

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.331 of 2020

Arising Out of PS. Case No.-1 Year-2012 Thana- GOVERNMENT OFFICIAL COMP.
District- Patna

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Ritlal Rai @ Ritlal Yadav @ Ritlal Ray @ Ritlal Prasad Singh S/o Shri
Ramashish Rai Resident of Village- Kothwan, P.S.-Khagaul, District-Patna.

... .. Petitioner/s

Versus

1. The U.O.I. through B. Hazara, Assistant Director, Prevention of Money Laundering Act (Complainant)
2. The State of Bihar through Principal Secretary, Home, Govt. of Bihar, Patna.
3. The Inspector General of Prison, Bihar
4. The Jail Superintendent, Beur Adarsh Jail, Patna. Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Y.C. Verma, Sr. Adv. Mr. Ansul, Adv.
For the Respondent/s	:	Mr. S.D. Sanjay (ASG)

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE SHIVAJI PANDEY)

Date :18-08-2020

Heard learned counsel for the parties through video conferencing.

In the present case, the petitioner has made a prayer for issuance of writ of Habeas Corpus or any other appropriate writ, order, direction for commanding the respondents to release the petitioner forthwith from Adarsh Jail, Beur, Patna where he is detained since 17.4.2013 in connection with Special Case No. 271



of 2018 arising out of Special Complaint Case No. 1 of 2013 instituted for an offence under Section 34 of the Prevention of Money Laundering Act (in short 'PML Act') which provides maximum sentence of 7 years pending before the Court of Special Judge as he has completed maximum sentence which could have been awarded under the PML Act after adjusting the period of provisional bail. It has further been claimed that this Court should declare the detention of the petitioner in connection with the aforesaid case is against the provision of Section 20(1) of the Constitution of India and second proviso to Section 436A of the Code of Criminal Procedure.

The short fact involved in this case is that on 20.3.2013, the Deputy Director, Directorate Enforcement (Prevention of Money Laundering Act), Government of India filed a Complaint Case No. 1 of 2013 in the court of Sessions Judge cum Special Judge for offence punishable under Section 3 and 4 of the PML Act alleging therein that he received a communication that the petitioner has been charge-sheeted in 17 cases of the IPC, Arms Act and Explosive Substance Act and out of them, 7 relates to scheduled offences under the PML Act. It has further been alleged that he along with co-accused Rinku Devi have accumulated huge quantity of money amounting Rs. 1,06,62,022/- as well as acquired



movable/immovable properties from the returns of the crime, thereby they have committed offence under the PML Act. From the complaint petition, it appears that the petitioner was involved in heinous crime of different nature on different occasion, details are as follows; Khagaul P.S. Case No. 91 of 2005 for offence under Sections 384/386/38/7/120B of the Indian Penal Code, Khagaul P.S. Case No. 55 of 2007 instituted for offence under Section 3 & 4 of the Explosive Substances Act, Danapur P.S. Case No. 309 of 2010 for offence under Sections 386/353/41/4/34 of the Indian Penal Code, Danapur P.S. Case No. 340 of 2010 for offence under Section 307/326/28/6/414/120B of the Indian Penal Code and Section 3 & 4 of the Explosive Substances Act, Danapur P.S. Case No. 339 of 2010 for offence under Sections 286/120B of the Indian Penal Code and Section 3 & 4 of the Explosive Substances Act, Bihta P.S. Case No. 280 of 2009 for offence under Sections 302/307/120B/34 of the Indian Penal Code and Section 27 of the Arms Act and Rupaspur (Patna) P.S. Case No. 64 of 2011 instituted for offence under Sections 120B of the Indian Penal Code and Section 3 & 4 of the Explosive Substances Act (Part A offence) apart from other severe offences have been committed by the petitioner.



It has been alleged in the complaint application that the petitioner was indulged in extortion, demand of Rangdari, Highway robbery, unauthorized use of arms, keeping of unauthorized explosive, murder and attempt to murder in the surrounding area of Khagaul, Danapur, Bihta and Patna. It has further been alleged that the petitioner had contested the Bihar Legislative Assembly, 2010 from 186, Danapur General Constituency. Accordingly, the Chief Electoral Officer, Patna, Bihar forwarded the copies of affidavit filed by the petitioner wherein he has given details of his property in the following head:-

1. Cash – Rs. 7,00,000/-
2. Deposits of Rs. 7,33,855/- in the Punjab National Bank, Danapur
3. Deposits of Rs. 5,02,917/- in the Central Bank of India, Chitkohra, Patna.
4. Certain investments have been made in different insurance company which comes to Rs. 1,08,124/-.
5. Jewellery worth Rs. 6,82,500/-
6. Immovable property worth Rs. 11,69,000/-

He has also given details of the property standing in the name of his wife Smt. Rinku Devi in the following heads:-

1. Cash Rs. 5700/-



2. Deposits of Rs. 2,00,800/- in the IndusInd Bank, Exhibition Road, Patna
3. Jewellery worth Rs. 2,92,500/-
4. Immovable property (agriculture land) value of the same shown to be Rs. 3,22,000/-
5. Immovable property (Non-agricultural land) value being Rs. 26,97,695/- and Rs. 39,24,195, both situated at Saguna, Danapur.

When the enquiry was conducted, it was found that the property given in the affidavit is completely wrong and false as the petitioner has acquired huge property in the shape of money as well as immovable property. It has also been found that to keep the property under cover, he purchased the same applying deceptive method, some time as Ritlal Yadav and some time, adding Prasad Ritlal Rai. As per the petitioner, cognizance has been taken under Section 34 of the PML Act and, accordingly, the petitioner has been taken into custody since 17.2.2013 and continuing under the judicial custody except the period from 25.1.2020 to 9.2.2020 as by way of provisional bail which was allowed on account of marriage of his daughter but, he surrender on 10.2.2020 fully complying the provisional bail order. It has been stated in the petition that as per Section 4 of the Money Laundering Act, maximum sentence has been prescribed, 7 years but, if the



proceeds of crime involved in money laundering relates to any offence which is prescribed in paragraph no.2 of Part-A of the Schedule of the provision of the Section shall have effect as if for the words “which may extend to 7 years” has been substituted by the words “which may extend to 10 years”. It has been stated that the offence alleged against the petitioner does not fall in any of the category mentioned in paragraph no.2 of Part-A which relates to offence under the Narcotic Drugs and Psychotropic Substance Act and none of them falls in the category of paragraph no.2 of Schedule A. Hence, the maximum sentence could be awarded against the petitioner is 7 years. It has been submitted that as per provision of 436A of the Cr.P.C. which prescribes that where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one- half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties. So Section 436A prescribes that if a person has completed half of the period of maximum period of sentence under the alleged offences except those offences wherein the death punishment has been prescribed,



under such circumstances, the petitioner requires to be released forthwith on his personal bond and further placed reliance on Article 20 and 21 of the Constitution of India. Article 20 prescribes that no person shall be convicted of an offence except for violation of law in force at time for the commission of the act charged as an offence nor be subjected to penalty greater than that which could be inflicted under the law in force at the time of commission of offence. So the thrust has been given that the person cannot be subjected to penalty greater than which could have been inflicted upon the petitioner, as he has completed seven years of his judicial custody, which is the maximum punishment could be awarded for Section 4 of the PML Act as well as Article 21 of the Constitution of India prescribes that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. So, the submission has been made that as the petitioner has completed outer limit of punishment which could in any circumstances be awarded and, as such, keeping the petitioner in jail custody beyond maximum period of sentence violates the protection given to every citizen of India provided under Article 20 and 21 of the Constitution of India as well as Section 436A of the Cr.P.C. Hence, he should be released forthwith honorably. In support of his submission, the petitioner has placed reliance on the



judgments; Harbanslal Sahnia and Anr. Vs. Indian Oil Corpn. Ltd. and Ors. reported in AIR 2003 SC 2120, Himmatlal Harilal Mehtav Vs. The State of Madhya Pradesh and Ors. reported in AIR 1954 SC 403, Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar, reported in AIR 1979 SC 1819, Hussain & Anr. Vs. Union of India reported in AIR 2017 SC 1362.

