

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

**WRIT PETITION NO.2754 OF 2021**

Sadiquabee Mohd. Usman Shaikh  
w/o. Mohd. Usman Mohd Hanif Shaikh

... Petitioner

**Versus**

1. State of Maharashtra  
Through the Public Prosecutor  
A.S. High Court, Mumbai.

2. Senior Police Inspector,  
Deonar Police Station, Mumbai,

3. Senior Police Inspector,  
Shivaji Nagar Police Station,  
Mumbai

... Respondents

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Mr. Adil Khatri for the Petitioner.  
Mr. Y.P. Yagnik, APP for the State.

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**CORAM : S.S. SHINDE AND  
N.J. JAMADAR, JJ.**

**RESERVED ON : 24<sup>th</sup> AUGUST 2021**

**PRONOUNCED ON : 16<sup>th</sup> NOVEMBER 2021**

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**JUDGEMENT : (Per N.J. JAMADAR, J.)**

1. This Petition under Article 226 of the Constitution of India is

filed by the wife of Mohd. Usman Mohd. Hanif Shaikh, the accused, for the following reliefs :-

- (a) to issue 'Writ of Habeas Corpus' or Writ in the nature of Habeas Corpus or any appropriate writ, direction, order to the Respondents, to forthwith release the Petitioner's husband, named, Mohd. Usman Mohd Hanif Shaikh, or such terms and conditions as this Hon'ble Court deem fit and proper illegal detention at Shivaji Nagar Police Station lock-up after MCR & Deonar Police Station dated 26 July 2021 and 27 July 2021;
- (b) to order disciplinary proceeding to be initiated against the concerned police officers;
- (c) to order for the compensation to be awarded to the Petitioner's husband by the Respondents.

2. The Petition arises in the backdrop of the following facts :

(a) On the basis of a report lodged by Shahnawaz Sayyed Sarang, C.R. no.399 of 2021 was registered at Deonar Police Station for the offence punishable under Section 380 of Indian Penal Code ("Penal Code") for the alleged theft of mobile phone handsets on the morning of 29 May 2021.

(b) The Petitioner alleges that in connection with the said crime, the Petitioner's husband Mohd Usman Mohd Hanif Shaikh,

the accused was illegally detained by Deonar Police on 26 July 2021 at about 09.30 p.m. No notice under Section 41A of the Code of Criminal Procedure, 1973 ("the Code") was given, though warranted by the circumstances of the case. The Accused was not produced before the jurisdictional Magistrate on 27 July 2021. The Accused came to be produced before the Learned Metropolitan Magistrate 45<sup>th</sup> Court, Kurla, Mumbai at about 12.50 p.m. on 28 July 2021. The Accused raised grievance of illegal detention before the learned Magistrate. However, the Accused was remanded to the police custody till 30 July 2021.

(c) On 30<sup>th</sup> July, 2021, the learned Magistrate declined to extend the police custody and remanded the Accused to judicial custody till 13 August 2021. However, the Accused was kept in the lockup at Shivaji Nagar Police Station in gross violation of the order passed by the learned Magistrate, remanding the Accused to the judicial custody and the constitutional and legal rights of the Accused. Hence, the Petitioner approached this Court on 1 August 2021 and invoked the writ jurisdiction.

3. A report was filed by the Investigating Officer. As the record

revealed that the Accused was remanded to judicial custody on 30 July 21 itself and yet the Accused was not lodged in the prison till 5 August 2021, the concerned investigation was directed to file an affidavit, dealing with the allegations in the Petition.

4. Mr. Pratap Desai, Police Sub-Inspector attached to Deonar Police Station has filed the affidavit. It was categorically denied that the Accused was apprehended on 26 July 2021 and kept in illegal detention till 28 July 2021. In contrast, the investigating officer asserted that the Accused was arrested on 27 July 2021 at about 06.00 p.m., which fact is evidenced by entries in the case diary. The allegations of illegal detention were thus sought to be refuted.

