IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on : 18.12.2018
Pronouncing orders on : 07.01.2019

CORAM

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

Crl.OP No.26888 of 2018 and Crl.MP No.15519 of 2018

State
Rep. by the Inspector of Police
D-4, Zam Bazaar Police Station,
Chennai 600 014.
Crime No.212 of 2018 .. Petitioner/Petitioner/Complainant

Versus

Tr.Nakeeran Gopal
S/o.Ramanathan,
No.105, J.J.Khan Road,
Royapettah, Chennai - 600 014. .. Respondent/Respondent/Accused-1

Prayer: Criminal Original Petition filed under Section 482 of Cr. PC to call for the records and set aside the order of refusal of remand of the Respondent / Accused No.1 by the learned XIII Metropolitan Magistrate dated 09.10.2018 in Crime No.212 of 2018 and pass appropriate orders.

For Petitioner : Mr.A.Ramesh
Special Public Prosecutor
For Respondents : Mr.P.T.Perumal
Mr.P.Kumaresan

ORDER

The State has preferred this Criminal Original Petition challenging the order passed by the learned XIII Metropolitan Magistrate Court, Egmore in Crime No.212 of 2018, refusing to remand the accused who was produced after the arrest by the petitioner police.

2. The petitioner police registered an FIR in Crime No.212 of 2018 for an offence under Section 124 of IPC against the respondent and 34 others, on the complaint given by the Deputy Secretary to the Governor and Comptroller, Tamil Nadu, Raj Bhavan, Chennai.

3. The sum and substance of the complaint given against the respondent is that "Nakkeeran" a bi-weekly Tamil magazine in its periodicals published between April to September 2018, has published fake / derogatory news about His Excellency the Governor of Tamil Nadu with an intention to prevent the Governor from exercising his lawful powers and duties and the same amounts to an offence under Section 124 of IPC.

4. Pursuant to the registration of the FIR, the petitioner police proceeded to arrest the respondent on 09.10.2018 and produced him before the Learned Magistrate for remand. The Learned Magistrate after going through the remand report and case diary and after hearing the submissions of the learned counsel appearing for either parties, refused to remand the respondent on the ground the police have not produced sufficient materials, justifying the remand. The learned Judicial Magistrate further gave liberty to the police to come up with sufficient materials and also directed the respondent to execute a bail bond for a sum of Rs.10,000/- (Rupees ten thousand only) on condition that he will appear whenever called for interrogation by the police and before the Court.

5. Mr.A.Ramesh, learned Special Public Prosecutor appearing on behalf of the state assailing the order passed by the learned Magistrate, made the following submissions :-

5.1. The learned Magistrate did not apply his mind to the sufficient materials that were produced by the police by way of remand report and case diary.

5.2 The learned Magistrate heard Mr.N.Ram, the Chairman of Hindu Publications and has even recorded his submissions in the impugned order and therefore, the learned Magistrate was swayed by extraneous considerations while considering the remand of the accused person.

5.3 Mr.N.Ram, the Chairman of Hindu publications did not have the *locus standi* to make his submissions before the Court and he was a rank outsider insofar as the present proceedings are concerned and therefore, the entire process adopted by the learned Magistrate while deciding the remand of the accused was not in accordance with law.

5.4 The learned Magistrate did not record the reasons for rejecting the remand as required under Section 167 (ii) of Cr.PC and as required by the Judgment of the Hon'ble Supreme Court in ***AIR 2014 SC 2756 [Arnesh Kumar Vs. State of Bihar]***.

5.5 The learned Magistrate was not clear about the decision taken by him, since on the one hand, the learned Magistrate has

rejected the remand, but on the other hand the learned Magistrate has directed the respondent to execute the bail bond for a sum of Rs.10,000/-. Therefore, the learned Senior Counsel would submit that there is total non-application of mind on the part of the learned Magistrate while passing the impugned order.

5.6 The learned Senior counsel also made an alternative submission to the effect that even if it is taken that the learned Magistrate has directed the respondent to execute a bond in exercise of his power under Section 59 of the Code of Criminal procedure, a special order has to be passed which should contain the reasons as to why the Court while rejecting the remand wanted the respondent to execute a bail bond.

5.7 The series of articles published by the respondent was fake and derogatory and it was done with the sole intention of preventing His Excellency the Governor of Tamil Nadu from exercising his lawful powers and duties and such article had the effect of overawing the Governor, which is a serious offence under Section 124 of IPC.

5.8 The rejection of remand of the respondent has emboldened him to continue with the publishing of derogatory articles against His Excellency the Governor of Tamil Nadu and the Freedom of Speech and Expression is always subject to reasonable restriction stipulated under Article 19(2) of the Constitution of India and the moment the offence is committed, Article 19(2) of the Constitution of India kicks in.

5.9 The learned Senior Counsel in order to substantiate his arguments relied upon the following judgments :

i. **AIR 2014 SC 2756** ***[Arnesh Kumar Vs. State of Bihar]***

ii. **AIR 1994 SC 1349** ***[Joginder Kumar Vs. State of Uttar Pradesh and others]***

iii. 2008 Cri.LJ 1998 [Sanal Haque Vs. State of Uttar Pradesh and another]

iv. 1985 Cri LJ 68 [Miss R. Shakuntala vs Roshanlal Agarwal And Others]

6. The respondent was represented by two counsels viz., Mr.P.T.Perumal and Mr.P.Kumaresan.

7. Mr.P.T.Perumal, learned counsel who appeared before the Court below on behalf of the respondent at the time of remand, wanted to appraise this Court as to what actually transpired at the time of hearing and what were all the materials that where submitted at the time of arguments and the learned Counsel also wanted to confine his submissions to the articles published in Nakkeran, the Freedom of Press and whether the materials *prima facie* constituted an offence under Section 124 of IPC.

8. Mr.P.Kumaresan, the learned counsel focused his submissions on the power of remand and the various legal provisions under the code of criminal procedure which governs the same.

9. Mr.P.T.Perumal, learned counsel made the following submissions :-

9.1 The entire criminal proceedings against the respondent is attended with malafides and a conscious attempt has been made to curb the freedom of press.

9.2 The respondent at the time of his arrest was not informed the grounds of arrest and he was not permitted to meet any advocate and there was a complete violation under Section 41 – B and 41-D of the Code of Criminal Procedure, 1973.

9.3 The arrest intimation form that was given to the respondent did not contain the name of the police station which is carrying out the arrest, the materials seized and virtually the intimation form itself was blank on material particulars.