Mr. S.D. Sanjay, learned Additional Solicitor General, appearing on behalf of the Union of India submits that the present application at the threshold requires to be dismissed as in past, the petitioner had moved for bail before this Court in Cr. Misc. No. 1458 of 2018 which was rejected vide order dated 25.4.2018 whereafter again he has moved before this Court for bail vide Cr. Misc. No. 2764 of 2019 which is pending for consideration. It has further been submitted that the petitioner has been remanded from time to time under the judicial order, the writ application in the present form is not sustainable, thus, the petitioner cannot be said to be under illegal detention. He is in jail custody under the valid order of the court below. So, in this circumstance, this Court should refrain to exercise the power under the writ jurisdiction. In support of his submission, he has placed reliance on the judgment reported in the case of The Home Secretary (Prison) & Ors. Vs. H. Nilofer Nisha reported in 2020 SCC Online 73, Col. Dr. B.



Ramachandra Rao Vs The State of Orissa and Ors. reported in (1972) 3 SCC 256, Saurabh Kumar Vs. Jailor, Koneila Jail & Anr. reported in (2014) 13 SCC 436, Hussain & Anr. Vs. Union of India reported in (2017) 5 SCC 702, Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar, reported in AIR 1979 SC 1819, Suresh Ramtirth Yadav Vs. State of Gujarat reported in 1990 Cri. Law Journal 1834, Serious Fraud Investigation Office Vs. Rahul Modi & Anr. reported in (2019) 5 SCC 266 Para-21 and P Ramachandra Rao Vs. State of Karnataka reported in (2002) 4 SCC 578 Para 23, 29 (iv).

On the strength of the aforesaid judgments, he has submitted that already the bail application is pending, he can move for early disposal of his bail application and, in the present form, no relief can be granted to the present petitioner.

In view of the aforesaid submissions of the parties, the seminal question which are to be answered are:-

1. Whether the person can be kept in jail custody beyond the period the maximum sentence which could be awarded pertaining to alleged offence though he has been remanded in judicial custody by a judicial order passed by the Court of competent jurisdiction?



2. Whether the judicial order of remand can be said a valid order of remand beyond the period of maximum sentence could have been awarded to the accused (the petitioner) in view of the protection provided under Article 20 and 21 of the Constitution of India which prescribes that the maximum punishment can be awarded against the accused person under the law which was prevailing at the time of commission of the offence?
3. In what manner, the period of custody in jail would be construed and calculated as per Section 31 and Section 428 of the Cr.P.C. in the fact and circumstances of the case that the petitioner is facing criminal trial under the different cases and, in some of them, death or the life imprisonment may be awarded to the petitioner.

Section 4 of the PML Act being relevant is quoted herein below:-

“4. Punishment for money-laundering.—Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words “which may extend to seven years”, the words “which may extend to ten years” had been substituted.”



Section 3 of the Prevention of Money-Laundering Act stipulates that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering and Section 4 provides that whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine but, proviso further added that if the proceeds of crime involved in the money laundering relates to offence specified in paragraph no.2 of Part A of the Schedule, the provisions of this section shall have effect as it for the words “which may extend to seven years”, the words “which may extend to ten years” had been substituted. So, if the maximum punishment apart from the offences mentioned in paragraph no.2 of Part A of the schedule is seven years but, if the offence is related to paragraph no.2 of Part A of the Schedule, ten years has been provided the maximum punishment. So, in that consideration, it has been argued that as the petitioner has completed seven years of punishment which is maximum as none



of the offence falls in any of the items mentioned in paragraph no.2 of Part A of the Schedule. Hence, he is required to be set free.

Before dealing with the merit of the case, it will be appropriate to consider the preliminary objection raised by the Union of India about the maintainability of the writ application. So, this Court first will deal with the issue of maintainability of the writ application as the plea has been taken by the counsel for the Union of India that the petitioner is under jail custody as per the order of remand passed by the court of competent jurisdiction. Hence, in such circumstances, the writ application itself is not maintainable.

Learned counsel for the Union of India has placed reliance on the judgment in the case of Harbanslal Sahnia and Anr. Vs. Indian Oil Corpn. Ltd. and Ors. reported in AIR 2003 SC 2120. In this case, the issue was raised with regard to availability of the alternative remedy, as the counsel for the Union of India has submitted that, as the petitioner has already moved bail application which is pending for consideration, in such circumstances, in view of availability of alternative remedy, the petitioner should be asked to avail the remedy under the general law. Normally, the Court would refrain to entertain the writ application if the alternative remedy is available to the parties but, having some exception in



the circumstances, namely, firstly where the writ application seeks enforcement of any fundamental right, secondly where there is a failure of principles of natural justice, thirdly where the orders of the proceeding are wholly without jurisdiction or the vires of an Act is under challenge, in such circumstances, the plea of alternative remedy cannot be invoked for non-suiting the person who has approached the court with any of the aforesaid plea to substantiate his claims, reliance can be placed on the judgment of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors. reported in (1998) 8 SCC 1. In that case, the Hon'ble Apex Court explained the circumstances where in the plea of alternative will not be a ground to refuse to entertain the writ application. So, if this Court would find that the present writ application falls under any of the exceptions, in such circumstances, the present writ application will be maintainable, otherwise not and the Court will deal with the matter on merit. Paragraph no.7 being relevant is quoted hereinbelow:-

7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ



jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 11]. The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.

The same issue of alternative remedy is again gone into in the case of Ummu Sabeena Vs. State of kerala & ors. reported in (2011) 10 SCC 781 in which the Hon'ble Apex Court has held that in the matter of habeas corpus, the technical objection cannot be entertained by the court and it has been held that the procedural safeguards given for protection of personal liberty must be strictly followed. The history of personal liberty, as is well known, is a history of insistence on procedural safeguards. The Hon'ble Apex Court has quoted observation on the principle made by James A. Scott and Charles C. Roe of the Chicago Bar wherein it has been held that habeas corpus is a writ of right of very ancient origin, and the preservation of its benefit is a matter of the highest importance to the people, and the regulations provided for its employment



against an alleged unlawful restraint are not to be construed or applied with overtechnical nicety. It is relevant to quote paragraph nos. 11, 13, 14, 15 and 16 of the aforesaid judgment which reads as follows:-

11. Going by the aforesaid precedents, as we must, we hold that the procedural safeguards given for protection of personal liberty must be strictly followed. The history of personal liberty, as is well known, is a history of insistence on procedural safeguards. Following the said principle, we find that delay in these cases is for a much longer period and there is hardly any explanation. We, therefore, have no hesitation in quashing the orders of detention on the ground of delay on the part of the Central Government in disposing of the representation of the detenus.

13. Taking up the second objection first, we find that the question of delay was urged before the High Court as it appears from pp. 6 and 7 of the impugned judgment. But, insofar as the question of technical plea which has been raised by the learned counsel on the question of prayer in the habeas corpus petition is concerned, we are constrained to observe that in dealing with writs of habeas corpus, such technical objections cannot be entertained by this Court.

14. Reference in this connection may be made to the Law of Habeas Corpus by James A. Scott and Charles C. Roe of the Chicago Bar (T.H. Flood & Company, Publishers, Chicago, Illinois, 1923) where the learned authors have dealt with this aspect in a manner which we should reproduce as we are of the view that the same is the correct position in law:



“A writ of habeas corpus is a writ of right of very ancient origin, and the preservation of its benefit is a matter of the highest importance to the people, and the regulations provided for its employment against an alleged unlawful restraint are not to be construed or applied with overtechnical nicety, and when ambiguous or doubtful, should be interpreted liberally to promote the effectiveness of the proceeding. (Ware v. Sanders [146 Iowa 233 : 124 NW 1081 (1910)] .)”

