**H.C.P.No. 1021 of 2023**

**C.V.KARTHIKEYAN., J.**

The Habeas Corpus Petition had been field by Mrs.Megala, w/o. V.Senthil Balaji, seeking a direction against the respondents, the State, represented by the Deputy Director, Directorate of Enforcement, Chennai and by the Assistant Director, Directorate of Enforcement also at Chennai, to produce the body of her husband / detenu.

**2.** The Habeas Corpus Petition was filed on 14.06.2023 and since it involved proceedings against a Minister, it was brought to the knowledge of the Hon'ble Chief Justice. Thereafter, it was listed before a Division Bench [*M.Sundar & R.Sakthivel,J.*] on 15.06.2023. On that day, the learned Judges had noted as follows:-

*"There is recusal by one of us [R.SAKTHIVEL, J.]*

*Registry to do the needful."*

**3.** In view of the Standing instructions issued, a request had apparently been placed before another Co-ordinate Division Bench, [*Mrs.J.Nisha Banu and D.Bharatha Chakravarthy, JJ]* on the same day, on 15.06.2023 to hear the matter urgently. The matter was then listed before the Division Bench and they had passed an interim order which is the subject matter of challenge before the Hon'ble Supreme Court.

**4.** The Division also proceeded to hear elaborate submissions made on behalf of the petitioner and also on behalf of the respondents and finally delivered Judgment on 04.07.2023. They both differed on crucial aspects.

**5.** The operative portion of the Judgment passed by *Hon'ble Mrs. Justice J.Nisha Banu* is as follows:-

*"**1**. The Writ of Habeas Corpus Petition is maintainable;*

*2. Enforcement Directorate is not entrusted with the powers to seek police custody under the Prevention of Money Laundering Act, 2002;*

***3.*** *Miscellaneous Petition filed by Respondent 1 seeking exclusion of the period is dismissed; and*

***4.*** *The detenue is ordered to be set at liberty forthwith."*

**6.** *Hon'ble Mr. Justice D.Bharatha Chakravarthy* however held as follows:-

*"(i). The Habeas Corpus Petition in H.C.P.No. 1021 of 2023 shall stand dismissed*

*(ii). The period from 14.06.2023 till such time the detenu/accused is fit for custody of the respondent shall be deducted from the initial period of 15 days under Section 167(2) of the Code of Criminal Procedure;*

*(iii) The detenu/accused shall continue the treatment at Cauvery Hospital until discharge or for a period of 10 days from today whichever is earlier and thereafter, if further treatment is necessary, it can be only at the Prison/Prison Hospital as the case may be;*

*(iv) As and when he is medically fit, the respondents will be able to move the appropriate Court for custody and the same shall be considered on its own merits in accordance with law except not to be denied on the ground of expiry of 15 days from the date of remand;*

*(v) However, there shall be no order as to costs."*

**7.** In view of the different opinions expressed, in accordance with Clause 36 of the Letters Patent, the Registry had placed the matter before the Hon'ble Chief Justice. The matter has then been listed before me by directions of the Hon'ble Chief Justice.

**8.** The matter was listed yesterday at 02.15 p.m. It was impressed on Mr.Tushar Mehta, the learned Solicitor General appearing for the respondents and also Mr.N.R.Elango, learned Senior Counsel, appearing for the petitioner that this Court should first endeavour to determine the points on which the learned Judges had expressed differences in their opinions.

**9.** Clause 36 of the Letters Patent, is as follows:-

> *"Single Judges and Division Courts.- And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, in pursuance of Section 108 of the Government of India Act, 1915, and if such Division Court is composed of two or more Judges, and the Judges are*

*divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case included who those first heard it."*

**10.** A reading of Clause 36 of the Letters Patent would reveal that if a Division Bench of two Judges had been equally divided in their opinion as to the decision to be given on any point, such point shall be heard and decided by one or more other Judges. In this case, it has been now listed before me.

