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KANU SANYAL

v.

DIST. MAGISTRATE, DARJEELING & ORS.

February 5, 1974

B [P. N. BHAGWATI AND P. K. GOSWAMI, JJ.]

Constitution of India, 1950, *Art.* 32—*Petition for the issue of writ of habeas corpus—Date with reference to which legality of detention may be tested.*

Prisoners (Attendance in Courts) Act, 1955 *s.* 6 *and its proviso—Scope of.*

C The petitioner was remanded to the District Jail, Darjeeling, in connection with certain offences. Thereafter, two charge sheets were filed against him and others for various offences under the I.P.C., which were triable exclusively by a Sessions Court, before the Special Magistrate, Visakhapatnam. The Special Magistrate issued a warrant for the production of the petitioner in his Court, under s. 3(2) of the Prisoners (Attendance in Courts) Act, 1955, and the officer in charge of the Dt. Jail Darjeeling, sent the petitioner to the Court of the Special Magistrate, Visakhapatnam. The petitioner was then D remanded to the Central Jail, Visakhapatnam, pending the disposal of the committal proceedings.

In a petition for the issue of a writ of habeas corpus, the petitioner contended that his initial detention in the Dt. Jail, Darjeeling, was illegal, because, (1)(a) it was violative of Art. 22(1), (b) the concerned Magistrate in Darjeeling had no jurisdiction to try the offences in connection with which he was detained in Darjeeling and hence could not order detention beyond 15 days; and (2) the officer in charge of the Dt. Jail, Darjeeling should have E refused to comply with the warrant for production issued by the Special Magistrate, Visakhapatnam, by reason of s. 6 of the Prisoners (Attendance in Courts) Act.

HELD: (1) As regards the earliest date with reference to which the legality of detention challenged in a habeas corpus proceeding may be examined, there are 3 views, namely, (a) that it is the date on which the application for habeas corpus is made to the Court, (b) that it is the date of F the return, and (c) that it is the date of hearing. Whichever be the correct view, the earliest of the dates would be the date of filing of the application for habeas corpus. In the present case, the application was filed after the petitioner was ordered to be detained in the jail at Visakhapatnam. Assuming that there was some infirmity in the detention in the jail at Darjeeling, that cannot invalidate the subsequent detention of the petitioner in the jail at Visakhapatnam. The legality of the detention at Visakhapatnam has to be judged on its own merits. Therefore, it is unnecessary to examine the legality of the detention of the petitioner in the jail at Darjeeling. [283 D—284 C]

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(2) Under s. 3(1) of the Prisoners (Attendance in Courts) Act, the order contemplated is an order by a civil or criminal court, for the production of a detained person *for giving evidence.* But the order contemplated by s. 3(2) is an order of production of a person for answering a charge in a criminal court. Under s. 5, when an order of production is made under s. 3(1) or (2), the officer in charge of a prison shall cause the detained person to be taken to the court where his attendance is required. Under s. 6, such officer H shall abstain from complying with the order of production in certain circumstances. The proviso to the section carves out an exception if the 3 conditions for its applicability, laid down in the proviso, are satisfied. The first condition is that the order of production should be by a criminal court and the second is that the detained person should not be unfit to be removed, and the

third is that the place where the *evidence* of the detained person is required is not more than 5 miles from the prison where he is confined. [285 A—G] A

In the present case, the first two conditions are satisfied. The 3rd condition can have no application where an order is made by a criminal court under s. 3(2) requiring production for answering a charge. The fulfilment of the first two conditions would, in such a case, be sufficient to attract the applicability of the Proviso, and to take the case out of s. 6. Therefore, the officer in charge of the jail at Darjeeling was bound to send the petitioner to the Court at Visakhapatnam and he acted according to law. The subsequent detention in the jail at Visakhapatnam pending trial must be held to be valid and a writ of habeas corpus cannot be granted where a person is committed to jail custody by a competent court by an order which, *prima facie*, does not appear to be without jurisdiction or wholly illegal. [285 H—286 G] B

B. R. Rao v. *State of Orissa*, A.I.R. 1971 S.C. 2197, followed. C

ORIGINAL JURISDICTION : Writ Petition No. 205 of 1973.

Under Article 32 of the Constitution of India for issue of a writ in the nature of habeas corpus.