15. In this connection, if we may say so, the writ of habeas corpus is the oldest writ evolved by the common law of England to protect the individual liberty against its invasion in the hands of the executive or may be also at the instance of private persons. This principle of habeas corpus has been incorporated in our constitutional law and we are of the opinion that in a democratic republic like India where Judges function under a written Constitution and which has a chapter on fundamental rights, to protect individual liberty the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the Court by issuing a writ of habeas corpus.

16. This facet of the writ of habeas corpus makes it a writ of the highest constitutional importance being a remedy available to the lowliest citizen against the most powerful authority (see Halsbury's Laws of England, 4th Edn., Vol. 11, para 1454). That is why it has been said that the writ of habeas corpus is the key that unlocks the door to freedom (see The Common Law in India, 1960 by M.C. Setalvad, p. 38).”

In the case of Himmatlal Harilal Mehtav Vs. The State of Madhya Pradesh and Ors. reported in AIR 1954 SC 403 also,



the question of alternative remedy was raised but, the Court has held that when the provision of Explanation II to Section 2(g) of the Central Provinces and Berar Sales Tax Act, 1947 having been declared ultra vires, any imposition of sales tax on the appellant in Madhya Pradesh is without the authority of law and that being so, a threat by the State by using the coercive machinery of the impugned Act to realize it from the appellant is sufficient infringement of his fundamental right under Article 19(1)(g) and it was clearly entitled to relief under Article 226 of the Constitution of India. So, in that case, the provision has been declared ultra vires, the Court has mandated the maintainability of the writ application which has been dealt with in paragraph no.9 of the said judgment.

In view of the aforesaid judgments, it is very much clear that there is no absolute bar to entertain the writ application in the event of availability of alternative remedy subject to the condition mentioned herein above. If the issue falls under the aforesaid heading then the alternative remedy cannot be invoked as a bar for entertainment of the writ application and the court would adjudicate the dispute raised by the parties.

As all the questions framed herein above are interconnected to each other, this Court would like to deal with the



aforesaid questions in an integrated manner. For arriving to a right conclusion, it will be appropriate to consider different provisions of the PML Act, Section 31 and 428 of the Cr.P.C. as well as Articles 20 & 21 of the Constitution of India. It is relevant to quote Article 20 and 21 of the Constitution of India for giving proper answer to the question framed herein above, as the same play a vital role in coming to the correct decision.

“20. Protection in respect of conviction for offences:-

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence

(2) No person shall be prosecuted and punished for the same offence more than once

(3) No person accused of any offence shall be compelled to be a witness against himself.”

21. Protection of life and personal liberty:-

No person shall be deprived of his life or personal liberty except according to procedure established by law.”

As in the present case, the basic thrust has been given by the petitioner that he has wrongly been kept in judicial custody in view of the fact that he has already completed more than the maximum punishment which could have been awarded to him. So, the prayer has been made in the manner for issuance of writ of mandamus in the shape of habeas corpus giving direction to the



court below to release from the judicial custody so that he could be able to take breath of fresh air.

The habeas corpus is a latin word which means “to provide the body”. A writ of habeas corpus is used to bring a prisoner or other detainee (e.g. institutionalized mental patient) before the court to determine, if the person's imprisonment or detention is lawful. A *habeas corpus* petition proceeds as a civil action against the State agent who holds the defendant in custody. It can be exercised pertaining extradition processes used.

The Habeas corpus first originated back in 1215, through the 39th clause of the Magna Carta signed by King John, which provided "No man shall be arrested or imprisoned...except by the lawful judgment of his peers and by the law of the land," English courts began actively considering petitions for habeas corpus in 1600. While habeas corpus had initially originated as an instrument in opposition to the king's “divine right to incarcerate people,” there were many other constables and other authorities during those times, who imprisoned people for various reasons. Accordingly, habeas corpus also developed as the king's role to demand account for his subject who is restrained of his liberty by other authorities. Deeply rooted in the Anglo-American jurisprudence, the law of habeas corpus was adopted in the U.S. as



well, by the early Founding Fathers. James Madison, in 1789, argued for the adoption of the Bill of Rights, including Habeas Corpus. The fourth Chief Justice of the U.S. Supreme Court, Chief Justice Marshall, emphasized the importance of habeas corpus, writing in his decision in 1830, that the "great object" of the writ of habeas corpus "is the liberation of those who may be imprisoned without sufficient cause." The U.S. Supreme Court has recognized that the "writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action" and must be "administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected.

Article 20 of the Constitution of India talks that no person shall be convicted for the offence except for violation of law in force at the time of commission of the act charged as on offence, nor the subjected to the penalty greater than that which might have been inflicted under the law in force at the time of commission of offence. He cannot be awarded higher penalty otherwise than what has been prescribed in the penal provision. Article 21 gives the protection to the life and liberty which is very much clear that no person shall be deprived of his life and personal liberty except according to the procedure established by law. It has



a very broad ramification, it can be articulated in the manner that the person can only be proceeded and penalized as per the provision of law was enforced on the day of commission of the offence.

There is another aspect of the matter as learned counsel for the Union of India has submitted that when there is a judicial order, writ of habeas corpus would not be available and liberty would be given to seek appropriate remedy. He has placed reliance on the judgment passed in the case of Col. Dr. B. Ramachandra Rao Vs The State of Orissa and Ors. reported in 1972 (3) SCC 256. In this case, the petitioner was a member of the Indian National Army who was confined in the jail at Bhuneshwar (Orisa), was brought from the district jail, Sikandarabad in Andhra Pradesh without any legal authority and was not produced before any Magistrate till January, 3 1970 when he had already moved before the Hon'ble Supreme Court for a writ of habeas corpus, basically making a plea that the petitioner was not produced before any Magistrate on October 4, 1969, averred that the warrant bearing the date and another document in support of his alleged production are all fabricated document and Shri D. Kanungo, Magistrate, I Class had on October 7, 1969 had directed the Superintendent, Sub-Jail, Bhubaneswar not to allow



facilities to the petitioner to approach any Court and that manifestly till that date no warrant committing the petitioner to jail custody was issued by the said Magistrate but, the fact that the petitioner's confinement in the sub-jail was directed by the Magistrate to be kept as highly confidential but, the fact remained that the said petitioner was under-trial prisoner lodged in the Bhubaneswar Sub-Jail and the charge-sheet in three criminal cases were filed against him in the court of Judicial Magistrate, Bhubaneswar and, inasmuch as, he was convicted in another case for offence under Sections 419, 420, 466 to a different terms of imprisonment. He was brought from Sikandarabad on account of issue of warrant by the Sub Divisional Officer, Bhubaneswar and was produced before the Magistrate, 1st Class on the day of arrival. As the S.D.O. concerned was absent, he was remanded to judicial custody from time to time. The Court has opined in the following terms:-

“This Court does not, as a general rule, go into such controversies in proceedings for a writ of habeas corpus. Such a writ is not 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 and we are not satisfied that the present is not such a case.”

The Court has further observed in the following terms:-

“We need only add that in case the petitioner is undergoing the sentence of imprisonment imposed on him by



competent Court then too writ of habeas corpus cannot be granted. This position is well settled.”