**11.** This would necessarily mean that the Habeas Corpus Petition should be heard, on the points which were the crux of difference between the two learned Judges.

**12**. The Clause also stipulated that the Judges should frame the points of difference. In the instant case, they have not.

**13**. Even on the hearing as on 06.07.2023, this Court had fallen back on the ratio laid down in (***2007) 2 MLJ 129 [ All India Anna Dravida Munnertra Kazhagam Vs. State Election Commissioner].*** The relevant portion had been given in paragraph No. 182 which is as follows:-

> *"182. Even though Clause 36 of the Letters Patent requires that if the opinion of the Judges should be equally divided, "they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including who those first heard it", no specific point on which*

*difference has arisen has been specified. When the matter was placed before me, at the threshold this aspect was highlighted by me and the learned counsels appearing for all the parties have stated that even though points of difference have not been specifically pointed out by the Division Bench, the difference as apparent from various discussions and conclusions of the two learned Judges should be culled out and should be decided on that basis without returning the matter for spelling out the difference."*

**14**. The ratio laid down, provided a small window for the third Judge, on a reading of the Judgments of the two learned Judges, to cull out the points of difference.

**15.** There is yet another Judgment which is helpful in this issue and that is reported in ***2018 SCC Online Madras 1595 [STAR India Private Limited and another vs Department of Industrial Policy and***

***Promotion, Ministry of Commerce and Industry, New Delhi and others]***. The relevant portion is paragraph No.4.2, which is as follows:-

> *"**4.2**. The role required to be played by a single Judge is accordingly distinctly marked. This specific role assigned is to confirm either of the decisions on a point of difference. Even in a case where the exact point of difference is not indicated, the Reference Court can formulate and proceed to answer it on a reading of the respective views. Such a role would encompass both fact and law. For concurring with a view of one as against another, the Reference Court can give its own reasons by supplementing it. On the same score, if the ultimate decision is one and the same, but reasons being different, the Reference Court cannot go beyond it. The power available cannot be equated with that of a review nor an exercise resulting in sitting in judgment over the other."*

**16.** The learned Solicitor General brought to the notice of this Court a Full Bench Judgment of the Allahabad High Court reported in ***1996 SCC OnLine All 250 [ The Union of India and another Vs. Joginder Singh Bhasin and another]***. Paragraph No. 6 was pointed out by the learned Solicitor General. That was an issue were there was a difference of opinion and under Section 98(2) of the CPC, it was held that the learned Judges, who were so divided in their opinion could refer to the third Judge only the point of law on which they differed and that the third Judge, was to hear arguments only on that point of law.

**17.** This provision is practically similar to what is stated in Clause 36 of the Letters Patent which had been extracted above, wherein it had again been reiterated that the Judges should state the point upon which they differed and the case shall then be heard upon that point by one or more Judges.

**18**. The learned Solicitor General also placed reliance on a Judgement of Allahabad reported in ***1956 SCC Online 321 [ Subedar and Others Vs. The State]***.

**19.** The learned Solicitor General had placed reliance on paragraph Nos. 8 and 9 which gave the broad principles about the points on which the third Judge should focus his attention. The relevant portions are extracted hereunder:-

> *"**8**.The third Judge has to give his opinion, but in the absence of any words stating on what matter he has to give his opinion it is reasonable to say that he must give his opinion on the matter on which the Judges are equally divided; it is only that matter that requires an opinion. When the Judges are equally divided, there must be an opinion of a third Judge to convert the equal division into an unequal division so that the majority view can be given effect to.*

> ***9.*** *The third Judge has not been given any power of appeal over the two Judges; he has been empowered to give his opinion so that his opinion should go with the opinion of one Judge composing the Court of appeal to make two opinions as against one opinion on the other Judge. It follows that the third Judge has jurisdiction to give his opinion only on those matters on which there has been a difference of opinion."*

**20.** Mr.N.R.Elango, learned Senior Counsel appearing on behalf of the petitioner also placed reliance on the said Judgment. That was a case where an Appeal questioning conviction under Section 302 IPC was heard by a Division Bench. There was difference of opinion on the very nature of sentence to be imposed and the matter was then referred to a third Judge, who proceeded to acquit the accused of all charges.