5. As regard the allegations of detention of the Accused in the police custody, post order by the learned Metropolitan Magistrate remanding the Accused to the judicial custody, the investigating officer has asserted that :-

“(i) I say that as on 31.07.2021 to 01.08.2021 being Saturday and Sunday, there is no facility available in the government hospital to do RTPCR, hence the present Petitioner's husband namely Mohd. Usman

Mohd. Hanif Shaikh is kept in Shivaji Nagar Lock up separately by following COVID-19 guidelines. Then subsequent dates on 02.08.2021 and 03.08.2021, due to unavoidable circumstances like this out of six vehicles, i.e. (i) Mobile – 1 Van, (ii) Light Van, (iii) Peter- 1 – Jeep, (iv) Mobile -2 Jeep, (v) Mobile – 3 Jeep and (vi) Mobile – 5 Jeep, no government vehicle was available, the copy of the Log Book/Diary of the government vehicles is clearly show that out of six government vehicles, three government vehicles were not in working condition. One government vehicle is out of order on 23.07.2021, another another government vehicles is out of order on 31.07.2021 and third government vehicles were on Nakabandi duty at different places, which is ordered by the Control Room and sixth government vehicle is engaged on Wireless Message duty. The copies of the extract of the Vehicle Register is annexed hereto and marked as **Annexure-B Colly**, with this Affidavit for ready reference to this Hon'ble Court.

(ii) I say that on 04.08.2021, the husband of the Petitioner was taken to Shatabdi Hospital for RTPCR Test and at Shatabdi Hospital, negative report was received on very same day in the evening and immediately on 05.08.2021, the Petitioner was given in the custody of Arthur Road Central Prison, Mumbai as Report was received late in the evening. The copy of the

Report that he was lodged in Arthur Road Central Prison, Mumbai is hereto annexed and marked as **Annexure-C** for ready reference to this Hon'ble Court.

(iii) I say that the Petitioner's husband has falsely alleged that the investigating officer was doing interrogation during the intervening period, but in fact, the investigating officer was busy in other investigation and such record can be produced as and when required by this Hon'ble Court."

6. In the backdrop of the aforesaid stand, as is manifested in the affidavit of the concerned police officer, Mr. Adil Khatri, learned Counsel appearing for the Petitioner strenuously submitted that the fact that the Accused was illegally detained in police custody, despite order of the Metropolitan Magistrate dated 30 July 2021, remanding the Accused to the judicial custody, can hardly be disputed. Learned Counsel for the Petitioner urged with a degree of vehemence that the reasons sought to be assigned by the investigating officer for not lodging the Accused in the prison, are simply unworthy of acceptance. It was submitted that, in the wake of COVID-19 pandemic, all the prisons have been equipped with quarantine facility. Thus, the claim of the investigating officer that

awaiting the report of COVID-19 test (RTPCR), the Accused was detained in police lock up at Shivaji Nagar Police Station is untenable. Mr. Khatri further submitted that non-availability of the vehicle to take the Accused for conducting RTPCR is a lame excuse. In the circumstances, in the backdrop of proved unlawful detention in police station, the Accused is entitled to compensatory relief and the State is duty bound to initiate disciplinary action against the errant official/s, submitted Mr. Khatri.

7. In opposition to this, Mr. J.P. Yagnik, learned APP for the State, would urge that the exigency of the situation, which arose on account of COVID-19 pandemic, cannot be lost sight of. The Prison Department, according to Mr. Yagnik, insisted on having a negative RTPCR report, so as to arrest the spread of contagion among the inmates. From this standpoint, the claim of the investigating agency that testing facility was not available on 31 July 2021 and 1 August 2021, being Saturday and Sunday, respectively, and test could not be conducted on 2 and 3 August 2021, as vehicle was not available, cannot be said to be unreasonable and unsustainable. After the receipt of the negative RTPCR report, the Accused was immediately shifted to prison on 5 August 2021.

Therefore, according to Mr. Yagnik, the claim of unlawful detention, in the police custody, is unworthy of acceptance.

8. We have carefully perused the Petition, its accompaniments and reply thereto. We have also perused the original file pertaining to investigation in connection with C.R. No.399 of 2021.

9. The Petitioner has agitated two issues. One, there was an illegal detention from 26 July 2021 till 28 July 2021. Two, the Accused was unlawfully detained in police custody, after he was remanded to judicial custody.