N. H. Hingorani, for the petitioner.

P. K. Chatterjee, Sukumar Basu and *G. S. Chatterjee*, for respondents Nos. 1—5. D

P. Ram Reddy and *P. P. Rao*, for respondent No. 6.

B. D. Sharma and *S. P. Nayar*, for respondent No. 7.

The Judgment of the Court was delivered by E

BHAGWATI, J., This is a writ petition by the petitioner under Art. 32 of the Constitution challenging the legality of his detention in the Central Jail, Vizakhapatnam and praying for a writ of *hebeas* corpus for setting him at liberty forthwith. The petitioner is one of the acknowledged leaders of the Naxalite movement which originated in the area within Naxalbari, Kharabari and Phansidewa police stations in Siliguri Sub-Division of Darjeeling District of West Bengal some ten years ago. The movement represents armed revolt of the peasantry against exploitation by landholders and it seeks to achieve its end by violent means calculated to overthrow the democratic process. The petitioner, as one of the top leaders of this movement, was engaged in violent and anti-social activities and was for quite some time underground evading arrest by the police. Eventually on 19th August, 1970 the petitioner was arrested by the police alongwith some of his associates from a hideout within the jurisdiction of Phansidewa police station. A huge quantity of arms, ammunition and explosives was found with the petitioner and his associates at the time of the arrest. Phansidewa PS case No. 3 was accordingly registered against the petitioner on 19th August, 1970 under s.5 of the Explosive Substances Act, s. 25(1)(a) of the Arms Act and ss. 120B, 121A, 122, 309 and 402 of the Indian Penal Code. There was also another case, namely, Phansidewa P.S. Case No. 28 registered against the petitioner on 29th June, 1967 under s. 412 read with s. 34 of the Indian Penal F G H

A Code. That case was under investigation at the time when the petitioner was arrested. Immediately after his arrest, on the same day, i.e., 19th August, 1970, the petitioner was produced before the Sub-Divisional Magistrate, Siliguri. The learned Sub-Divisional Magistrate passed an order of remand directing that the petitioner be detained in the District Jail, Darjeeling and that he should be produced before B the Sub-Divisional Magistrate, Darjeeling. The petitioner was accordingly produced before the Sub-Divisional Magistrate Darjeeling from time to time and orders of remand were passed by the Sub-Divisional Magistrate, Darjeeling at the interval of every fourteen days since the investigation in P.S. Case No. 28 dated 29th June, 1967 and P.S. Case No. 3, dated 19th August, 1970 was not complete. It appears that on 16th January, 1970 first information report in respect of cer- C tain criminal offences alleged to have been committed by the petitioner and a large number of other co-conspirators was lodged in Parvathipuram police station and after the completion of the investigation, two chargesheets were filed against the petitioner and other 139 accused in the Court of the Special Magistrate, Visakhapatnam on 12th October, 1970 charging them with offences under s. 120B read with ss. 302, 395, 397, 121, 122, 123, and 124A of the Indian Penal Code. D The offences charged under these two chargesheets were triable exclusively by the Court of Sessions, and therefore, inquiry proceedings under Ch. XVIII of the Cods of Criminal Procedure were initiated by the Special Magistrate, Visakhapatnam. Since the petitioner, who was accused No. 138 in these two criminal cases, which were numbered as P.R.C. Nos. 1 and 2 of 1971, was under remand in the District Jail, Darjeeling pending investigation of the two Phansidewa P.S. E cases, the Special Magistrate, Visakhapatnam issued on 30th May, 1972 a warrant for production of the petitioner in his Court under s. 3, sub-s. (2) of the Prisoners (Attendance in Courts) Act, 1955. The officer in-charge of the District Jail, Darjeeling, in obedience to this warrant for production, sent the petitioner to the Court of the Special Magistrate, Visakhapatnam on 14th June, 1972 and immediately on arrival, the petitioner was produced in the court of the F Special Judge, Visakhapatnam on 17th June, 1972. The petitioner was remanded by the Special Judge, Visakhapatnam from time to time pending the disposal of the committal proceedings and pursuant to the orders of remand, the petitioner was detained in the Central Jail, Visakhapatnam.