In the case of Kanu Sanyal Vs. District Magistrate, Darjeeling & Ors. reported in AIR 1974 SC 510, it has been held that when 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, writ of mandamus will not apply. It is relevant to quote paragraph no.4 which reads as follows:-

“4. ----- 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 fulfillment 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 that a writ of habeas corpus cannot be granted "Where person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction wholly illegal". The present case is clearly covered by these observation and the petitioner is not entitled to a writ of habeas corpus to free him from detention.”



In the case of Saurabh Kumar Vs. Jailor, Koneila Jail & Anr. reported in (2014) 13 SCC 436 in which the writ of habeas corpus has been filed for release of the accused. The fact of the present case is that he was the XIIth pass, wanted to move out from the village in search of job, for that, he made an application for passport. Police called him for examining his credentials. As was alleged, he was put in lock-up, on the next day, he was produced before the Magistrate, he was beaten before the Magistrate who remanded him in jail custody. The point of objection has been raised that as the petitioner was in jail custody on the ground of the judicial order passed by the criminal court, in such circumstances, instead of moving for writ of habeas corpus, he should have moved for bail before the court concerned. The objection which raised was accepted. It is relevant to quote paragraph no.22 of the said judgment which reads as follows:-

“22. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced. Having said that, we are of the view that the petitioner could and indeed ought to have filed an application for grant of bail which prayer



could be allowed by the court below, having regard to the nature of the offences allegedly committed by the petitioner and the attendant circumstances. The petitioner has for whatever reasons chosen not to do so. He, instead, has been advised to file the present petition in this Court which is no substitute for his enlargement from custody.”

So, the view of the Hon’ble Apex Court is that if a person is under judicial custody by an order of the competent jurisdiction, in such circumstances, the plea of habeas corpus per se is not maintainable.

The another judgment has been brought to the notice of this Court, namely, Serious Fraud Investigation Office Vs. Rahul Modi & Anr. reported in (2019) 5 SCC 266. In this case also, the relief was sought under the writ of habeas corpus as the plea was taken that the respondent was arrested and later on the Magistrate remanded him from time to time. The order of remand was challenged on the ground of being illegal order and the plea of habeas corpus as the order of remand is illegal, he should be set free as it attracts the high prerogative writ of habeas corpus. The Hon’ble Apex Court did not accept the contention. Before the order of release, a valid order of remand was produced. The release order cannot be passed. The order of remand is judicial act and, as such, the writ of habeas corpus cannot be entertained.



The Court in paragraph no.17 has held that the illegality of detention order under the writ of habeas corpus can be looked into and examined is the date on which the return is filed in such proceeding not with reference to the initiation of proceeding and further in paragraph no.20, the Court has considered as to whether the relief under the habeas corpus should be entertained against the order of remand passed by the Judicial Magistrate. Finally, the Court in paragraph no.21, the Hon'ble Court has said that the act of directing 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. It has further been held that as the challenge was with respect to detention, pursuant to valid remand order passed by the Judicial Magistrate, the constitutional court, the High Court should not have entertained the challenge. The act of directing remand is fundamentally a judicial function, correctness or validity of the such order could, if at all, be tested in a properly constituted proceedings before the appellate or revisional forum. In that circumstances, even if the arrests were effected within the jurisdiction of the High Court, the High Court not to have entertained the writ petition in the event of order of remand. It is relevant to quote paragraph nos. 17, 18, 19, 20.1,



20.2, 20.3, 21 & 22 of the aforesaid judgment which reads as follows:-

“17. For considering whether the writ petitioners were entitled to any interim relief, two questions were framed by the High Court in paragraph 15 of its Order. Before considering the matter from the perspective of said two questions, an issue which was stressed by the learned Solicitor General may be addressed first. It was submitted by him that the date with reference to which the legality of detention can be challenged in a Habeas Corpus proceeding is the date on which the return is filed in such proceedings and not with reference to the initiation of the proceedings. He relied upon the decision of the Federal Court in Basanta Chandra Ghose vs. King Emperor¹, which had concluded:

“... ..If at any time before the Court directs the release of the detenue, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention.... ..”

18. Similar questions arose for consideration in Naranjan Singh Nathawan vs. State of Punjab, Ram Narayan Singh vs. State of Delhi, A.K. Gopalan vs. Govt. of India, Pranab Chatterjee vs. State of Bihar, Talib Hussain vs. State of J&K, B. Ramachandra Rao vs. State of Orissa. These decisions were considered in Kanu Sanyal vs. District Magistrate, Darjeeling, as under:

“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:

5. 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 and Ram Narayan Singh v. State of Delhi a slightly different view was expressed and that view was reiterated by this Court in B.Ramachandra Rao v. State of Orissa where it was said (at p. 259, para 7):

‘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, Mr Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that (at p. 121, para 6):

‘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, "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.) 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.”

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”. In Kanu Sanyal the validity of the detention of the petitioner in District Jail, Darjeeling was therefore not considered by this Court and it was observed that the infirmity in the detention of the petitioner therein in the District Jail, Darjeeling could not invalidate subsequent detention of the petitioner in the Central Jail, Vishakhapatnam.

20. At this stage we may also deal with three recent cases decided by this Court:-

20.1 In Manubhai Ratilal Patel v. State of Gujarat a Division bench of this Court extensively considered earlier decisions in the point including cases referred to above. It also dealt with an issue whether Habeas Corpus petition could be entertained against an order of remand passed by a Judicial Magistrate. The observations of this Court in paragraphs 20 to 24 and para 31 were as under:

“20. After so stating, the Bench in Kanu Sanyal case⁸ opined that for adjudication in the said case, it was immaterial which of the three views was accepted as correct but eventually referred to para 7 in B.



*Ramachandra Rao*⁷ wherein the Court had expressed the view in the following manner: (SCC p. 259)

‘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.’

Eventually, the Bench ruled thus: (Kanu Sanyal case, SCC p. 148, para 5) 9 (2013) 1 SCC 314

‘5. ... 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 Col. B. Ramachandra Rao v. State of Orissa⁷ (SCC p. 258, para 5) that a writ of habeas corpus cannot be granted

“5. ... 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”.’

21. The principle laid down in Kanu Sanyal, thus, is that any infirmity in the detention of the petitioner at the initial stage cannot invalidate the subsequent detention and the same has to be judged on its own merits.

22. At this juncture, we may profitably refer to the Constitution Bench decision in Sanjay Dutt v. State through CBI, Bombay (II) 10 wherein it has been opined thus: (SCC p. 442, para 48)

“48. ... It is settled by 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.

... ..



31. Coming to the case at hand, it is evincible that the arrest had taken place a day prior to the passing of the order of stay. It is also manifest that the order of remand was passed by the learned Magistrate after considering the allegations in the FIR but not in a routine or mechanical manner. It has to be borne in mind that the effect of the order of the High Court regarding stay of investigation could only have a bearing on the action of the investigating agency. The order of remand which is a judicial act, as we perceive, does not suffer from any infirmity. The only ground that was highlighted before the High Court as well as before this Court is that once there is stay of investigation, the order of remand is sensitively susceptible and, therefore, as a logical corollary, the detention is unsustainable. It is worthy to note that the investigation had already commenced and as a resultant consequence, the accused was arrested. Thus, we are disposed to think that the order of remand cannot be regarded as untenable in law. It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in *B. Ramachandra Rao and Kanu Sanyal*⁹, the court is required to scrutinise the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted. It is apposite to note that the investigation, as has been dealt with in various authorities of this Court, is neither an inquiry nor trial. It is within the exclusive domain of the police to investigate and is independent of any control by the Magistrate.



The sphere of activity is clear cut and well demarcated. Thus viewed, we do not perceive any error in the order passed by the High Court refusing to grant a writ of habeas corpus as the detention by virtue of the judicial order passed by the Magistrate remanding the accused to custody is valid in law.”