9.4 The entire reading of the complaint does not anywhere reveal about the fact as to whether His Excellency the Governor of Tamil Nadu read this article or he was explained about the contents of the article and whether His Excellency the Governor of Tamil Nadu had requested or instructed or directed any of the officials in Raj Bhavan to

lodge a complaint against the respondent.

9.5 There is no whisper in the complaint that His Excellency the Governor of Tamil Nadu was placed in a position that he could not carry out his lawful duties because of the effect of this publication and in the absence of such factual particulars, the complaint itself does not make out an offence under section 124 of IPC.

9.6 The complaint has emanated from the officials in Raj Bhavan, since during the publication in September 2018, there was a reference to the Principle Secretary in Raj Bhavan and that seems to have triggered the criminal action and therefore, the real person aggrieved by the impugned publication is not His Excellency the Governor of Tamil Nadu and it is actually the higher echelon in the Raj bhavan and the name of the Governor is being misused.

9.7 The complaint itself was more like a direction to the police to register an FIR for an offence under Section 124 of IPC and the Police have mechanically registered an FIR without any materials and

without satisfying the ingredients of Section 124 of IPC.

9.8 The entire attempt of the complaint was to forcibly stop the publication of the critical articles and that is the reason why the names of nearly 34 persons have been unnecessarily added as accused persons in the FIR. The learned counsel also submitted that the persons whose name has been shown in the article and based on whose statements, the article was written, has been safely omitted to be shown as accused person. The accused persons have been chosen selectively to stop the publication of articles in "Nakkeran".

9.9. The publication at the worst can only cause harm to the reputation of any person and till now, proceedings used to be initiated for defamation and it is the first time in the legal history of India where a publication has been made a cause of action to register an FIR under Section 124 of IPC.

9.10. There cannot be prevention or prior restraint of publication since it directly touches upon the Freedom of Press and by no

stretch, a publication can overawe any public authority and the complaint itself is oppressive to gag the media.

9.11. Mr.N.Ram, the Chairman of Hindu Publications was standing in the midst of advocates and others who had gathered in the Court at the time of hearing. He did not make any submission on his own. The learned Magistrate himself called upon Mr.N.Ram and invited his opinion as to whether the provision under Section 124 of IPC was applied against any publication in the past. On being called upon to give his opinion as a Senior and renowned Journalist, Mr.N.Ram, expressed his opinion in the Court.

9.12. The learned counsel would submit that inviting Mr.N.Ram and seeking his opinion is very much within the powers of the Court and there is no bar in law to seek for such an opinion. In order to substantiate his submissions, the learned Counsel brought to the notice of this Court Section 32 of the Advocates Act, 1961 and the judgment of the Hon'ble Supreme Court in ***1978 (2) SCC 165 [Harishankar Rastogi Vs. Girdhari Sharma and another]***.

9.13. The learned counsel also read the relevant portions of all the publications and submitted that Nakkeran as an investigative journal has to explore, in order to bring out the truth and in this regard, various persons were interviewed by the reporters and materials were collected based on their statements. All these materials are available with the publication by way of audio recording. Even if the entire publication from April to September 2018 is read as a whole, there is no personal imputation against the Governor to the extent that it will overawe the lawful authority of His Excellency the Governor of Tamil Nadu.

9.14. In order to substantiate the right of Freedom of Press, the learned counsel relied upon the following judgments :

i. 1956 AIR (SC) 541 [Kartar Singh Vs. State of Punjab].

ii. 1962 AIR (SC) 305 [Sakal papers (P) Ltd Vs. Union of India].

iii. 1986 AIR (SC) 515 [Indian Express News Papers

(Bombay) Private Ltd. Union of India].

iv. 1988 (4) SCC 592 [Reliance Petrochemicals Ltd., Vs. Proprietors of Indian Express News Papers, Bombay Pvt.Ltd.]

v. 1989 (2) SCC 594 [S.Rangarajan Vs.P.Jagjivan Ram and others]

vi. 1992 (3) SCC 637 [Life Insurance Corporation of India Vs. Prof.Manubhai D.Shah]

vii. 1996 (6) SCC 632 [R.Rajagopal alias R.R.Gopal and another Vs. State of Tamil Nadu and others]

viii.1996 (6) SCC 466 [Harijai Singh and another Vs. Vijay Kumar]

ix.1998 (1) SCC 226 [Vineet Narain and others Vs. Union of India and another]

x.2002 (5) SCC 294 [Union of India Vs. Association for Democratic Reforms and another]

xi.WP.No.25706 of 2012 [R.Mani and another Vs. the State of Tamil Nadu rep.by its Secretary to Government and another]

10. Mr.P.Kumerasan, learned counsel made the following submissions :-

10.1 The learned Magistrate has applied his mind in rejecting the remand sought for by the petitioner and the same is evident from the order itself.

10.2 The order of remand is a judicial function performed by Magistrate and the learned Magistrate cannot mechanically remand any accused person and in this case, the learned Magistrate has satisfied himself that no sufficient materials were produced before the Court to justify the remand of the respondent.

10.3 The application of mind by the learned Magistrate is evident from the fact that he has permitted the police to collect sufficient materials and thereafter approach the Court and in the meantime, the respondent has been directed to execute a bail bond for Rs.10,000/- on condition that he should appear for interrogation by

police and also appear before the Court. Therefore, this order has been passed in line with the provisions under Section 59 of the Code of Criminal Procedure. In order to substantiate his submission, the learned counsel relied upon the judgment of the Bombay High Court in ***[Assistant Collector of Customs R & I (P), Bombay Vs.Shri Shankar Govardhan Mohite and others]*** reported in ***1988 Cri LJ 624.***

10.4. The police miserably failed to comply with the directions given by the Hon'ble Supreme Court in ***[D.K.Basu Vs. State of West Bengal] reported in 1997 (1) SCC 416*** and also the statutory requirements under Sections 41, 41A, 46, 50, 50A, 51 of the Code of the Criminal Procedure.

10.5 The learned counsel in order to substantiate his arguments in support of the impugned order passed by the learned Magistrate, relied upon the following judgments:

i. ***1997 (1) SCC 416 [D.K.Basu Vs. State of West Bengal]***

ii. 2008 Cri LJ 1998 [Sanaual Haque Vs. State of Uttar Pradesh and another]

iii. 2014 SCC online All 895 [Surendra kumar Sharma Vs. State of Uttar Pradesh and 2 others]

iv. 2014 SCC online All 2346 [Sathish Kumar and 4 others Vs. State of Uttar Pradesh and 3 others]

v. Crl.A.No.1572 of 2012 [Manubhai Ratilal Patel Tr.Ushaben Vs. State of Gujarat and others]

vi. 1993 SCC online Bombay 187 [Shrawan Waman Nade and others Vs. State of Maharastra]

vii. 2014 (8) SCC 273 [Arnesh Kumar Vs. State of Bihar and another]

viii. 1992 SCC online Mad 292 [Ramdoss and others Vs. State of Tamil Nadu and another]

11. This Court has carefully considered the elaborate submissions made by the learned counsel appearing for the parties and also the materials placed on record.