G On 6th January, 1973, whilst under detention in the Central Jail, Visakhapatnam, the petitioner preferred a writ petition under Art. 32 of the Constitution in this Court challenging the legality of his detention right from the time of its inception and praying that he may be set free by issue of a writ of *habaas corpus*. The District Magistrate, Darjeeling, the Sub-Divisional Judicial Magistrates, Siliguri, Kurseon and Darjeeling, the State of West Bengal, the Superintendent, H Central Jail, Visakhapatnam and the Post Master General, West Bengal were made respondents to the writ petition. This Court ordered a *rule nisi* to be issued on the writ petition but directed that the petitioner need not be produced in person. The District Magistrate, Darjeeling and the State of West Bengal filed their return to the *rule*

nisi on 19th April, 1973 and the Superintendent of Central Jail, Visakhapatnam filed his return to the *rule nisi* on 11th May, 1973. When the writ petition reached hearing, counsel appearing on behalf of the petitioner raised a contention that the writ petition could not be heard by the Court unless the petitioner was produced in person and his argument was that once *rule nisi* was issued, the Court was bound to order production of the petitioner. Since this contention raised an important question of law affecting the practice of the Court while dealing with petitions for a writ of *habeas corpus*, the Division Bench hearing the writ petition referred this question for decision by the Constitution Bench. The writ petition was thereafter placed before the Constitution Bench and by a judgment delivered by the Constitution Bench on 11th September, 1973, it was held that it was competent to the Court to dispense with the production of the body of the person detained while issuing *rule nisi*, and the *rule nisi* could be heard without requiring the body of the person detained to be brought before the Court. On this view being taken by the Constitution Bench, the writ petition again came back to the Division Bench for final disposal. In the meantime the committal proceedings which were being held by the Special Judge, Visakhapatnam against the petitioner and his other associates concluded and by an order dated 12th July, 1973 the petitioner and 66 other accused were commited to the court of Sessions to stand their trial for various offences. The trial of this Sessions Case, being Sessions Case No. 46 of 1973, is still pending against the petitioner in the Court of the Second Additional Sessions Judge, Visakhapatnam and the petitioner is under detention in the Central Jail, Visakhapatnam pursuant to the orders made by the Second Additional Sessions Judge, Visakhapatnam pending trial.

A B C D E

The learned counsel appearing on behalf of the petitioner put forward three grounds challenging the legality of the detention of the petitioner and they may be briefly summarised as follows :

A. The initial detention of the petitioner in the District Jail, Darjeeling was illegal because he was detained without being informed of the grounds for his arrest as required by cl (i) of Art. 22 of the Constitution;

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B. The Sub-Divisional Magistrate, Darjeeling had no jurisdiction to try the two Phansidewa P.S. cases against the petitioner and he could not, therefore, authorise the detention of the petitioner under s. 157 of the Code of Criminal Procedure for a term exceeding fifteen days in the whole. It was only the Sub Divisional Magistrate Siliguri who had jurisdiction to try the two Phansidewa P.S. cases and he alone could remand the petitioner to custody after the expiration of the initial period of fifteen days under s. 344 of the Code of Criminal Procedure. The orders of remand under which the petitioner was detained in the District Jail, Darjeeling were, however, made by the Sub-Divisional Magistrate, Darjeeling and the detention of the petitioner in the District Court, Darjeeling was, therefore illegal.

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A C. The officer in charge of the District Jail, Darjeeling was bound to abstain from complying with the warrant for production issued by the Special Judge, Visakhapatnam by reason of s. 6 of the Prisoners (Attendance in Courts) Act, 1955 and the production of the petitioner before the Special Judge, Visakhapatnam pursuant to such warrant for production and his detention in the Central Jail, Visakhapatnam B were consequently without the authority of law.

Re : Grounds A and B.