**21.** I must place my appreciation to the efforts taken by the office of the Solicitor General in preparing a note on the points of difference so far as they could cull out from the Judgments of the two learned Judges in this case.

**22.** In equal measure, Mr.N.R.Elango, learned Senior Counsel appearing for the petitioner had also, as always, applied his mind on the issue and had also submitted the points of difference.

**23**. The one contentious aspect to be addressed is when one of the learned Judges had not expressed any opinion on an issue and the other learned Judge had expressed an opinion and whether that issue could be termed as a point of difference.

**24**. This aspect was with specific reference to the applicability or non applicability or otherwise of Section 41(A) of the Code of Criminal Procedure qua Section 19 of the PMLA Act.

**25.** Arguments had actually been advanced but the *Hon'ble Mrs. Justice J.Nisha Banu* did not deem it necessary to answer those points. *Hon'ble Mr. Justice D.Bharatha Chakravarthy* however expressed his opinion on that issue raised relating to the above provisions. Whether this aspect could be termed as point of difference was argued at some length by both the learned Solicitor General and by Mr.N.R.Elango.

**26.** To fall back to the wordings of Clause 36 of the Letters Patent which alone should be the guideline, I hold that when the learned Judges had not framed the points of differences of opinion, then, the points of differences should be culled out by this Court and on those points alone, an answer should be given.

**27.** Arguments relating to Section 41-A of Cr.P.C., and on Section 19 of PMLA Act would necessarily have to be advanced by both the sides since the entire issue also surrounds '*arrest'*. But this could not be stated as a point of difference, as this Court can never answer or uphold an opinion given by one of the learned Judges. I would call upon

the learned Senior Counsels to advance arguments as a step to reach a conclusion on the actual points of difference.

**28.** On perusal of the notes prepared by either sides and after spending considerable time reading the Judgments, it is clear that there has been a difference of opinion on the issues of (i) maintainability of the Habeas Corpus Petition, particularly when there has been an order of remand which has been passed by a competent Court, (ii) the very power of respondents herein to seek custody of the detenu / husband of the petitioner herein and (iii) as a corollary to that particular issue, since there is a limitation is provided under the Code, whether such custody should be only within 15 days of the initial remand or whether the starting date could be extended, since the detenu / husband of the petitioner is now in remand and in hospital taking treatment under directions of the Court. Whether that period of hospitilisation could be excluded is an issue. If it is answered in the negative then the request for custody would become otiose and not capable of being put into effect. Arguments on this line will necessarily have to be advanced as this is an

issue which will have to be necessarily clarified and clarity is one aspect which should be the object of any Judgment. This is all the more important because the learned Principal Sessions Judge, at Chennai had passed an order granting custody and this Court will have to clarify the starting date of such custody, if it all it is held permissible.

**29.** In view of these reasons, I would reduce the points of difference on which the arguments can be advanced as follows:-

**(i)** Whether Enforcement Directorate has the power to seek custody of a person arrested?;

On this issue, *Hon'ble Mrs. Justice J.Nisha Banu* had come to an opinion that the respondent / Enforcement Directorate has no such power; on the other hand, *Hon'ble Mr. Justice D.Bharatha Chakravarthy* had stated that the respondent/Enforcement Directorate is vested with such power to seek custody.

In view of such divergent views expressed on this issue, it becomes imperative on this part of this Court to permit arguments to be advanced on this point to enable this Court to come to a definite conclusion on this aspect.

**(ii)** Whether the Habeas Corpus Petition itself is maintainable after a judicial order of remand is passed by a Court of competent jurisdiction.

**30.** This issue would comprise of two separate aspects. One would be maintainability. Any Petition could be maintainable, but need not always be entertained by the Court. But striking out a petition as not maintainable would go to the right to file the petition.