20.2 In Saurabh Kumar vs. Jailor, Koneila Jail and another the issue was dealt with in para 13 of the leading Judgment as under: (SCC p. 440)

13. It is clear from the said narration of facts that the petitioner is in judicial custody by virtue of an order passed by the Judicial Magistrate. The same is further ensured from the original record which this Court has, by order dated 9-4-2014, called for from the Court of the Additional Chief Judicial Magistrate, Dalsingsarai, District Samastipur, Bihar. Hence, the contention of the learned counsel for the petitioner that there was illegal detention without any case is incorrect. Therefore, the relief sought for by the petitioner cannot be granted. Even though there are several other issues raised in the writ petition, in view 11 (2014) 13 SCC 436 of the facts narrated above, there is no need for us to go into those issues. However, the petitioner is at liberty to make an application for his release in Criminal Case No. 129 of 2013 pending before the Court of the learned Additional Chief Judicial Magistrate, Dalsingsarai.”

Thakur, J. (as the learned Chief Justice then was) who agreed with the leading Judgment authored by Ramana, J., also dealt with the matter in paragraph 22 of his concurring opinion as under: (Saurabh Kumar case, SCC p. 442



“22. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced. Having said that, we are of the view that the petitioner could and indeed ought to have filed an application for grant of bail which prayer could be allowed by the court below, having regard to the nature of the offences allegedly committed by the petitioner and the attendant circumstances. The petitioner has for whatever reasons chosen not to do so. He, instead, has been advised to file the present petition in this Court which is no substitute for his enlargement from custody.”

20. 3 A Bench of three learned Judges of this Court in State of Maharashtra and Others vs. Tasneem Rizwan Siddiquee concluded as under: (SCC pp. 751-52, paras 10-12)

“10. 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 Saurabh Kumar v. Jailor, Koneila Jail and Manubhai Ratilal Patel⁹ v. State of Gujarat. 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 18-3-2018/19-3-2018 and decided by the High Court on 21-3-2018 her husband Rizwan Alam Siddiquee was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No. I-31 vide order dated 17-3-2018 and which police remand was to enure till 23-3-2018. 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.

11. Reverting to the prayer for expunging the scathing observations made in the impugned judgment, in particular paras 4-6, reproduced earlier, it is submitted that the said observations were wholly unwarranted as the Deputy Commissioner of Police concerned who was present in Court, could not have given concession to release Rizwan Alam Siddiquee in the teeth of a judicial order passed by the Magistrate directing police remand until 23-3-2018. Moreover, it is evident that the High Court proceeded to make observations without giving any opportunity, whatsoever, to the police officials concerned to explain the factual position on affidavit. The writ petition was filed on 18-3-2018/19-3-2018 and was moved on 20-3-2018² when the Court called upon the advocate for the appellants to produce the record on the next day i.e. 21-3-2018. The impugned order came to be passed on 21-3-2018¹, notwithstanding the judicial order of remand operating till 23-3-2018. The High Court, in our opinion,



should not have taken umbrage to the submission made on behalf of the Deputy Commissioner of Police that the respondent's husband could be released if so directed by the Court. As aforesaid, the DCP has had no other option but to make such a submission. For, he could not have voluntarily released the accused who was in police custody pursuant to a judicial order in force. The High Court ought not to have made scathing observations even against the investigating officer without giving him an opportunity to offer his explanation on affidavit.

12. Suffice it to observe that since no writ of habeas corpus could be issued in the fact situation of the present case, the High Court should have been loath to enter upon the merits of the arrest in the absence of any challenge to the judicial order passed by the Magistrate granting police custody till 23-3-2018 and more particularly for reasons mentioned in that order of the Magistrate. In a somewhat similar situation, this Court in State represented by Inspector of Police and others v. N.M.T. Joy Immaculate deprecated passing of disparaging and strong remarks by the High Court against the investigating officer and about the investigation done by them. Accordingly, we have no hesitation in expunging the observations made in paras 4 to 6 of the impugned judgment against the police officials concerned in the facts of the present case."

21. The act of directing 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. The first question posed by the High Court, thus, stands answered. In the present case, as on the date when the matter was considered by the High Court and the Order was passed by it, not only were there orders of remand passed by the Judicial Magistrate as



well as the Special Court, Gurugram but there was also an order of extension passed by the Central Government on 14.12.2018. The legality, validity and correctness of the order or remand could have been challenged by the original Writ Petitioners by filing appropriate proceedings. However, they did not raise such challenge before the competent Appellate or Revisional Forum. The orders of remand passed by the Judicial Magistrate and the Special Court, Gurugram had dealt with merits of the matter and whether continued detention of the accused was justified or not. After going into the relevant issues on merits, the accused were remanded to further police custody. These orders were not put in challenge before the High Court. It was, therefore, not open to the High Court to entertain challenge with regard to correctness of those orders. The High Court, however, considered the matter from the standpoint whether the initial Order of arrest itself was valid or not and found that such legality could not be sanctified by subsequent Order of remand. Principally, the issue which was raised before the High Court was whether the arrest could be effected after period of investigation, as stipulated in said order dated 20.06.2018 had come to an end. The supplementary issue was the effect of extension of time as granted on 14.12.2018. It is true that the arrest was effected when the period had expired but by the time the High Court entertained the petition, there was as order of extension passed by the Central Government on 14.12.2018. Additionally, there were judicial orders passed by the Judicial Magistrate as well as the Special Court, Gurugram, remanding the accused to custody. If we go purely by the law laid down by this Court with regard to exercise of jurisdiction in respect of Habeas Corpus petition, the High Court was not justified in entertaining the petition and passing the Order.



22. We must, however, deal with the submission advanced on behalf of the original Writ Petitioners that the relief as regards Habeas Corpus was a secondary prayer while the principal submissions were with regard to the first three prayers in the petition. It was submitted that with the expiry of period, the entire mandate came to an end and as such, there could be no arrest and that illegality in that behalf would continue regardless whether there was a subsequent order of extension. In the submission of the learned counsel for the Writ Petitioner such an extension could not cure the inherent defect and as such, the High Court was justified in entertaining the petition. We may deal with this issue after considering the second question posed by the High Court in said paragraph 15.”

Learned counsel for the Union of India has placed reliance on another judgment passed in the case of The Home Secretary (Prison) & Ors. Vs. H. Nilofer Nisha reported in 2020 SCC Online 73. In this case, the respondent was life convict, made a prayer for remission and release as per the notification of the State Government. The High Court has passed the order for release but, the Hon'ble Apex Court set aside and held that habeas corpus is not maintainable, direction was given to file application before the Government which will look into the matter and pass the order. While dealing with the matter, the Hon'ble Apex Court has held that the writ of habeas corpus is available as a remedy in all cases where a person is deprived of his personal liberty. It is the processual writ to secure liberty of the citizen from unlawful and



unjust detention whether a person is detained by State or is in private detention. As per Justice Hidayatullah (as he then was), held; the writ of habeas corpus issues not only for release from the detention of the State but also for release from the private bodies. If the confinement or detention is without authority of law, in that event, the writ of habeas corpus could be issued. Habeas corpus means to produce the body, the corollary is that the legality and illegality of the detention to be decided by the High Court or the Supreme Court and illegal detention certainly the writ of habeas corpus would be applied and the relief can be granted to the parties but, if there is a valid order of remand, writ of habeas corpus would not be a proper remedy available to the detainee, he should move for the relief under the general law that is Code of Criminal Procedure. Finally, the Hon'ble Apex Court in paragraph no.35 held that as to whether the High Court was justified in directing for release of the petitioner under the circular issued by the Government. The Court has considered and held that it is not to be done by the High Court and given direction to the State Government to consider the representation filed by the detainees for consideration of the respective cases in terms of the circular. While dealing with the issue, the Court has said that when a person is in judicial custody under a valid order of the court, the writ of



habeas corpus cannot be entertained. It will be relevant to quote paragraph nos. 22, 23, 24, 25, 26 & 27 of the aforesaid judgment which reads as follows:-

“22. A writ petition by a prisoner is maintainable if his fundamental rights are violated.