12. The issue involved in this case is one of a kind in the 72 years of independent India, where a publication has been called in question

and it has been made as a premise to register an FIR for an offence under Section 124 of IPC. In this petition, this Court is not going to elaborately deal with the scope and applicability of Section 124 of IPC to the facts of the case, since independent petitions have been filed challenging the registration of FIR under Section 124 of IPC and while deciding those petitions, this Court will delve deep into that question. In this case, this Court will focus only upon the impugned order passed by the learned Judicial Magistrate rejecting the remand of the respondent when he was produced before the Magistrate after arrest.

13. The petitioner has registered an FIR for an offence under Section 124 of IPC against the respondent and 34 others on the compliant given by the Deputy Secretary to the Governor to the effect that "Nakkeran" a biweekly Tamil magazine in its publications made in various issues from April to September 2018, has published fake and derogatory news about His Excellency the Governor of Tamil Nadu with an intention to prevent him from exercising his lawful powers and duties and the same amounts to overawing the Governor.

14. The respondent was arrested on 09.10.2018 and he was produced before the learned XIII Metropolitan Magistrate Court for remand. The learned Magistrate after considering the remand report, case diary and also the submissions made on either side, rejected the remand on the ground that the police have failed to produce sufficient materials against the respondent.

15. The following important issues arise for consideration in this petition :

a. Whether the Police followed the mandatory procedure while arresting the respondent before producing him before the learned Magistrate?

b Whether a learned Magistrate had properly applied his mind regarding the materials available on record while rejecting the remand of the respondent?

c. Whether a 3rd party is entitled to make his submissions before a Court of law and how far the Court can entertain a 3rd party to participate in Judicial proceedings?

d. Whether considering the submissions made by the 3rd

party in this case will amount to extraneous consideration while deciding the remand of the respondent?

e. Whether the procedure adopted by the learned Magistrate, who on the one hand rejected the remand of the respondent and on the other hand directed the respondent to execute a bail bond, by itself shows uncertainty in the mind of the Magistrate and consequently, will amount to non-application of mind?

f. Whether the learned Judicial Magistrate has given sufficient reasons in the impugned order while rejecting the remand of the respondent ?

16. Discussion on Issue"a"

i. Section 41 of Cr.PC empowers the police officer to arrest a person without an order from a Magistrate and even without a warrant if the requirements stipulated in the said section is satisfied. Since arrest directly curtails personal liberty of an individual and strikes at his freedom, this power of arrest is expected to be exercised by the police very cautiously. An arrest consist of taking into custody of another

person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of a criminal offence. The word “custody” and “arrest” are not synonyms. It is true that in every arrest, there is a custody but visa versa is not true. The arrest, remand and bail constitutes very vital parts of investigation. The accused should be arrested only in a serious offence and for the offences which are not punishable with imprisonment for more than seven years, the Investigating Officer must satisfy the grounds contained in Section 41 of Cr.PC and then only, he should arrest the accused.

ii. The Hon'ble Supreme Court in the case of ***D.K.Basu case (referred supra)***, dealt in detail among other things about arrest. The relevant portions of the judgment is extracted hereunder :

> ***17.*** *Fundamental Rights occupy a place of pride in the Indian Constitution. Article 21 provides “no person shall be deprived of his life or personal liberty except according to procedure established by law”. Personal liberty, thus, is a sacred and cherished right under the Constitution. The*

expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the State. In tune

with the constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. Chapter V of the Criminal Procedure Code, 1973 deals with the powers or arrest of a person and the safeguards which are required to be followed by the police to protect the interest of the arrested person. Section 41 CrPC confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Under this section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail

and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes clause (2) of Article 22 of the Constitution of India. There are some other provisions also like Sections 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an enquiry into the cause of death.

***20**. This Court in Joginder Kumar v. State of U.P. [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] (to which one of us, namely, Anand, J. was a party) considered the dynamics of misuse of police power of arrest and opined: (SCC p. 267, para 20)*

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite

another. … No arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter."

***34**. In addition to the statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be countersigned by*

the arrestee.

***35**. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:*

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in

his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

***36**. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of*

the country, having territorial jurisdiction over the matter.

***37**. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.*

***38**. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.*

This judgment was passed on 18.12.1996. Subsequently, the legislature thought it fit to amend the code of criminal procedure and inserted Section 41-A to 41-D by Act 5 of 2009 and codified the various procedures to be followed by the Police and the rights that are available to the accused persons at the time of arrest. Section 46 of the Cr.PC also provides for the manner in which the arrest has to be made. Section 50 of the Cr.PC provides for the right of the person arrested to be informed

about the grounds of arrest and the right to bail. Section 50-A makes an obligation to the police making the arrest to forthwith inform regarding such arrest and place of arrest to a nominated person.

iii. The arrest intimation form that was issued by the police to the arrested person viz., the respondent has been filed before this Court. This record was also available before the Court below at the time of considering the remand. This arrest intimation form does not state the reason for arrest. It also does not state the name of the police station which has undertaken the process of arrest and whether any material / publication has been seized from the office of Nakkeran. The learned counsel also submitted that the respondent was not permitted to meet any advocate which is a violation of Section 41-D of Cr.PC. The remand report merely states that the guidelines given by the Hon'ble Supreme Court and the provisions of Cr.PC has been followed by the police at the time of arrest of the respondent.

iv. It is an admitted case that the respondent was arrested on 09.10.2018 at 8.30 am in the Domestic Airport at

Meenambakkam. The arrest intimation form does not state anything about the reason for arrest or the materials seized by the police or the name of the police station which is carrying out the arrest and the vital material facts are missing in the arrest intimation form. The Court below has also taken note of these irregularities.

iv. On a *prima facie* consideration of the materials available on record, this Court is not satisfied with the manner in which the arrest has taken place in this case. The arrest intimation form given to the respondent does not even reveal the reasons for the arrest, which is a very fundamental requirement before a person is arrested in a case. The order of the Court below shows that the gist of the offence alleged to have been committed by the accused in the publication of Nakkeran was read out to the accused in the open Court. This was the first time the respondent came to know the reason for his arrest. If the arrest intimation form does not even reveal which police station is involved in the process of arrest, it will be difficult to even fix the jurisdiction of the Court which has to consider the remand of the accused. The arrest intimation form does not contain these fundamental particulars about

the police station involved and that is the reason why, the Court below has stated in the order that the very jurisdiction of the court is not clear since, no police station has been mentioned in the arrest intimation form. This process of arrest carried out by the Police is not in strict compliance with the guidelines given in D.K.Basu case and the provisions of the Code of Criminal Procedure.

