC 410, the relevant extract of the judgment, which reads thus:-

“48.....It is settled by the Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order.”

“23. Keeping in view the aforesaid concepts with regard to the writ of habeas corpus, especially pertaining to an order passed by the learned Magistrate at the time of production of the accused, it is necessary to advert to the schematic postulates under the Code relating to remand. There are two provisions in the Code which provide for remand, i.e., Sections 167 and 309. The Magistrate has the authority under Section 167(2) of the Code to direct for detention of the accused in such custody, i.e., police or judicial, if he thinks that further detention is necessary.

24. The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner. It is apt to note that in Madhu Limaye (supra), it has been stated that once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand, the Magistrate directed detention in jail custody after applying his mind to all relevant matters.”

21. Thus, the exercise of jurisdiction clearly shows that the Magistrate performs a judicial act. The order of remand, which is a judicial act, as we perceive does not suffer from any infirmity. It is a well accepted principles that a writ of Habeas Corpus is not to be entertained when a person committed to the judicial custody or the police custody by a competent court by an order, which prima facie does not appear without jurisdiction or passed in absolutely mechanical manner or wholly illegal as has been

stated in judgement in **B.Ramchandra Rao(supra) & Kanu Sanyal(supra)**. The court is required to scrutinize the legality or otherwise of the order of detention which has been passed unless the court is satisfied the person has been committed to the jail custody by virtue of an order that suffer from vice of lack of jurisdiction or absolute illegality a habeas corpus writ petition cannot be granted. It is apposite to note that the investigation, as has been dealt with in a various authorities of the courts is neither an inquiry or a trial. It is within the exclusive domain of the police to investigate and is independent of any control by Magistrate. The sphere of activities is clear cut and well demarcated, thus we are of the considered opinion that the prayer sought by means of the present Habeas Corpus writ petition could not be granted in favour of the petitioner.

22. Seeking help from yet another judgment in the case of **State of Maharashtra Vs. Tanseem Rizwan Siddiquee** reported in **(2018) 9 SCC 745** :-

“The question as to whether a writ of Habeas Corpus could be maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in the case of Saurabh Kumar through his father Vs. Jailor, Koneila Jail and Anr., [2014 13 SCC 346] and Manubhai Ratilal Patel Vs. State of Gujarat and Ors. [2013 1 SCC 314]. It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the respondent on 18th/19th March, 2018 and decided by the High Court on 21st March, 2018 her husband Rizwan Alam Siddique was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No.131 vide order dated 17th March, 2018 and which police remand was to enure till 23rd March, 2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order passed by the jurisdictional

Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued.”

23. In the latest pronouncement of the Hon’ble Supreme Court delivered on 07.08.2023 in the case of **V. Senthil Bala Ji Vs. The State of represented by Deputy Director & Others** in **CrI. Appeal no. 2288-2289 of 2023** in which Hon’ble Supreme Court lucidly explained :-

“29. A writ of Habeas Corpus shall only be issued when the detention is illegal. As a matter of rule, an order of remand by a judicial officer, culminating into a judicial function cannot be challenged by way of writ of Habeas Corpus, while it is open to the person aggrieved to seek other statutory remedies. When there is a non-compliance of the mandatory provisions along with a total non-application of mind, there may be a case for entertaining a writ of Habeas Corpus and that too by way of challenge.”

As mentioned earlier the petitioners neither challenged the judicial remand order nor any pleadings to this effect was made in the entire proceedings. The Court is at complete loss to appreciation the arguments which are tangent to the pleadings.

24. In the light of the above judgements, when there is a no prayer with regard to the alleged judicial remand is ex-facie defective or illegal by the aforesaid any of the vices, we cannot allow the instant Habeas Corpus writ petition in favour of the petitioner. As it is evident from the prayer, that only limited remedy is sought to the extent that the personal presence of the petitioner may be ordered and he is sat at liberty. There is no whisper with regard to the fact that the alleged remand by the Magistrate suffers from any of the vices enumerated above. Even assuming for the sake of argument that the said judicial remand order suffers from any of the vice mentioned above the apt remedy is challenge the said order first by invoking proper remedy for the same and then to approach this Court.

25. Now coming to the last leg of the argument that the petitioner’s bail application has already been rejected by the concerned court by order

dated 11.07.2023, he ought to have invoked the powers of this Court under Section 439 Cr.P.C. for filing the bail application but instead of invoking the same, learned counsel for the petitioner has wrongly advised the petitioner to move an instant Habeas Corpus writ petition without challenging the judicial remand order, which clearly indicates the professional incompetence of the counsel for the petitioner. Not only this, the learned counsel during this marathon argument of two days never divulged this important aspect of this issue, that petitioner's bail application was rejected on 11.07.2023. When a counsel is invoking the extraordinary jurisdiction of this Court, he must come with clean hands. We are of the opinion that the learned counsel for the petitioner without annexing the bail rejection order has made a passing reference, so as to justify his conduct.

26. More over, when he has only given a passing reference the petitioner bail application was rejected on 11.07.2023 without annexing the bail rejection order clearly establish the fact that he wants to hide something while invoking the equitable jurisdiction of this Court, which was purpose and intentional attempt on the part of the counsel for the petitioner to play a hide and seek with the court's proceedings by concealing the material fact.

27. Thus we are not at all inclined to grant the desired prayer to the petitioner on the aforesaid reasons and ground hereby **REJECTED** the present Habeas Corpus petition with the **cost of Rs. 50,000/- (Rs. Fifty Thousand Only)**, which the petitioner shall deposit with the Registrar General, High Court, Allahabad within a period of one month from today. On deposit of such cost, it shall be transmitted to the account of '**High Court Legal Services Committee, Allahabad**'. If the petitioner fails to deposit the cost of Rs. 50,000/- (Rs. Fifty Thousand Only), the Registrar General of this Court shall inform the District Magistrate/Collector, Varanasi for recovery of the said amount as **arrears of land revenue**, who shall after recovering the said amount from the petitioner, transmit it to

the Registrar General of this Court for depositing in the account of '**High Court Legal Services Committee, Allahabad**' within a further period of two months. It is also incumbent upon the DM/Collector to apprise the court after executing the order within the aforesaid period.

28. No laxity would be tolerated in executing the directions of the Court while collecting the 'COST' from the petitioner by the executive authority concerned within time bound period.

Order Date :- 06/09/2023

Abhishek Sri.