23. Having held that a writ of habeas corpus is maintainable by a person who is under detention if his rights are violated, the question that remains to be answered is whether in the present case any right of the detenue was violated which could have led to the issuance of an order directing his release from prison. We may make reference to the judgment of this Court in the Col. Dr. B. Ramachandra Rao v. The State of Orissa, wherein it was urged before this Court that the orders of the Court directing the detention of the petitioner were illegal. In this case, the Court has held as follows:

“5....This Court does not, as a general rule, go into such controversies in proceedings for a writ of habeas corpus. Such a writ is not 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 and we are not satisfied that the present is not such a case.”

24. In Kanu Sanyal v. District Magistrate, Darjeeling this Court while dealing with the writ of habeas corpus has held as follows:

“4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty....”



25. In *Manubhai Ratilal Patel v. State of Gujarat*, an order of remand was challenged before this Court. After referring to a large number of judgments, which we are not referring in detail since they have all been considered in this judgment, this Court held as follows:

“31....It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal....”

26. In *Saurabh Kumar v. Jailor, Koneila Jail*, this Court came to the conclusion that the petitioner was in judicial custody by virtue of an order passed by the judicial magistrate and, hence, could not be said to be in illegal detention. Justice T.S. Thakur, as he then was, in his concurring judgment held as follows:

“22. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced...”

27. The same view has been taken in the *State of Maharashtra v. Tasneem Rizwan Siddiquee* wherein it was observed that no writ of habeas corpus could be issued when the detenu was in detention pursuant to an order passed by the Court. As far as the present cases are concerned, it is not disputed that the



detenus are behind bars pursuant to conviction and sentence imposed upon them by a court of competent jurisdiction and confirmed by this Court, whereby they were sentenced to undergo imprisonment for life.”

So, the consistent view of the Hon’ble Apex Court is that in the event of detention on account of the valid judicial order, the writ of habeas corpus is not maintainable, followed the same principle laid down in the judgment passed in the case of Suresh Ramtirth Yadav Vs. State of Gujarat reported in 1990 Cri. Law Journal 1834 wherein the issue was raised, invoking the writ of habeas corpus and the Court has held that when there is a valid judicial order, the writ of habeas corpus cannot be entertained and he may move the remedy under the general law by way of appeal or revision. It is relevant to quote paragraph no.30 of the aforesaid judgment which reads as follows:-

“30. From a reading of the above sections, it is clear that the procedure taken from the Criminal Procedure Code is in addition to the procedure contained in this self-contained Act called ‘The Terrorist and Disruptive Activities (Prevention) Act, 1985’ (as substituted by Act XVI of 87) and that is why it is stated in Section 12(4) of the old Act “so far as may be in accordance with the procedure prescribed in the code for the trial before a Court of Session”. Thus, the procedure set out in this Act overrides the procedure in the Criminal Procedure Code and as far as may be, the procedure in the Code is taken for the limited purpose mentioned in the Act. If the orders of adjournments and remand are not in accordance with Section



309 of the Criminal Procedure Code, it is open to the party aggrieved to apply to the Court for necessary relief, either for grant of bail or for getting directions for a speedy trial. The Section 16 of the Act of 1985 (Section 19 of the Act of 1987) specifically mentions that no appeal or revision shall lie to any Court from any judgment, sentence or order of a Designated Court except to the Supreme Court. The provision in this self-contained Act, when there is especially a decision of the Supreme Court (Usman's case, supra), prohibiting any revision or appeal before the High Court under Section 439 or Section 482 of the Criminal Procedure Code, cannot be circumvented by invoking the jurisdiction of this Court under Article 226 of the Constitution of India alleging as if there is a violation of Article 21 of the Constitution of India. Looking into the Roznama and the facts of this case, we are of the view that the orders of adjournments and also the orders of remand are within the powers of the Designated Court and its Officers as such, there is absolutely no illegality in such remand orders and the adjournments granted by the Court.”

The Full Bench judgment of this Court passed in the case of Shikha Kumari Vs. State of Bihar & Ors. reported in 2020 (2) PLJR 15 (FB) in which the relief was sought under the habeas corpus for release the petitioner Shikha Kumari from the Remand Care Home, was staying in the Government Care Home, Gaighat. The fact of that case is that a written complaint dated 7.1.2019 was filed by one Ashok Pandey wherein it has been alleged that his daughter aged 16 years had gone to Sirni Bazar on 10.12.2018 in the evening for purchasing some medicine whereafter she did not



return, he started searching of her whereabouts and whereupon he came to know that she was seen going together with one Dhanjeet Yadav of the same village. When inquired from the parents and family members of Dhanjeet Yadav, they started abusing him and said that Dhanjeet Yadav would marry with his daughter. It was further alleged that he came to know that Dhanjeet Yadav and his family member had gone along with his daughter to Bettiah court, in turn, he went together with his brother Santosh Pandey but, they had already left the court premises. Further alleged that on fake mark-sheet of matriculation and fake Aadhar Card, the date of birth has been shown as 1.1.1998 submitted in the office of the Registrar of Marriage along with the false affidavit whereas in the mark-sheet, the date of birth has been recorded differently. In such view of the matter, as per the original matriculation certificate, his daughter was a minor and forcibly abducted his daughter for illegal purpose of marrying with Dhanjeet Yadav. A criminal case was instituted whereafter the statement of the girl was taken under Section 164 of the Cr.P.C. in which she had stated that on her own volition had entered into the marriage with Dhanjeet Yadav and, after marriage, she came back to the parent's house and beseeched that she wants to live with Dhanjeet Yadav. As her family members



are inimical, she has a threat to her life at the hand of one Marmesh, Son of Ganesh Yadav.

One of the question was framed as to whether an order of remand passed by the Judicial Magistrate could be reviewed in a petition seeking the writ of habeas corpus holding judicial order of remand to be illegal detention. The Full Bench has considered different judgments and in paragraph no. 80 has held that in view of the above discussion, the Court could not exercise power under Article 226 & 227 of the Constitution of India and further held that under Section 483 Cr.P.C., the High Court would not be justified in issuing a general direction to all Magistrate and Judicial Magistrate of the State for release of such women and permitting them to go along with the person of their choice who are minor and brought before the Magistrate with a statement of having married somebody of their own volition. It is relevant to quote paragraph nos. 76, 77 and 78 of the aforesaid judgment which reads as follows:-

“76. A three-judge Bench of the Supreme Court in TGN Kumar vs. State of Kerala & Ors.(supra) while answering the question posed by the two-judge Bench, in paras 13, 21 and 22 held as follows :

“13. Similarly, while it is true that the power of superintendence conferred on the High Court under Article 227 of the Constitution of India is both administrative and judicial, but such power is to be



exercised sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. In any event, the power of superintendence cannot be exercised to influence the subordinate judiciary to pass any order or judgment in a particular manner.

21. Thus, in the instant case, we have no hesitation in holding that the High Court exceeded its jurisdiction under Section 482 of the Code and/or Article 227 of the Constitution by laying down the afore extracted general directions, which are inconsistent with the clear language of Sections 205 and 313 of the Code, as noted above. We feel that in the light of the aforementioned guidelines laid down by this Court, further directions on the same issue by the High Court were wholly uncalled for. In this regard, the following observations in S.Palani Velayutham v. Collector [(2009) 10SCC 664 : (2010) 1 SCC (Cri) 401] are quite apt: (SCC p. 669, para 19)

“19. The courts should avoid the temptation to become authoritarian. We have been coming across several instances, where in their anxiety to do justice, the courts have gone overboard, which results in injustice, rather than justice. It is said that all power is trust and with greater power comes greater responsibility.”