10. On the first count, learned Magistrate, upon perusal of the material on record, observed that the ground of illegal detention from 26 July 2021, was not sustainable, especially, in the face of the material to show that the Accused was arrested on 27 July 2021 at about 06.00 p.m. Upon perusal of original record, we are of the view that no fault can be found with the said observations of the learned Metropolitan Magistrate.



11. On the second count, however, the claim of the Petitioner appears to be sustainable on facts. The orders passed by the learned Metropolitan Magistrate on 28 July 2021 and 30 July 2021, make the position abundantly clear. By the first order, the Accused was remanded to police custody till 30 July 2021. By later order, the prayer of the investigating officer to extend the police custody was turned down and the Accused was remanded to judicial custody till 13<sup>th</sup> August 2021. Undoubtedly, the Accused was not lodged in prison till 5 August 2021 and was detained at police lock up at Shivaji Nagar Police Station.

12. The investigating agency attempted to wriggle out of the situation by asserting that, the Accused could not have been lodged in prison as it was obligatory to have a negative RTPCR report before a person is lodged in prison. Since the test could not be conducted on 31 July 2021 and 1 August 2021, as testing centres were closed, and on 2 and 3 August 2021, the Accused could not be taken for test, as vehicles were not available, it cannot be said that there was a deliberate attempt to detain the Accused in police custody, in violation of the order of the Metropolitan Magistrate. Whether this explanation is sustainable ?

13. We have extracted above the relevant part of the affidavit of Pratap Desai, on purpose. The explanation sought to be offered by police does not reflect the true and complete state of facts, as borne out by material on record. Firstly, it appears that on 30 July 2021 itself, the Accused Mohd Usman Shaikh was administered first dose of vaccine (*Covishield*) at Deonar Maternity Home, Mumbai. A certificate was issued on that day. Secondly, the intimation dated 5 August 2021, by the Competent Authority, Central Prison, indicates that the Accused was sent for being kept in isolation at a temporary prison at Municipal Corporation School, Byculla, Mumbai. It is true that the RTPCR test was conducted on 4 August 2021 and the report was received on the very day. However, the fact remains that from 30 July 2021 to 05 August 2021, the Accused was detained at police lock up of Shavaji Nagar Police Station. The standing order issued by the Competent Authority shows that the prisoner ought be lodged in prison only after giving vaccine to prisoner. In the case at hand, the first dose of vaccine was administered to the Accused on 30 July 2021 itself. Eventually, the Accused was sent for isolation in a temporary prison. In the backdrop of these facts, the claim of investigating

agency that the accused could not have been lodged in prison for want of negative RTPCR report, does not appear to be wholly sustainable.

14. The endeavor of the investigating officer to explain the delay in lodging the Accused in prison for want of availability of the vehicle, for two clear days, simply does not merit acceptance. Documents were sought to be placed on record to show that three out of six vehicles had broken down. We are afraid to accede to such an explanation. The constitutional and legal rights of a person cannot be sacrificed at the altar of such flimsy explanation.

15. The situation which thus obtains is that, the Accused was detained in police custody in flagrant violation of the order passed by the learned Metropolitan Magistrate to lodge the Accused in prison. The constitutional and legal rights of the Accused were, thus, blatantly violated. The question which crops up for our consideration is the manner, in which the grievances of the Accused can be redressed. A mere declaration that the authorities acted in violation of the constitutional and legal provisions is of no consequence to the person, whose rights have been infringed. The

principle of “Public Law Damage”, thus comes to the fore. The constitutional Courts are empowered to award compensation under public law, to redress such grievances.