17. Discussion on Issues "b & f"

i. A person arrested without a warrant by the Police Officer has to be produced within 24 hours to the nearest Magistrate, if he is not able to complete the investigation within that time, as per the mandate under Section 57 of Cr.P.C. This is where the provisions of Section 167 of Cr.P.C comes into play. While considering the application for remand, the learned Magistrate must be first satisfied that the arrest made is legal and in accordance with law. The Magistrate has to get acquainted with the progress of investigation which would appear from the case diary. Since remand is a fundamental judicial function of a Magistrate, the Magistrate has to satisfy himself that there are reasonable grounds therefor and that the materials placed before him justify the remand of

the accused. While remanding the accused, it is obligatory on the part of the Magistrate to apply his mind to the facts of the case and not to pass remand order automatically or in a mechanical fashion.

ii. The remand of a accused person may be required for various purposes. The accused may have to be questioned in detail regarding various facets of motive, attribution, commission, and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide intimation leading to discovery of material facts. It may be necessary to detain a person in order to enable investigation without hindrances and to protect witnesses and persons connected with the victim of the crime. Sometimes it may be required even to maintain law and order in the locality.

iii. The remand application has to be filed by the investigation agency to satisfy the Court that there are justifiable grounds to detain a accused already arrested, in Police or judicial custody. By such applications, the investigating agency is required to

bring to the notice of the Court the materials collected against an arrested accused to persuade the Court to remand him to custody for the purpose of further investigation.

iv. It will be relevant to fall upon the reported judgments of the Hon'ble Supreme Court in this regard :

a. **[Arnesh Kumar Vs. State of Bihar]** reported in AIR 2014 8 SCC 273, the Hon'ble Supreme Court had an occasion to consider the entire law on arrest and remand and the relevant portions are extracted hereunder :

> ***8.*** *From a plain reading of the aforesaid provision, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused*

from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is

necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 CrPC.

***9**. An accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India and Section 57 CrPC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power under Section 167 CrPC. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner. Before a Magistrate authorises detention under Section 167 CrPC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty-bound not to authorise his*

further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that the condition precedent for arrest under Section 41 CrPC has been satisfied and it is only thereafter that he will authorise the detention of an accused. The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement, etc. the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording his satisfaction in writing that the Magistrate will authorise the detention of the accused. In fine, when a suspect is arrested and produced before a

Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant, and secondly, a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

10.*Another provision i.e. Section 41-A CrPC aimed to avoid unnecessary arrest or threat of arrest looming large on the accused requires to be vitalised. Section 41-A as inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), which is relevant in the context reads as follows:*

"41-A. Notice of appearance before police officer.—*(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.*

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent court in this behalf, arrest him for the offence mentioned in the notice."

***11**. The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) CrPC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as*

envisaged under Section 41 CrPC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

12. We are of the opinion that if the provisions of Section 41,Cr.PC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr.PC for effecting arrest be discouraged and discontinued.

13. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the

parameters laid down above flowing from Section 41 CrPC;

***2**.All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);*

***3**.The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;*

***4**.The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;*

***5**.The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;*

***6**. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be*

extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

7. *Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.*

8.*Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.*

b. The Hon'ble Supreme Court in the case of [***Joginder Kumar v. State of Uttar Pradesh]***, **(1994) 4 SCC 260** also had an occasion to consider the entire law on arrest and the relevant portions are extracted hereunder:

17.*The Royal Commission suggested restrictions on the power of arrest on the basis of the "necessity of (sic) principle". The two main objectives of this principle are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the commission of offences, to investigate crime. The Royal Commission was of the view that such restrictions would*

diminish the use of arrest and produce more uniform use of powers. The Royal Commission Report on Criminal Procedure — Sir Cyril Philips at p. 45 said:

"… we recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:

(a) the person's unwillingness to identify himself so that a summons may be served upon him;

(b) the need to prevent the continuation or repetition of that offence;

(c) the need to protect the arrested person himself or other persons or property;

(d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and

(e) the likelihood of the person failing to appear at court to answer any charge made against him."

The Royal Commission in the abovesaid report at p. 46 also suggested:

"To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be

extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case ….”

In India, Third Report of the National Police Commission at p. 32 also suggested:

“An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines … .”

18. *The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous*

offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.

***19**. Then, there is the right to have someone informed. That right of the arrested person, upon request, to have someone informed and to consult privately with a lawyer was recognised by Section 56(1) of the Police and Criminal Evidence Act, 1984 in England (Civil Actions Against the Police — Richard Clayton and Hugh Tomlinson; p. 313). That section provides:*

"[W]here a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable except to the extent that delay is permitted by this section, that he has been arrested and is being detained there."

These rights are inherent in Articles 21 and 22(1) of the Constitution and require to be recognised and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements:

1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare

told as far as is practicable that he has been arrested and where he is being detained.

2. The police officer shall inform the arrested person when he is brought to the police station of this right.

3. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

***20**. The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various police manuals. These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest.*

c. It is also relevant to rely upon the following judgments in order to clearly understand the scope of jurisdiction

exercised by a Magistrate at the time of remanding an accused person :-

i) 2008 Cri LJ 1998 (Sanaul Haque v. State of U.P) **and the relevant portions of the judgment is extracted hereunder:**

8. According to section 167 Cr. P.C. whenever any person is arrested and is detained in custody, it appears to the I.O. that the investigation cannot be completed within 24 hours fixed by section 57 of Cr. P.C. and there are grounds for believing that the acquisition or information is well founded, the officer in charge of the police station concerned, or the police-officer making investigation, shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary and shall at the same time forward the accused to such Magistrate and the Magistrate concerned authorised the detention of the accused in such custody as such the Magistrate thinks fit, for a term not exceeding 15 days, it shows that the judicial remand shall be passed on the subjective satisfaction of the Magistrate on the basis of the relevant police papers, in such circumstances, the perusal of the relevant police papers is essentially required for the application of the judicial mind of the Magistrate

concerned, in such process the learned Magistrate concerned is not under obligation to accept the report of the I.O. without applying the judicial mind for passing the judicial remand, it may be accepted or it may be rejected or it may be altered by adding some more offence or deleting some offence, in the present case also, same issue is evolved

ii) 2014 SCC online All 895 (Surendra Kumar v. State of Uttar Pradesh] **and the relevant portions of the judgment is extracted hereunder:**