22. In the light of the foregoing discussion, the appeal is allowed, and the impugned order containing general directions to the lower courts is set aside. However, we direct that if the accused moves the trial court with an application under Section 205 of the Code for exemption from personal attendance within four weeks of the



receipt of a copy of this judgment, the exemption granted to her by the High Court shall continue to be in force till her application is disposed of by the trial court.”

77. *Keeping in mind the ratio laid down by the Supreme Court in the aforementioned cases, it would be manifest that the inherent power of the High Court under Section 482 of the CrPC or under Article 227 or an extraordinary jurisdiction under Article 226 of the Constitution of India can be invoked only under an extraordinary situation where the abuse of the process of the court or miscarriage of justice is writ large. The power of continuous superintendence of the High Court under Section 483 of the CrPC over the courts of Judicial Magistrates subordinate to it is with a view to ensure that there is an expeditious and proper disposal of cases by such Magistrates. The power of superintendence conferred on the High Court under Article 227 of the Constitution of India or under Section 483 of the CrPC is both administrative and judicial, but such power should be exercised sparingly and only in appropriate cases. Such power cannot be exercised to influence the subordinate judiciary to pass any order or judgment in a particular manner. The power of superintendence exercised over the courts of judicial Magistrates does confer jurisdiction upon the High Court to intervene in functions of the subordinate judiciary, whose independence is of paramount importance in the discharge of its judicial functions.*

78. *In Dharmeshbhai Vasudevhai & Ors. vs. State of Gujarat & Ors., [(2009) 6 SCC 576], the Supreme Court has held that the High Court, apart from exercising its supervisory jurisdiction under Article 227 of the Constitution of India, has a duty to exercise continuous superintendence over the Judicial Magistrates in terms of Section 483 of the Cr.P.C.”*



The judgment which has been cited in the case of Hussain & Anr. Vs. Union of India reported in AIR 2017 SC 1362 is on the issue of speedy trial wherein the Hon'ble Apex Court has adumbrated that if it is necessary, the trial should be expedited but, the Court has refused to fix any time for completion of the investigation, enquiry or trial and the same view has also been taken in the case of P Ramachandra Rao Vs. State of Karnataka reported in (2002) 4 SCC 578 which also deals with the speedy trial, therein the Court held that no time limit cannot be fixed for disposal of criminal case and thereby the Hon'ble Apex Court has overruled the earlier judgment passed in Rajdeo Singh 1 and Rajdeo Singh 2 and common causes case.

Thus, the judgment passed in the case of Hussain & Anr. Vs. Union of India reported in AIR 2017 SC 1362 ~ (2017) 5 SCC 702 is not relevant in the present case as it deals with the expeditious disposal of the criminal case.

The Hon'ble Apex Court in the case of Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar, reported in AIR 1979 SC 1819 : (1980) 1 SCC 115 has considered the issue of personal liberty wherein the plea was taken that the accused has already suffered maximum term of jail, the punishment could be awarded on conviction to the accused. It has been held that when a



person is accused in multiple cases, even if it may be presumed, the sentence would run consecutively, there will be no justification to keep the person under the jail custody beyond maximum to sentence which has already suffered as it would violate the human right and would run contrary to Article 21 of the Constitution of India. There is virtually no reason why he would continue in jail maximum to the sentence which could have been awarded. So, it will be relevant to quote paragraph no.2 of the aforesaid judgment which reads as follows:-

“2. Mrs Hingorani has handed over to us a list of undertrial prisoners who are accused of multiple offences and who have already been in jail for the maximum term for which they could be sentenced on conviction, even if the sentences awarded to them were consecutive and not concurrent. Now ordinarily when a person is accused of more offences than one, the sentences of imprisonment imposed on him are directed to run concurrently, but even on the assumption that the sentences of imprisonment may be consecutive, these undertrial prisoners, mentioned in the list of Mrs Hingorani, have already suffered incarceration for the maximum period for which they could have been sent to jail on conviction. There is absolutely no reason. why they should be allowed to continue to remain in jail for a moment longer; since such continuance of detention would be clearly violative not only of human dignity but also of their fundamental right under Article 21 of the



Constitution. We, therefore, direct that these undertrial prisoners be released forthwith.”

Though the Hon’ble Apex Court has not granted relief to the petitioner as it was found that she has not suffered the jail custody more than the sentence which could have been awarded in different cases but, the principle has been delineated that the person cannot be detained in jail custody beyond the maximum period of sentence could be awarded in multiple cases. If he has remained for maximum period in jail custody, he cannot be kept confinement even for a single day, beyond the maximum limited he could have been put to jail custody. So, Article 21 of the Constitution of India comes into full play which requires to be released from jail forthwith without any delay.

As the plea has been taken in this that he has already remained in jail custody for optimum period, hence, the right has accrued to be released from jail custody. For giving answer to the question raised, it will be required to deal with question in what manner the period of detention would be construed to deal with the issue to have spent maximum jail custody, which attracts examination of Section 31 and 428 of the Cr.P.C. which are as follows:-

“31. Sentences in cases of conviction of several offences at one trial.



(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefore which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that-

(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

428. Period of detention undergone by the accused to be set off against the sentence or imprisonment. *Where an accused person has, on conviction, been sentenced to imprisonment for a term¹, not being imprisonment in default of payment of fine], the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such*



conviction shall be restricted to the remainder, any, of the term of imprisonment imposed on him.

[Provided that in cases referred to in section 433-A, such period of detention shall be set off against the period of fourteen years referred to in that section.]”

Section 31 of the Cr.P.C. stipulates that when a person is convicted at one trial of two or more offences, the Court may, subject to provisions of Section 71 of the I.P.C., sentence him for such offences, to the several punishments prescribed therefore which such Court is competent to inflict; such punishment when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently. So this provision makes it clear that while passing the order in different penal provision, different punishment is provided, it will run consecutively subject to the order passed by the court concerned to run concurrently. Section 428 deals with in what manner the accused will be granted benefit of set off in the event he has been made accused of several criminal cases which prescribes different nature of punishments. In nutshell, the extension of benefit would be granted to the accused during the period of investigation, enquiry and trial with respect to other cases but, in the event, the accused has been found guilty and has been awarded sentence, till the expiry of the period of sentence, he



will not be granted relief of set off with respect to other criminal cases. The principle of set off has been considered and interpreted in the following cases.

In the case of Atul Manubhai Parekh Vs. Central Bureau of Investigation reported in (2010) 1 SCC 603, the Hon'ble Apex Court has considered the provision of Section 428 of the Cr.P.C. in what manner the detention of the accused will be considered, construed and calculated. If a person has been made accused in several cases, in that circumstances, the custody during the investigation, trial and enquiry, will run concurrently but, the moment the person is convicted and has been awarded sentence for particular period in particular case then he will be treated in the judicial custody for the period of investigation, enquiry and trial will be invoked for grant of set off. The period of custody after conviction will not be attracted for grant of set off in another case, otherwise, it will be wind fall to the accused, that he will not suffer any incarceration with respect to other case in which he has been made an accused. Paragraph nos. 12, 14 & 15 being relevant are quoted herein below:-

“12. From the wording of Section 428 it is clear that what is to be set-off is the period of detention, if any, undergone by the convict during the investigation, enquiry or trial of the same case and before the date of such conviction. What has fallen for the interpretation of the courts is the expression "the same



case". While in one set of judgments it has been held that periods of detention undergone in connection with other cases can be counted towards set-off under Section 428 Cr.P.C. in respect of the conviction in another case, in the other set of cases it has been held that it cannot.