These two grounds relate exclusively to the legality of the initial detention of the petitioner in the District Jail, Darjeeling. We think it unnecessary to decide them. It is now well settled that the earliest C date with reference to which the legality of detention challenged in a *habeas corpus* proceeding may be examined is the date on which the application for *habeas corpus* is made to the Court. This Court speaking through Wanchoo, J., (as he then was) said in *A. K. Gopalan* v. *Government of India*(1) : "It is well settled that in dealing with the petition for *habeas corpus* the Court is to see whether the detention on the date on which the application is made to the Court is legal, D if nothing more has intervened between the date of the application and the date of hearing". In two early decisions of this Court, however, namely, *Naranjan Singh* v. *State of Punjab*(2) and *Ram Narain Singh* v. *State of Delhi*(3) a slightly different view was expressed and that view was reiterated by this Court in *B. R. Rao* v. *State of Orissa*(4) where it was said : "In *habeas corpus* the Court is to have regard to the legality or otherwise of the detention at the time of the return E and not with reference to the institution of the proceedings". And yet in another decision of this Court in *Talib Husain* v. *State of Jammu & Kashmir*(5) Mr. Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that "in *habeas corpus* proceedings the Court has to consider the legality of the detention on the date of the hearing". Of these three views taken by the Court at different times, the second appears to be more in consonance with the law and practice in F England and may be taken as having received the largest measure of approval in India, though the third view also cannot be discarded as incorrect, because an inquiry whether the detention is legal or not at the date of hearing of the application for *habeas corpus* would be quite relevant, for the simple reason that if on that date the detention is legal, the Court cannot order release of the person detained by G issuing a writ of *habeas corpus*. But, for the purpose of the present case, it is immaterial which of these three views is accepted as correct, for it is clear that, whichever be the correct view, the earliest date with reference to which the legality of detention may be examined is H the date of filing of the application for *habeas corpus* and the Court is not, to quote the words of Mr. Justice Dua in *B. R. Rao* v. *State of Orissa*,(4) "concerned with a date prior to the initiation of the proceed-

(1) [1966]2 S. C. R. 427 (2) [1952] S. C. R. 395
(3) [1953] S. C. R. 652 (4) A. I. R. 1971 S. C. 2197
(5) A. I. R. 1971 S. C. 62

ings for a writ of *habeas corpus*". Now the writ petition in the present case was filed on 6th January, 1973 and on that date the petitioner was in detention in the Central Jail, Visakhapatnam. The initial detention of the petitioner in the District Jail, Darjeeling had come to an end long before the date of the filing of the writ petition. It is, therefore, unnecessary to examine the legality or otherwise of the detention of the petitioner in the District Jail, Darjeeling. The only question that calls for consideration is whether the detention of the petitioner in the Central Jail, Visakhapatnam is legal or not. Even if we assume that grounds A and B are well founded and there was infirmity in the detention of the petitioner in the District Jail, Darjeeling, that cannot invalidate the subsequent detention of the petitioner in the Central Jail, Visakhapatnam. See para 7 of the judgment of this Court in *B. R. Rao* v. *State of Orissa*.(4). The legality of the detention of the petitioner in the Central Jail, Visakhapatnam would have to be judged on its own merits. We, therefore, consider it unnecessary to embark on a discussion of grounds A and B and decline to decide them.

Re : Ground 'C'

The only question which, therefore, requires to be considered is whether the detention of the petitioner in the Central Jail, Visakhapatnam is illegal. Now the legality of this detention is challenged on the ground that by reason of s. 6 of the Prisoners (Attendance in Courts) Act, 1955 the officer in charge of the District Jail, Darjeeling was bound to abstain from complying with the warrant for production issued by the Special Magistrate, Visakhapatnam and was not entitled to send the petitioner to the Court of Special Magistrate, Visakhapatnam in compliance with such warrant for production. This ground is wholly without substance. It overlooks the Proviso to s. 6 of the Act. In order to arrive at a proper interpretation of s. 6 with the Proviso, it is necessary to have a look at ss. 3 and 5 as well. Sub-s. (1) of s. 3 provides that any civil or criminal court may, if it thinks that the evidence of any person confined in any prison is material in any matter pending before it, make an order in the form set forth in the First Schedule, directed to the officer in charge of the prison. It is clear from this sub-section as well as the form set out in the First Schedule that the order contemplated by this sub-section is an order for production of a person detained in any prison for giving evidence and such an order may be made by a civil court or a criminal court. Section 3, sub-s. (2) provides for a different situation. It says that any criminal court may, if a charge of an offence against a person confined in any prison is made or pending before it, make an order in the form set forth in the second Schedule directed to the officer in charge of the prison. The order contemplated in this sub-section—and that is evident also from the form set forth in the Second Schedule—is an order of production for answering a charge and exhypothesi that can only be by a criminal court. The warrant for production in the present case was under s. 3, sub-s. (2) as the petitioner was admittedly required to be produced before the Special Magistrate, Visakhapatnam for answering the charges against him.