In case the Magistrate is of the opinion that the arrest has not been made in a bona fide manner, or the grounds for arrest mentioned do not conform with the criteria set out in sections 41(1)(b) or 41 A, or there is no material to substantiate the reasons for arrest, the Magistrate may refuse to remand the accused to custody and may release the accused on personal bond with or without sureties after taking an undertaking from the accused to appear before the investigating officer or the Court when required.

iii) 2014 SCC online All 2346 (Satish Kumar and 4 others v. State of Uttar Pradesh and 3 others) **and**

the relevant portions of the judgment is extracted hereunder:

It is apparent from the record that if the allegations are proved, the maximum sentence that can be awarded is 7 years.

Accordingly, in view of the ammendment made in the Cr.P.C. vide Act No. 5 of 2009 and notified on 01.11.2010, where it has been provided in Section 41(1)(b) Cr.P.C. that a person against whom credible information of being involved in a cognizable offence punishable with imprisonment of 7 years or less is reported to the police officer, the accused can only be arrested if the police officer is satisfied that:

(a) there is probability of the accused committing another offence,

(b) for proper investigation of the offence,

(c) to prevent such person from causing the evidence of the offence to disappear or his tampering with the evidence in any manner,

(d) to prevent such person from making any inducement, threat or promise to the witnesses to disclose such facts to the court or to the police,

(e) unless the person is arrested, his presence in court could not be ensured and the police officer has to record the reasons in Writing before making such arrest.

The present case is one punishable with imprisonment up to 7 years. The petitioner should, therefore have no apprehension that he would be arrested unless there are conditions justifying his arrest as mentioned above and provided under section 41(1)(b) Cr.P.C.

Also under the newly introduced provision, section 41 A Cr.P.C. (which has also been added by Act No. 5 of 2009, effective from 1.11.2010), in all cases where the arrest of such an accused is not needed in view of the provisions of section 41(1) Cr.P.C., the police officer concerned is required to issue a notice directing the accused to appear before him at a specified place and time. However if at any time the accused fails to comply with the terms of the notice, or fails to identify himself, or the police officer is of the opinion that the arrest is required, he may arrest the said accused after recording his reasons for the same. The police powers of arrest will be subject to any orders that may have been passed by the Competent Court.

In case the police officer arrests the accused the Magistrate before whom the accused is produced for an order of remand, shall examine the reasons mentioned in the case diary for arresting the accused for satisfying himself that the arrest has been made in accordance with the exceptional circumstances indicated in sections 41(1)(b) and 41 A Cr.P.C described hereinabove. In case the Magistrate is of the opinion that the arrest has not been made in a bona fide manner, or the grounds for arrest mentioned do not conform with the criteria set out in sections 41(1)(b) or 41 A, or there is no material to substantiate the reasons for arrest, the Magistrate may refuse to remand the accused to custody and may release the accused on personal bond with or without sureties after taking an undertaking from the accused to appear before the investigating officer or the Court when required.

iv) 1993 SCC online Bom 187 (Shrawan Waman Nade and others Vs. State of Maharashtra) **and the relevant portions of the judgment is extracted hereunder:**

4*. However, the submission made by the applicants that the learned Magistrate has committed*

an error in granting remand and ordering detention of the applicants from the beginning, as at no time the extracts of the case diary regarding investigation were submitted before the Magistrate, deserves to be accepted. The Magistrate before passing the order of detention or remand has to get himself satisfied regarding adequacy of grounds for the said purpose. This cannot be from what is stated in the application i.e. whether the investigation is complete or certain accused are to be arrested. He has to get himself satisfied from the case diary which is required to be maintained under section 172(1) by the Investigating Officer. It is obligatory upon every Investigating Officer to maintain the said diary which contains various details regarding the progress of the investigation. It is a chart or graph of the investigation which is carried out by the said officer as day to day progress of the investigation is required to be recorded in it. The said extract of the diary must be produced before the Magistrate when any remand or detention of the accused is claimed. The Magistrate must look into the same and get himself satisfied regarding adequacy of the grounds and pass necessary order. Without the extracts of the said diary of investigation or case papers, it is not possible for the Magistrate to

find out the adequacy of grounds and to get himself satisfied. The Magistrate must indicate, however, succinctly it may be, his satisfaction for detention or remand of the accused. Since the order passed by the learned Magistrate is having the effect of taking away the liberty of a person, which is a fundamental right guaranteed to every citizen under the Constitution of India, it must be scrupulously followed.

6. Similarly, in AIR 1957 AP 561, In re B.J. Reddi the Division Bench considered the effect of section 167 of the Code of Criminal Procedure, 1898. It came to be observed as follows:

"It is manifest that the provision relating to the transmission of a copy of the entries in the diary prescribed in section 172 is mandatory and therefore imperative that every one of the officers answering the description in the section should send along with the remand report a copy of the case-diary which he is bound to keep under section 172, Criminal Procedure Code. The object of enacting this section is that the entries in the diary afford to the Magistrate information upon which he can decide whether or not the detention of the accused person in custody should be authorised and also to enable him to form an

opinion as to whether any further detention is necessary.

In the absence of the entries referred to in that section, it is difficult for the Magistrate to decide whether either the detention was authorised or the further detention is necessary. By not complying with with the first requirement, the investigating officers render that part of the section which requires the transmission of entries in the case diary otiose. It is really astounding that a Police Officer should offer the explanation that it is not usual to send copies of case-diary in spite of an obligation cast on them by the section.