14. The wording of Section 428 is, in our view, clear and unambiguous. The heading of the Section itself indicates that the period of detention undergone by the accused is to be set off against the sentence of imprisonment. The Section makes it clear that the period of sentence on conviction is to be reduced by the extent of detention already undergone by the convict during investigation, enquiry or trial of the same case. It is quite clear that the period to be set off relates only to pre conviction detention and not to imprisonment on conviction.

15. Let us test the proposition by a concrete example. A habitual offender may be convicted and sentenced to imprisonment at frequent intervals. If the period of pre-trial detention in various cases is counted for set-off in respect of a subsequent conviction where the period of detention is greater than the sentence in the subsequent case, the accused will not have to undergo imprisonment at all in connection with the latter case, which could not have been the intention of the legislature while introducing Section 428 in the Code in 1973."

The issue of calculation of period of sentence and set off came for consideration in the case of Prabhu Sah Vs. State of Bihar & Ors. reported in 2011 (4) PLJR 641. Section 428 of the Cr.P.C. has been interpreted in the manner that the principle of set off will be applicable, the period spent in investigation, enquiry



and trial as it will run concurrently for all multiple cases but, the moment conviction recorded and awarded sentence, the period spent in incarceration in that case will not be added in other case which are at the stage of investigation, enquiry or trial, otherwise it will premium to accused as he will not remain in custody with respect to other cases. Paragraph no. 29 to 33 being relevant are quoted herein below:-

“29. From the aforesaid judgments what we find the true interpretation of Section-428 of the Code of Criminal Procedure is that the period of set off as contemplated under Section-428 Cr.P.C. would be the period when in that case a person is first under remand custody as an under-trial and then he is sentenced. If there be more than one case, then, the remand period of each case would be set off against sentence in that case alone separately for each case even though the remand period may overlap, but the period spent as serving out sentence as a convict in one case cannot be taken into account as a remand period as an under-trial in another case.

30. In our view, taking any other view would be contrary to the legislative policy. The legislative policy of Section-428 is not to reduce sentence or obliterate the period of punishment but to restrict the sentence effectually to the period awarded by giving benefit of pre sentence detention in the case where he is ultimately sentenced otherwise as noticed in Atul Manubhai Parekh's case (supra) it would lead to absurd and unintended results. A person on different dates would commit different and distinct offences but if multiple benefits were to be given of pre-sentence detention of one case to another then if he was ultimately sentenced on different dates for different



offences for different periods which we may say to be 3 years, 4 years or 7 years, he will get away with only singular punishment of 7 years even though he has committed many more offences and was punished several times, he would go escort free unpunished so far as the other crime is concerned. That surely is not the legislative intent. The set off would ultimately be on a case to case basis excluding period during which he is serving out sentence as substantively he is not then an under-trial. The distinction as repeatedly drawn by the Apex Court between the nature and status of detention has to be kept in mind.

31. If we apply this principle then the contention of the State in the present case has to be upheld. The remand period in the third case when he was already undergoing life imprisonment consequent to his conviction in the second case cannot inure to his benefit in terms of Section-428 Cr.P.C. That is the latest dictum of the Apex Court after noticing all the earlier case in the case of Atul Manubhai Parekh (supra).

32. In view of this recent judgment of the Supreme Court by which we are bound, it is not necessary to refer to the two Division Bench judgments of this Court being in the case of Shambhu Nath Singh (supra) and in the case of Hari Shankar Sah (supra) which followed the judgment in Najakat Alia Mubarak Ali (supra), which has been considered by the Apex Court in the recent decision namely Atul Manubhai Parekh (supra) aforesaid.

33. In that view of the matter, the contention of the petitioner for an early release merits no consideration.”

On conspectus of the aforesaid judgments, this Court has to decide in the present case as to whether the petitioner is essential to be released from jail custody as the petitioner has



claimed in the present writ application of habeas corpus that he has been proceeded under the Prevention of Money Laundering case where the maximum punishment could have been awarded is seven years and, thus, he has already completed seven years, therefore, his stay beyond seven years is nothing but an unlawful custody and he should be set free from the judicial custody but, the present petitioner has too long criminal history as he has been made accused in several cases. The list has been provided by the petitioner himself which shows that he has been made accused in 33 cases and, out of that, the petitioner has been acquitted in Danapur P.S. Case No. 424 of 1998, Khagaul P.S. Case No. 40 of 2003, Khagaul P.S. Case No. 51 of 2001, Khagaul P.S. Case No. 10 of 1999, Danapur P.S. Case No. 260 of 2001, Khagaul P.S. Case No. 55 of 2007, Khagaul P.S. Case No. 6 of 2006, S.K. Puri P.S. Case No. 263 of 2003, Danapur P.S. Case No. 339 of 2010, Danapur P.S. Case No. 340 of 2010, Rupaspur P.S. Case No. 64 of 2011, Khagaul P.S. Case No. 119 of 2010, Khagaul P.S. Case No. 64 of 1996, Khagaul P.S. Case No. 91 of 2001, Bihta P.S. Case No. 280 of 2009, Bihta P.S. Case No. 01 of 1999, Danapur P.S. Case No. 161 of 2019, Khagaul P.S. Case No. 37 of 2001, Danapur P.S. Case No. 231 of 2001, Danapur P.S. Case No. 87 of 2000, Khagaul P.S. Case No. 54 of 1998 and with respect to Khagaul P.S. Case



No. 65 of 1995 and Danapur P.S. Case No. 200 of 2003, it has been stated in the first case, it is at the stage of evidence and, in the second case, the evidence has been closed but, in both the cases, the petitioner is not on bail. With respect to Danapur P.S. Case No. 309 of 2010, Khagaul P.S. Case No. 48 of 2017, Khagaul P.S. Case No. 166 of 2019, it has been mentioned that the petitioner has been granted bail. So, in the present case, admittedly, the petitioner is not only in custody with respect to present case rather with respect to other cases also and with respect to two cases, still he has not been granted bail and, as such, he is in jail custody in respect of aforesaid two cases also.

Learned counsel for the Union of India has filed reply to the supplementary affidavit filed by the petitioner but, counsel for the State has not participated in the virtual court proceedings. The Union of India has stated that as per status report given by the Special P.P., the petitioner has been acquitted in Danapur P.S. Case No. 340 of 2010, Khagaul P.S. Case No. 55 of 2007 and in the matter of Danapur P.S. Case No. 309 of 2010, the case is pending for evidence on 7.7.2020. It has further been stated that Khagaul P.S. Case No. 91 of 2005, Bihta P.S. Case No. 280 of 2009, Danapur P.S. Case No. 339 of 2010 and Rupaspur P.S. Case No. 54 of 2011, efforts are being made to obtain current status as could



not get access to the records of those cases because of restricted working of the office of the civil courts.

Accordingly, this Court only places reliance on the declaration made by the petitioner as well as to the extent the Union of India has brought the fact to the notice of this Court.

Though the petitioner has already suffered maximum punishment of seven years, so in the present case lodged under the PML Act, he cannot be kept in judicial custody but, because in two cases in which he is still in jail with respect to valid order of remand, in such circumstances, he cannot be released from jail custody exercising the power of habeas corpus but, this Court observes that after calculating the period of sentence in terms of Section 31 and 428 of the Cr.P.C., if the petitioner has completed seven years of jail custody, which is the maximum period he can be sentenced in this case, in such situation, he cannot be kept in jail custody with respect to the present case but, he cannot be set free from the jail on account of valid judicial order of remand with respect to two other cases as mentioned herein above.

In view of the aforesaid discussions, it will not be appropriate for this Court to straightway give direction for release of the petitioner from the jail custody rather he should take proper steps in accordance with law.



Accordingly, with the aforementioned observation, this application is disposed of.

(Shivaji Pandey, J)

Partha Sarthy, J. I agree.

(Partha Sarthy, J)

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