**31.** *Hon'ble Mrs. Justice J.Nisha Banu* was of the opinion that the Habeas Corpus Petition was maintainable and had allowed it. *Hon'ble Mr. Justice D.Bharatha Chakravarthy* had fallen back on the Judgment of ***Madhu Limaye, In re (1969) 1 SCC 292*** and stated that a

Habeas Corpus Petition would be maintainable only in exceptional cases. This point of difference arose because there was a subsequent event which was the order of remand passed by the learned Principal Sessions Judge, Chennai.

**32.** It has been argued on the side of the respondents that since an order of remand had been passed, effectively the respondents herein can never produce the body of the detenu, since they cannot as on date claim to have custody of the detenu. The custody is with the Court which granted remand and therefore, it is argued that the Habeas Corpus Petition seeking a direction against the respondents herein / Enforcement Directorate to produce the husband of the petitioner/detenue, could never be put into effect even if ordered by this Court.

**33.** On the other hand going into the issue of arrest, it is argued by the learned Senior Counsel on behalf of the petitioner that since that fact stands vitiated for not following due procedure as laid by law, the order of remand is also questionable, and therefore, the Habeas Corpus Petition is maintainable.

**34**. There being divergent opinions, it would only be prudent that this Court takes this aspect as also a point of difference between the two learned Judges.

**(iii).** The Consequential issue as to whether ED would be entitled to seek exclusion of time for the period of hospitalization beyond the first 15 days would be automatically answered depending on the decision on the 1st issue above.

**35.** A corollary to both the above questions would be issuing a clarity to the Principal Sessions Judge, who had already passed orders granting custody of the detenu / husband of the petitioner to the Enforcement Directorate. Giving effect to that particular order, has become a bone of contention since the detenu is now in hospital on orders passed by the Division Bench and during the order of remand by the learned Principal Sessions Judge.

**36.** The issue is whether on his recovery, custody would be effective from the first day on which actual physical custody of the detenu / husband of the petitioner is handed over to the respondents or it could be termed that the period had naturally lapsed consequent to the run of 15 days from the date of first remand.

**37.** This is an issue which will have to be argued and answered since, again there has been a difference of opinion with *Hon'ble Mrs. Justice J.Nisha Banu* holding that the 15 days time would start from the date of first remand while *Hon'ble Mr. Justice D.Bharatha Chakravarthy* very specifically gave a time line of 10 days for such direction to be given effect and stated that after the period of 10 days, the detenu should be shifted to prison and be treated in the prison hospital and custody to be given subsequent to that 10 days and that day should be treated as the first date of custody by the respondent.

**38.** In view of the difference in opinion on this particular time gap or the starting point custody if at all custody is to be granted and which

would be depend on answer to the first question, namely, whether the respondents could seek custody of the person arrest, I hold this issue should be addressed, but as a fact specific issue in this case.

**39.** These are the issues on which, I hope that arguments would be focused on.

**40**. A request had been earlier placed that arguments could be advanced on 08.07.2023 Saturday. The learned Senior Counsel for the petitioner however expressed some inconvenience.

**41.** It is only appropriate that the Court also give some leverage to the learned Senior Counsels to prepare themselves to answer these issues that they would only be to the advantage of the Court.

**42.** The arguments can be advanced on 11.07.2023 on behalf of the petitioner herein. The learned Solicitor General expressed that his presence would be required before the Hon'ble Supreme Court on

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11.07.2023 but if he can, he can always join through Video Conference and if arguments of the petitioner are concluded and if time permits, he may advance his arguments on that date. But the matter will also be listed on 12.07.2023 for continuation of arguments and I would place a request on both sides to conclude their arguments by 12.07.2023.

**43.** The learned Principal Sessions Judge may proceed further on extension of remand on expiry of the existing period of remand which is to expire on 12.07.2023.

Vsg 07.07.2023

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