We are unable to understand how the Magistrates are able to act on the remand reports without the entries. These are very relevant in considering whether a further remand should be granted or not. We hope that the Magistrate acting under section 167 would insist upon the mandatory provisions of the section being complied with."

v. From a conspectus of the judgments the following principles emerge governing the arrest and remand of an accused person

a) Where the offences alleged carry a punishment of up to seven years or below, the police officer is under a statutory obligation to follow the edict of Section 41(1)(b) of the Cr.P.C. After the 2009 Amendment (vide Act 5 of 2009) to Section 41 of the Code, mere satisfaction of the police officer that there is a reason to believe that the accused has committed an offence will not suffice to effect arrest. The police officer must also demonstrate that a need for arrest has arisen by showing that the case falls within any of the limbs under Section 41(1)(b)(ii). In other words, the satisfaction of the police officer that there exists reason to believe that the accused has committed the offence must be coupled with one or more of the conditions set out in Section 41(1)(b)(ii) viz., a) that arrest is necessary to prevent the accused from committing any further offence or b) for proper investigation of the offence or c) to prevent the accused from tampering with the evidence or d) to prevent the accused from winning over witnesses through inducement or threat or e) to secure his presence before the Court.

b) In all cases where the police officer decides to effect arrest he must set out the facts and record reasons in writing disclosing

the satisfaction that has led him to conclude that arrest is necessary for the purposes of investigation. This is the plain requirement of the law, as was held by the Supreme Court in Arnesh Kumar v State of Bihar (2014 (8) SCC 273), and is a safeguard to ensure that the power of arrest does not degenerate into a weapon of harassment. Ipso facto, the requirement would be the same where the police officer decides not to arrest the accused in view of the proviso to Section 41(1)(b) of the Code.

c) In cases where the police officer decides not to arrest the accused,Section 41-A Cr.P.Cwill come into play. In such cases, the police officer can issue a notice directing the accused to appear before him at a time and place set out in the notice. The police officer shall serve the notice on the accused within two weeks from the date of institution of the case after forwarding a copy to the jurisdictional Magistrate. The concerned Superintendent of Police may extend the time for service of notice after recording reasons in writing.

d) The police officer shall follow the guidelines issued by the High Court of Delhi in Amandeep Singh Johar v State of NCT Delhi and Anr (W.P Civil 7608 of 2017), dated 07/02/2018, as regards the format and contents of the notice under Section 41-A and the mode

and manner of its service. The aforesaid guidelines shall be followed till such time suitable amendments are incorporated into the Second Schedule of the Code. Suitable circular instructions shall be issued by the Director General of Police to all Station House Officers, directing them to follow the aforesaid procedure.

e) There may also be cases where the police officer may not require the presence of the accused for interrogation and may complete the investigation without going anywhere the accused. In such cases, notice under Section 41-A of the Code need not be issued.

f) In view of Section 41-A(4) of the Code, where the accused does not act in terms of the notice issued under Section 41-A(1) or is unwilling to identify himself, the police officer can proceed to arrest him for the offence specified in the notice.

g) If the accused complies with the terms of the notice, he shall not be arrested unless the police officer is of the opinion that arrest is necessary. Even in cases of this eventuality, the conditions precedent for arrest as envisaged under Section 41 Cr.P.C must be complied with.

h) The power to arrest is statutorily granted in aid of

investigation. The five contingencies set out in Section 41(1)(b)(ii) of the Cr.P.C clearly demonstrate that arrest is to be effected only where it is necessary to do so for proper investigation of the case or when there exists grounds to believe that the accused may resort to one or more of the acts specified in Section 41(1)(b)(ii) (a),(c),(d) and (e) of the Code. In cases falling within the ambit of Section 41(1)(b) of the Code, if the police officer requires the presence of the accused for interrogation he shouldfirst resort to the procedure under Section 41-A of the Code, unless there is reason to believe that one or more of the contingencies set out in Section 41(1)(b) (ii) exist necessitating arrest.

i) A police officer must not resort to the power of arrest under Section 41 Cr.P.C merely because it is lawful to do so. The existence of the power of arrest is one thing and the justification for its exercise is quite another. Time and again the Supreme Court has condemned the attitude of the police to arrest first and then proceed with the rest. The police officer must be able to objectively demonstrate the necessity to arrest on the touchstone of the requirements set out in Section 41(1)(b) of the Code.

j) The expression “reason to believe” in Section 41(1)(b)

of the Code is a clear pointer that the grounds that led the police officer to suspect the commission of the offence by the accused must be disclosed in the file. Such belief must be capable of objective assessment. A checklist containing specified sub-clauses under Section 41(1)(b)(ii) of the Cr.P.C along with the reasons and materials which necessitated the arrest should be forwarded to the Magistrate authorized to remand the accused. This would ensure that the Magistrate authorizing remand under Section 167 Cr.P.C is in a position to effectively assess the material on the basis of which further detention of the accused is being sought. However, at this stage the Magistrate can only examine the record to see whether there exists some material to justify a remand. The Magistrate cannot conduct a roving enquiry to test the sufficiency of material at this stage for the obvious reason that investigation would be at a nascent stage and the police are yet to file a report either under Section 169 or Section 170 of the Cr.P.C.

k) Mechanically reproducing in the case diary all or most of the conditions contained in Section 41 Cr.P.C will not suffice. This is plainly a subversion of the law, and is a practice to be strongly deprecated.

l) A Magistrate before whom the accused is produced for remand must scrutinize the file to ensure that the requirements of Section 41(1)(b) of the Code are satisfied. If the Magistrate finds that Section 41(1)(b) of the Code has not been complied with, he would be justified in refusing to remand the accused to custody, and may direct that the accused be released on his own bond, without or without sureties, with an undertaking that he shall appear before the investigation officer as and when required. By adopting this procedure unnecessary arrest can be avoided and investigation can be speeded up.

m) It requires no reiteration that the power of remand under Section 167 Cr.P.C is essentially a judicial function. It must be borne in mind that the very purpose of authorizing remand under Section 167 Cr.P.C arises on account of the fact that investigation cannot be completed within 24 hours. The Magistrate is, therefore, required to peruse the report of the police, containing the checklist and the reasons and materials forwarded by the police officer, and record its satisfaction thereon, before authorizing detention.

n) While exercising jurisdiction to remand under Section 167 Cr.P.C the Magistrate is not required to write an elaborate order

granting or refusing remand. However, as the Magistrate acts judicially in deciding an application for remand, he is required to briefly set out his reasons.In the event of a challenge before a superior forum this would enable the Court to judicially review the order to see that discretion under Section 167 Cr.P.C has been exercised within the bounds of the law. The practice of passing non-speaking orders of remand and mechanically extending the same is illegal and must be avoided.

o) Failure to comply with the directions aforesaid shall apart from rendering the Police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of Court.

p) Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the High Court.

18. This Court will now apply the above principles to the facts of this case.

19. It is seen from the FIR that the complaint was given by the

Deputy Secretary to the Governor and Comptroller of Tamil Nadu, Raj Bhavan, Chennai on 08.10.2018. Nowhere in the complaint, it is stated wheather His Excellency the Governor of Tamil Nadu was appraised about the publication made in Nakkeran and that he was satisfied that the publication prevents him from exercising his lawful powers and duties. The entire complaint reads as if the concerned officer was satisfied that the contents of the publication is fake / derogatory. The complaint extracts certain articles from the publication and proceeds to conclude that the same amounts to an offence under section 124 of IPC. The offence under Section 124 is punishable with imprisonment which may extend to Seven years. Therefore, the above principles can be applied to the facts of the present case.

