

Kanu Sanyal

Vs

District Magistrate, Darjeeling and Others

Writ Petition No. 205 Of 1973

(P. N. Bhagwati, P. K. Goswami JJ)

05.02.1974

JUDGMENT

BHAGWATI, J. -

1. 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 habeas 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 August 19, 1970 the petitioner was arrested by the police along with 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 P.S. Case No. 3 was accordingly registered against the petitioner on August 19, 1970 under Section 5 of the Explosive Substances Act, Section 25(1)(a) of the Arms Act and Sections 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 June 29, 1967 under Section 412 read with Section 34 of the Indian Penal Code. That case was under investigation at the time when the petitioner was arrested. Immediately after his arrest, on the same day, i.e., August 19, 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 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 June 29, 1967 and P.S. Case No. 3, dated August 19, 1970 was not complete. It appears that on January 16, 1970 first information report in respect of certain 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, Vizakhapatnam on October 12, 1970 charging them with offences under Section 120B read with Sections 302, 395, 397, 121, 122, 123 and 124A of the Indian Penal Code. The offenses charged under these two charge-sheets were tried exclusively by the Court of Sessions, and therefore, inquiry proceedings under Ch. XVIII of the Code of Criminal Procedure were initiated by the Special Magistrate, Vizakhapatnam,. 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. Cases, the Special Magistrate, Vizakhapatnam issued on May 30, 1972 a warrant for production of the petitioner in his Court under Section 3, sub-section (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, Vizakhapatnam on June 14, 1972 and immediately on arrival, the petitioner was produced in the Court of the Special Judge, Vizakhapatnam on June 17, 1972. The petitioner was remanded by the Special Judge, Vizakhapatnam 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, Vizakhapatnam.

2. On January 6, 1973, whilst under detention in the Central Jail, Vizakhapatnam, the petitioner preferred a writ petition under Article 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 habeas corpus. The District Magistrate, Darjeeling, the Sub-Divisional Judicial Magistrates, Siliguri, Kurseon and Darjeeling, the State of West Bengal, the Superintendent, Central Jail, Vizakhapatnam 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 April 19, 1973 and the Superintendent of Central Jail, Vizakhapatnam filed his return to the rule nisi on May 11, 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 September 11, 1973, *Kanu Sanyal v. D. M., Darjeeling, (1973) 2 SCC 674 : 1973 SCC (Cri) 980*. 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, Vizakhapatnam against the petitioner and his other associates concluded and by an Order dated July 12, 1973 the petitioner and 66 other accused were committed 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, Vizakhapatnam and the petitioner is under detention in the Central Jail, Vizakhapatnam pursuant to the orders made by the Second Additional Sessions Judge, Vizakhapatnam pending trial.

3. 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. (1) of Article 22 of the Constitution.

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 Section 167 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 Section 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.

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, Vizakhapatnam by reason of Section 6 of the Prisoners (Attendance in Courts) Act, 1955 and the production of the petitioner before the Special Judge, Vizakhapatnam pursuant to such warrant for production and his detention in the Central Jail, Vizakhapatnam were consequently without the authority of law.

Re : Grounds A and B.

4. 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 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* : ((1966) 2 SCR 427 : AIR 1966 SC 816 : 1966 Cri. LJ 602)

"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, if nothing more has intervened between the date of the application and the date of the hearing."

In two early decisions of this Court, however, namely, *Naranjan Singh v. State of Punjab*, (1952 SCR 395 : AIR 1952 SC 106 : 1952 Cri. LJ 656) and *Ram Narayan Singh v. State of Delhi*, (1953 SCR 652 : AIR 1953 SC 277 : 1953 Cri LJ 1113) a slightly different view was expressed and that view was reiterated by this Court in *B. R. Rao v. State of Orissa*, ((1972) 3 SCC 256, 259 : 1972 SCC (Cri) 481) where it was said (at Page 259, para 7) :

"in habeas corpus proceedings the Court, is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings."

and yet in another decision of this Court in *Talib Hussain v. State of Jammu & Kashmir*, (1971) 3 SCC 118, 121. Mr. Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that (at page 121, para 6) :

"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 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 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 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 (supra)*, "concerned with a date prior to the initiation of the proceedings for a writ of habeas corpus". Now the writ petition in the present case was filed on January 6, 1973 and on that date the petitioner was in detention in the Central Jail, Vizakhapatnam,. 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, Vizakhapatnam 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, Vizakhapatnam. See para 7 of the judgment of this Court in *B. R. Rao v. State of Orissa (supra)*. The legality of the detention of the petitioner in the Central Jail, Vizakhapatnam 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.

5. The only question which, therefore, requires to be considered is whether the detention of the petitioner in the Central Jail, Vizakhapatnam is illegal. Now the legality of this detention is challenged on the ground that by reason of Section 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, Vizakhapatnam and was not entitled to send the petitioner to the Court of Special Magistrate, Vizakhapatnam in compliance with such warrant for production. This ground is wholly without substance. It overlooks the Proviso to Section 6 of the Act. In order to arrive at a proper interpretation of Section 6 with the Proviso, it is necessary to have a look at Sections 3 and 5 as well. Sub-section (1) of Section 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-section (2) provides for a different situation. It says that any criminal Court may, if a charge of an offense 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 ex hypothesi that can only be by a criminal Court. The warrant for production in the present case was under Section 3, sub-section (2) as the petitioner was admittedly required to be produced before the Special Magistrate, Vizakhapatnam for answering the charges against him. Now, when an order of production is made under sub-section (1) or sub-section (2) of Section 3, what is to happen ? That is provided in Section 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 part of Section 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 -

(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

(b) is under committal for trial; or

(c) is under remand pending trial or pending a preliminary investigation; or

(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;

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 :

"Provided that such officer as aforesaid shall not abstain where -

(i) the order has been made by a criminal Court; and

(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 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 five miles 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, Vizakhapatnam under Section 3, sub-section (2) was under remand pending preliminary investigation in the two Phansidewa P. S. Cases, and therefore, under the main provision in Section 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 clauses (i) and (ii) were admittedly satisfied. The only question could be about the condition in clause (iii), but that condition has obviously no application in case of an order of production under sub-section (2) of Section 3. Clause (iii) posits an order of production for giving evidence made under sub-section (1) of Section 3. It is only where such an order of production is made that the condition in clause (iii) can apply. It can have no application where an order is made by a criminal Court under sub-section (2) of Section 3 requiring production for answering a charge. In such a case, the condition in clause (iii) would be wholly inappropriate and would not have to be satisfied. The fulfillment of the conditions set out in clauses (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-section (2) of Section

3 and therefore the only requirement for bringing the Proviso into operation was the fulfillment of the conditions set out in clauses (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 Section 6. The officer in charge of the District Jail, Darjeeling was, therefore, bound to send the petitioner to the Court of the Special Magistrate, Vizakhapatnam 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, Vizakhapatnam, could not, therefore, be said to be illegal and his subsequent detention in the Central Jail, Vizakhapatnam, pursuant to the orders made by the Special Judge, Vizakhapatnam, pending trial must be held to be valid. This Court pointed out in *B. R. Rao v. State of Orissa (supra)*, 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.

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

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