16. A useful reference, in this context, can be made to the judgment of the Supreme Court in case of **Rudul Sah Vs. State of Bihar**<sup>1</sup>, wherein the petitioner was detained illegally in prison for over fourteen years after his acquittal in a full fledged trial. The Supreme Court was confronted with the question, as to whether in exercise of its jurisdiction under Article 32, it can pass an order for the payment of money, if such order is in the nature of a compensation consequential upon the deprivation of a fundamental right to life and liberty of a petitioner. The Supreme Court answered the question in the affirmative in the following words :-

“10. We cannot resist this argument. We see no effective answer to it save the stale and sterile objection that the petitioner may, if so advised, file a suit to recover damages from the State Government. Happily, the State's counsel has not raised that objection. The petition could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover

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1 AIR 1983 Supreme Court 1086

damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably with the mandate of Article 21 secured, is to be mulct its violaters in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

(emphasis supplied)

17. In the case of **Bhim Singh, MLA Vs. State of J & K**<sup>2</sup>, where the Supreme Court found that orders of remand were obtained from the Executive Magistrate and the Sub-Judge on the applications of the police officers without the production of the

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2 AIR 1986 Supreme Court 494

petitioner before them, the Supreme Court observed that “when a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation.” Holding thus, the Supreme Court directed State of J & K to pay Bhim Singh a sum of Rs.50,000/-.

(emphasis supplied)

18. A Division Bench of this court in the case of **Rajeev Shankarlal Parmar Vs. Officer-in-Charge, Police Station**<sup>3</sup>, was persuaded to award the compensation to the Petitioner, who was neither produced before the Juvenile Justice Board nor shifted to Observation Home, despite an order passed by the learned Sessions Judge. Such order was passed by the learned Sessions Judge on 7 March 2003. However, it could be given effect to, only on 13 June 2003, on account of the intervention of the High Court. In that backdrop, the Division Bench awarded compensation of

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3 2003(5) Mh. L.J. 820

Rs.15,000 to the petitioner therein.

19. Another Division Bench of this court in the case of **Baban Khandu Rajput Vs. The State of Maharashtra**<sup>4</sup> in the backdrop of allegations that the petitioner therein was arrested on 5.5.1990 and was produced before the Executive Magistrate only on 7.5.1990 and was, thus, illegally detained for over two days, awarded compensation of Rs.10,000/- to the petitioner to be paid by the State of Maharashtra, to whom liberty was reserved to hold inquiry and find out who was the official responsible for the illegal detention of the petitioner and decide whether any further action was required to be initiated against the concerned.

20. The Division Bench observed *inter alia* as under :-

“19. As we have come to the conclusion that the petitioner was kept in detention for a period of two and half days without producing him before the appropriate authority with mala fide intention without giving any explanation justifying the said detention, the petitioner is entitled for payment of compensation. In spite of the strong plea made on behalf of the petitioner, we are inclined to grant a symbolic compensation in view of the lapse of time which has taken place.

20 In the facts and circumstances, we allow the writ

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4 2002 ALL MR (Cri) 1373

petition and award compensation of Rs. Ten Thousand to the petitioner, which shall be paid by the State of Maharashtra. State to deposit the compensation within a period of four weeks from today and when the same is deposited, the Additional Registrar of this court shall pay the same to the petitioner. It would be open to the respondent State to hold inquiry and find out as to who was the officer responsible for the illegal detention of the petitioner and decide whether any further action has to be taken against the erring police officer in accordance with law including the criminal officer in accordance with law including the criminal action which is prescribed under law. Rule is made absolute accordingly.”

21. A profitable reference can also be made to a judgment of the Supreme Court in the case of **Chairman, Railway Board and Others Vs. Chandrima Das (Mrs.) & Ors.**<sup>5</sup> In the said case, the respondent, a practicing advocate of the Calcutta High Court, had claimed compensation for the victim, a Bangladeshi national, who was ravished by many, including the employees of the Railways at Howrah Railway Station. Dealing with the challenge by the Railway Board that the victim herself should have approached the Court in the realm of Private Law, the Supreme Court, after adverting to its previous pronouncements, enunciated the cases in which public law remedies can be resorted to, in the following words :