20. The FIR gets registered on the very same day for an offence under Section 124 of IPC. As stated in the begining of this judgment, this is the first time an FIR has been registered for an offence under Section 124 of IPC against a publication made in a Journal. The justification being that the publication attempts to overawe the Governor to prevent him from exercising his lawful powers and duties.

21. In order to satisfy the requirements of the word “overawe”, there must be something more than the creation of an apprehension, alarm or even perhaps fear. On a *prima facie* consideration of the allegations made in the complaint, this Court is of the considered view that a lot of intellectual debate is required in this case in order to come to a conclusion as to whether a publication by itself can attract the provisions of Section 124 of IPC. Section 124 of IPC has the ingredients similar to Section 353 of IPC. The latter is a generic version of Section 124 of IPC applying to public servants. The question of whether mallacious criticism of the police on facebook would amount to an offence under Section 353 of IPC was considered by the Hon'ble Supreme Court in the Judgment in **[Manik Taneja and another Vs. State of Karnataka and another]** reported in ***2015 7 SCC 423*** where the Hon'ble Supreme Court quashed the FIR after holding that neither criminal force nor assault could be said to have occured by publishing a post on facebook, however malicious it may be. That is the reason why the learned counsel appearing for the respondent would submit that the publication if it is construed as malicious and harms the reputation of His Excellency the Governor of Tamil Nadu, at the best can only attract the

provisions of Section 499 of IPC punishable under Section 500 of IPC for defammation.

22. While such a fundamental question as to whether an offence under Section 124 of IPC looms large, the petitioner police should not have resorted to arrest on 09.10.2018, the very next day after registering the FIR. The learned Magistrate was therefore right in stating that there is no sufficient material to justify the remand of the respondent.

23. In this case, the publication is said to have been made from April to September 2018. The petitioner police is not able to demonstrate as to how these publications are preventing His Excellency the Governor of Tamil Nadu from exercising his lawful powers and duties and in what manner it has overawed the Governor. Except the *ipse dixit* statement made in the complaint, no other material was available with the police in order to seek for the remand of the respondent. Therefore, the Court below was right in rejecting the remand on the ground of in sufficient materials.

24. The learned Magistrate apart from considering the irregularities committed by the police at the time of arrest of the respondent, has also given sufficient reasons while rejecting the remand of the respondent.

25. Discussion on issues "C & D"

25.1 When this case came up for admission, on a reading of the order passed by the learned Magistrate, this court got an impression that Mr.N.Ram, the Chairman of Hindu Publications has ventured to make his submissions in a case in which he had no locus standi to do so and there by, the order of the learned Magistrate got swayed. This Court called for report from the learned Magistrate and the learned Magistrate in his report dated 26.11.2018 has stated that he only asked Mr.N.Ram as to whether there are any previous instances where Section 124 of IPC has been invoked against a media house for publishing an article. Only after this query was put to Mr.N.Ram, he had given his opinion about the same and he had also stated that such registration of FIR will directly affect and interfere with the Freedom of Press.

25.2 The learned Magistrate was under the bonafide impression that he is entitled to call for such opinion in view of provisions available under Section 32 of the Advocates Act, 1961 and Rule 69 of the Criminal Rules of practice. This report submitted by the learned Magistrate stands fortified by the submissions made by Mr.P.T.Perumal, the learned counsel for the respondent, who appeared before the Court below on behalf of the respondent.

25.3 It will be relevant to extract Section 32 of the Advocates Act herein :-

> *32. Power of Court to permit appearances in particular cases.—Notwithstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case.*

It is clear form this provision that the Court has the power to permit any person not enrolled as an advocate to put forth his submissions before a Court whenever called for by the Court. It will also

be relevant to rely upon the judgment of the Hon'ble Supreme Court in **[Harishankar Rastogi vs Girdhari Sharma And Anr]** 1978 2 SCC 165. The relevant portion of the judgment is extracted hereunder :-

> *Having regard to this conspectus of-considerations I hold that a private person, who is not an advocate, has no right to barge into Court and claim to argue for d party. He must get the prior permission of the Court, for which the motion must come from the party himself. It is open to the Court to grant or withhold permission in its discretion. In fact, the Court may, even after grant of permission, withdraw it half-way through if the representative proves himself reprehensible. The antecedents, the relationship, the reasons for requisitioning the services of the private person and a variety of other circumstances must be gathered before grant or refusal of permission. In the present case I have noticed the petitioner and his friend who is to represent him, come together with mutual confidence. The party somehow has not shown*

sufficient confidence in advocates he has come by. This bodes ill for him. I should have suspected the association of the private person as having sinister implications of exploitation of a guileless party but suspicion by itself should not be the basis of a conclusion. Therefore,. I think it right to give the party, who appears to be unable to represent his own case, an opportunity to present his grievance through, his friend. That friend, judging by the note prepared and put in, seems to be familiar with law, although quacks can prove fatal friends. I grant the petitioner permission to be represented by a private person as prayed for, with the condition that if this latter proves unworthy, the permission will be withdrawn.

25.4 It is clear from the above judgment that with the prior permission of the Court, the Court can permit any person to speak in the Court. In this case, the Court was dealing with a very peculiar case where a publication has been made a subject matter of an offence under Section 124 of IPC, which is unprecedented and which has come up for

the first time before a Court. Therefore, the learned Magistrate wanted to get the views of a reputed and senior journalist as to whether there are any such instances in the past. This query was answered by Mr.N.Ram by touching upon the Freedom of press.

25.5 This Court does not find anything wrong with the procedure adopted by the learned Magistrate and the submissions made by Mr.N.Ram in this case, has not in any way affected the decision taken by the learned magistrate since Mr.N.Ram has not made any submissions on the merits of the case. The respondent was effectively represented before the Court below by his Counsel Mr.P.T.Perumal on the merits of the case.

26. Discussion on Issue "e"

i. It is seen from the order passed by the learned Magistrate that while rejecting the remand of the respondent, the learned Magistrate has directed the respondent to execute a bail bond for Rs.10,000/- on condition that the respondent shall appear for interrogation before the police and also before the Court during hearings. This procedure adopted by the learned Magistrate has been

called in question by the learned Special Public Prosecutor appearing for the petitioner. This according to the learned Special Public Prosecutor clearly demonstrates the uncertainty in the mind of the Magistrate. The learned Senior Counsel submitted that the Magistrate after having rejected the remand of the respondent on the ground of insufficient materials had directed the respondent to execute a bail bond without passing any special order as required under Section 59 of Cr.PC.

ii It will be relevant to extract the provisions of Section 59 of Cr.PC.