A Now, when an order of production is made under sub-s. (1) or sub-s. (2) of s. 3, what is to happen? That is provided in s. 5 which says that upon delivery of such order of production to the officer in charge of the prison, that officer shall cause the person named in the order to be taken to the Court in which his attendance is required so as to be present in the Court at the time mentioned in the order. The main B part of s. 6, however, sets out certain circumstances in which the officer in charge of the prison shall abstain from complying with the order of production. It reads :

> "6. Officer in charge of prison when to abstain from carrying out order—Where the person in respect of whom an order is made under section 3—
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> C (a) is, in accordance with the rules made in this behalf, declared to be unfit to be removed from the prison where he is confined by reason of sickness or other infirmity; or
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> (b) is under committal for trial; or
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> D (c) is under remand pending trial or pending a preliminary investigation; or
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> (d) is in custody for a period which would expire before the expiration of the time required for removing him under this Act and for taking him back to the prison in which he is confined;
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> E the officer in charge of the prison shall abstain from carrying out the order and shall send to the Court from which the order had been issued a statement of reasons for so abstaining :"

But there is a proviso to this section which carves out an exception in the following terms :

> E "Provided that such officer as aforesaid shall not abstain where—
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> (i) the order has been made by a criminal Court; and
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> (ii) the person named in the order is confined under committal for trial or under remand pending trial or pending a preliminary investigation and is not declared in accordance with the rules made in this behalf G to be unfit to be removed from the prison where he is confined by reason of sickness or other infirmity; and
>
> (iii) the place, where the evidence of the person named in the order is required is not more than fives miles H distant from the prison in which he is confined."

Now there can be no dispute that the petitioner in respect of whom the warrant for production was issued by the Special Magistrate, Visa-

khapatnam under s. 3, sub-s. (2) was under remand pending preliminary investigation in the two Phansidewa PS cases, and therefore, under the main provision in s. 6, the officer in charge of the District Jail, Darjeeling was bound to abstain from complying with the warrant for production, unless, of-course, the Proviso was applicable. The Proviso lays down three conditions for its applicability. The two conditions set out in cls. (i) and (ii) were admittedly satisfied. The only question could be about the condition in cl. (iii), but that condition has obviously no application in case of an order of production under sub-s. (2) of s. 3. Clause (iii) posits an order of production for giving evidence made under sub-s. (1) of s. 3. It is only where such an order of production is made that the condition in cl. (iii) can apply. It can have no application where an order is made by a criminal court under sub-section (2) of s. 3 requiring production for answering a charge. In such a case, the condition in cl. (iii) would be wholly inappropriate and would not have to be satisfied. The fulfilment of the conditions set out in cls. (i) and (ii) would in that case be sufficient to attract the applicability of the Proviso. Here the warrant for production was admittedly issued under sub-s. (2) of s. 3 and therefore the only requirement for bringing the Proviso into operation was the fulfilment of the conditions set out in cls. (i) and (ii). These two conditions were clearly satisfied and the Proviso was accordingly attracted and it took the case out of the main provision in s. 6. The officer in charge of the District Jail, Darjeeling was, therefore, bound to send the petitioner to the Court of the Special Magistrate. Visakhapatnam in compliance with the warrant for production and he acted according to law in doing so. The production of the petitioner before the Special Judge, Visakhapatnam, could not, therefore, be said to be illegal and his subsequent detention in the Central Jail, Visakhapatnam, pursuant to the orders made by the Special Judge, Visakhapatnam, pending trial must be held to be valid. This Court pointed out in *B. R. Rao* v. *State of Orissa*(4) that a writ of *habeas corpus* cannot be granted "where a person is committed to jail custody by a competent court by an order which *prima facie* does not appear to be without jurisdiction or wholly illegal". The present case is clearly covered by these observations and the petitioner is not entitled to a writ of *habeas corpus* to free him from detention.

The writ petition is accordingly dismissed and the rule *nisi* is discharged.

V.P.S. *Petition dismissed.*