“9.....The Public Law remedies have also

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5 (2002) 2 SCC 465



been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Govt. The causing of injuries, which amounted to tortious act, was compensated by this Court in many of its decisions beginning from Rudul Sah vs. State of Bihar 1983(3) SCR 508 = (1983) 4 SCC 141 = AIR 1983 SC 1086. [See also : Bhim Singh vs. State of Jammu & Kashmir (1985) 4 SCC 577 = AIR 1986 SC 494; People's Union for Democratic Rights vs. State of Bihar, 1987 (1) SCR 631 = (1987) 1 SCC 265 = AIR 1987 SC 355; People's Union for Democratic Rights Thru. Its Secy. vs. Police Commissioner, Delhi Police Headquarters, (1989) 4 SCC 730 = 1989 (1) SCALE 599; SAHELI, A Woman's Resources Centre vs. Commissioner of Police, Delhi (1990) 1 SCC 422 = 1989 (Supp.) SCR 488 = AIR 1990 SC 513; Arvinder Singh Bagga vs. State of U.P. (1994) 6 SCC 565 = AIR 1995 SC 117; P. Rathinam vs. Union of India (1989) Supp. 2 SCC 716; In Re: Death of Sawinder Singh Grower (1995) Supp. (4) SCC 450 = JT (1992) 6 SC 271 = 1992 (3) SCALE 34; Inder Singh vs. State of Punjab (1995) 3 SCC 702 = AIR 1995 SC 1949; D.K. Basu vs. State of West Bengal (1997) 1 SCC 416 = AIR 1997 SC 610].

10 In cases relating to custodial deaths and those relating to medical negligence, this Court awarded compensation under Public Law domain in Nilabati Behera vs. State of Orissa (1993) 2 SCC 746 = 1993 (2) SCR 581 = AIR 1993 SC 1960; State of M.P. vs. Shyam Sunder Trivedi (1995) 4 SCC 262 = 1995 (3) SCALE 343; People's Union for Civil Liberties vs. Union of India (1997) 3 SCC 433 = AIR 1997 SC 1203 and Kaushalya vs. State of Punjab (1996) 7 SCALE (SP) 13; Supreme Court Legal Aid Committee vs. State of Bihar (1991) 3 SCC 482; Dr. Jacob George vs. State of Kerala (1994) 3 SCC 430 = 1994 (2) SCALE 563; Paschim Bangal Khet Mazdoor Samity vs. State of West Bengal & Ors. (1996) 4 SCC 37 = AIR 1996 SC 2426; and Mrs. Manju Bhatia vs. N.D.M.C. (1997) 6 SCC 370 = AIR 1998 SC 223 = (1997) 4 SCALE 350.

11 Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the civil court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to

the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law.”

22. The aforesaid pronouncements indicate that adjudication under public law domain essentially involves the resolution of disputes between the citizen, on the one hand, and State or its instrumentalities, on the other hand. Remedy under public law domain is resorted to preserve the rule of law. Where a clear case of infringement of constitutional or legal rights is made out, the remedy of award of compensation under public law domain, has now ingrained in our jurisprudence. In such cases, a mere declaration that the rights of the citizens were violated is of no succour. It is true, monetary compensation may not, in all cases, recuperate the injury suffered by the citizen. However, that remains the most practicable and effective measure for redressal of the wrong, to the extent possible.

23. Detaining a person in police custody for five days, despite specific order by the jurisdictional Magistrate remanding the Accused to the judicial custody, cannot be brushed aside as an aberration. The statutory provisions, which limit the period of

police custody, would be rendered illusory if the accused is detained in police custody, inspite of a reasoned and conscious order passed by the Magistrate declining police custody and remanding the accused to the judicial custody. Such infraction, in our view, warrants award of compensation.

24. For the foregoing reasons, in the totality of the circumstance, in our view, a sum of Rs.Twenty Thousand would be appropriate compensation for the infringement of the constitutional and legal rights of the Accused.

25. Hence, the following order.

**: O R D E R :**

- (i) The Petition stands partly allowed.
- (ii) Respondent No.1-State is directed to pay Rs. 20,000/- (Rupees Twenty Thousand only) to the husband of the Petitioner, namely, Mohd. Usman Mohd Hanif Shaikh, the accused, by way of compensation, within a period of four weeks.

(iii) It would be open to Respondent No.1-State to hold inquiry and fix liability on the concerned officer/ officials and thereafter take appropriate action, if found necessary.

No costs.

Rule is made absolute to the aforesaid extent.

(N.J. JAMADAR, J.)

(S.S. SHINDE, J.)