> **59. Discharge of person apprehended.** No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

iii. It will also be relevant to rely upon the judgment reported in ***[Assistant Collector of Customs R & I (P), Bombay Vs.Shri Shankar Govardhan Mohite and others]*** reported in ***1988 Cri LJ 624***.

> ***7****. Shri Merchant further submitted that the rearrest of the respondents 1 to 3 on 30th July, 1987 was itself*

illegal inasmuch as the order of discharge passed by the learned Additional Chief Metropolitan Magistrate on 29th July, 1987 amounted to an order of bail and, in view of S. 59 of the Cr.P.C., the rearrest of the respondents 1 to 3 is illegal. In order to appreciate this contention, it may be convenient to reproduce S. 59 of the Cr.P.C. which reads as under :-

"No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate."

8.*According to Shri Merchant, the words under the special order of a Magistrate should be reckoned 'Ejusdem generis' to the words "on his own bond", "or on bail". He submitted that the phrase special order of the Magistrate should be given the same meaning as the words "on his own bond, or on bail". Once the same is done, the rearrest of the accused would be illegal, as the learned Addl. Chief Metropolitan Magistrate could not be said to be sitting in judgment over its earlier order discharging the respondents*

1 to 3. Reliance was placed on Bindra's Interpretation of Statutes on the following passage :-

***9**.Ejusdem generis. - "The words 'ejusdem generis' means 'of the same kind or nature'. The rule of ejusdem generis is that where particular words are followed by general, the general words should not be construed in their widest sense but should not be construed in their widest sense but should be held as applying to objects, persons or things of the same general nature or class as those specifically enumerated, unless of course there is a clear manifestation of a contrary purpose. Or to put it in a slightly different language where general and special words which are capable of analogous meaning are associated together, they take colour from each other and the general words are restrained and limited to a sense analogous to the less general. The ejusdem generis doctrine has been described in the words of Lopes, L.J., in Smelting Co. of Australia v. Commr. of Inland Revenue (1897) 1 QB 275, as meaning "that where general words immediately follow or*

are closely by associated with specific words, their meaning must be limited by reference to the preceding words". Ejusdem generis is not a rule of law but a rule of construction which enables a Court to ascertain the intention of the legislature when the intention is not clear, and does not warrant the Court is subverting or defeating the legislative will by confining the operation of a statute within narrower limits than intended by the law-makers. It should be resorted to not for the purpose of defeating the intention of the Legislature but for the purpose of elucidating its words and giving effect to its intention. It is based on the idea that if the Legislature intended its general words to be used in an unrestricted sense so as to embrace the objects, persons or things covered by the particular words, it would not have taken the trouble of using the particular words at all." .

"The rule is to be made use of only where the language of the statute under consideration is somewhat vague or uncertain ....."

10. All that Section 59 of the Cr.P.C provides is that once the accused is arrested by the Police Officer, he shall not be dicharged except on his own bond, or on bail, or under a Special order. If the arrest and detention of the accused cannot be said to be illegal, he can be discharged either on his own bond, or on bail. However, if the arrest is found to be illegal, as in the present case, there would arise no question of releasing the accused on his own bond or on bail and the only proper order would be an order of discharge, ie., the order of his release by passing of the Special order, as contemplated in the latter part of Section 59. I find no ambiguity in construing the phrase under the Spcial order of a Magistrate so as to take resort to the principle of 'Ejusdem generies' as submitted by Shri Merchant.

iv. From the above judgment, it is clear that once an accused is arrested by a police officer, he shall not be discharged except on his own bond or on bail or under a special order. If the arrest and detention of the accused cannot be said to be illegal, he can be discharged either on

his own bond or on bail. Only when the arrest is found to be illegal, a special order should be passed as contemplated under Section 59 of Cr.PC. In the instant case, the learned Magistrate did not find the arrest to be illegal. The learned Magistrate refused to remand the accused only on the ground that no sufficient material is available in order to justify a remand. Therefore, the learned Magistrate thought it fit to direct the respondent to execute a own bail bond for Rs.10,000/-.

v. The learned Magistrate has in fact perfectly applied his mind and he has given scope for the police to collect further materials and for that purpose has got an undertaking from the petitioner to appear for interrogation as and when required. The learned Magistrate has not closed his mind and the openness in his approach is very clear from the fact that he has given liberty to the investigating officer to again approach the Court after collecting sufficient materials.

vi. The learned Magistrate also ensured that the respondent appears for interrogation before the police and also appear before the Court at the time of hearing. This Court does not find any uncertainty in the procedure adopted by the learned Magistrate and the learned Magistrate has in fact adopted the correct procedure.

27. In view of the above, this Court does not find any ground to interfere with the order passed by the learned Magistrate rejecting the remand of the respondent, who was produced by the police officer after arrest. In the result, this Criminal Original Petition is dismissed.

28. Before parting with this case, this Court wants to record its appreciation to the learned XIII Metropolitan Magistrate Court, Egmore, for the manner in which the proceedings were conducted in the midst of a charged atmosphere in a packed Court hall flooded with advocates, police officers and media persons. The learned Magistrate had maintained equipoise and the same is reflected in the order passed by the learned Magistrate.

29. This Court is also deeply indebted to the valuable contribution made by Mr.A.Ramesh, learned Special Public Prosecutor, Mr.P.T.Perumal and Mr.P.Kumaresan, learned counsel who enthralled the Court with their submissions both on law and facts. Consequently, the connected miscellaneous petition is closed.

30. A copy of this judgment shall be marked to the Director General of Police, Chennai and Inspector General of Police of various zones in Tamil Nadu for immediate follow up and compliance in all future cases. The Judicial Officers shall also be apprised of the principles enunciated in this judgment, through the Tamil Nadu Judicial Academy, in order to ensure strict compliance.

07.01.2019

Index : Yes
Internet : Yes
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To

1. The XIII Metropolitan Magistrate,
   Egmore, Chennai

2. The Public Prosecutor,
   High Court of Madras

3. The Tamil Nadu Judicial Academy,
   Chennai

4. The Director General of Police,
   Mylapore,
   Chennai - 600 004

5. The Inspector General of Police,
   Chennai.

N.ANAND VENKATESH.J.,

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Pre-delivery Judgment made in

Crl.OP.No.26888 of 2018

07.01.2019