

**ILR Sajjad & Another vs State of Karnataka by IG Prisons and Ors. 3313**

**ILR 2005 KAR 3313**

**A.M. FAROOQ AND ASHOK B. HINCHIGERI JJ.**

**Sajjad and Another vs State of Karnataka by IG Prisons and Others\***

**CODE OF CRIMINAL PROCEDURE-1973-SECTION 167-  
ORDER OF REMAND BY THE MAGISTRATE  
UNDER-"WHETHER AN ORDER OF REMAND  
MADE WITHOUT PRODUCING THE ACCUSED  
BEFORE THE COURT IS AN ILLEGALITY AND  
DETENTION IN PRISON UNDER SUCH REMAND  
ORDER AMOUNTS TO ILLEGAL CUSTODY WHICH  
ENTITLES THE ACCUSED TO SEEK HIS RELEASE  
FROM CUSTODY OR ON BAIL" - HELD- An Order  
of Remand in the absence of the Accused is not an  
illegality- But if under any circumstances the accused  
cannot be produced, the Court should insist an affidavit  
to be filed by the concerned officer seeking the remand  
order-The Court can dispense with the presence of the  
accused on special reasons-But merely on the ground  
that the remand order was passed in the absence of an  
accused, the accused cannot be released on bail.**

**Dismissing the Writ Petition, the Court,**

**HELD-**

*That the Honble Supreme Court has taken the view that  
there could be a valid order of remand when made without*

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\* W.P. HC No. 11 of 2005 Dated: 30<sup>th</sup> June 2005.

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*producing the accused before Court if it is found that it was impossible to produce the prisoner or the accused before the Court. It depends upon the factual circumstances.*  
(Para 16)

*Therefore, it is necessary on the part of the police to produce the accused before the Court before seeking an order of remand. But if under any circumstances, the accused cannot be produced, the Court should insist the officer seeking the remand order to file an affidavit stating the reasons for not producing the accused and also as to the state of health of the accused. While remanding the accused without he being produced in Court. The Court shall give reasons for not getting the accused produced before the Court the Court can dispense with the presence of the accused only on special reasons.*  
(Para 17)

**CASES REFERRED:**

**AT PARAS**

1. AIR 1953 SC 277  
*Ramanarayan Singh Vs.*  
*State of Delhi* (Refd) 7
2. 1977 Criminal Law journal 632  
*Gyanu Madhu Jamakhandi and*  
*Others vs The state of Karnataka* (Refd) 8
3. 1978 CRL LJ page58  
*Izhar Ahmed vs State* (Refd) 8

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4. 1978 CrI. L.J., 1074  
*Ram Deo Mahto vs. State of Bihar* (Refd) 9
5. 1980 SCC page 777  
*Sunil Batra vs Delhi Administration* (Refd) 10
6. AIR 1981 SC 928  
*Khatri vs State of Bihar* (Refd) 10
7. 1990 CrI. L.J. 2685  
*G.K. Moopnar, MLA vs State of Tamil Nadu* (Refd) 11
8. AIR 1971 SC 178  
*Rajnarayan vs Superintendent Central Jail* (Refd) 12
9. AIR 1972 SC 711 in para 7  
*Gowri Shankar vs State of Bihar* (Refd) 14
10. AIR 1974 SC 871  
*Sandeep Kumar Dev vs Officer in Charge* (Refd) 15

M/s Younous Alikhan Associates - Advocate for Petitioners  
Sri H.S. Chandramouli - SPP - Advocate for Respondents

**ORDER**

**Farooq, J**

In this writ petition, the petitioners have sought for a issue of a writ in the nature of habeas corpus directing the respondent to release the petitioners from the alleged illegal custody.

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2. The petitioners have alleged that they were arrested along with the notorious criminal Tanveer Ahmed @ Tanveer on 8/5/2004. The first petitioner was thereafter produced before the Jurisdictional Magistrate on 9/5/2004 and police custody was obtained until he was remanded to the judicial custody. That likewise, the second petitioner was also remanded to judicial custody till 31/5/2004. That thereafter their judicial remand was being extended without being produced before the Court. It is stated that it was mandatory on the part of the police to produce the petitioners before the Court and it is only then that the Court could remand them to judicial custody. It is stated that the petitioners were transferred to Belgaum Central Prison from Bangalore and from there to Bellary Central Prison. The Petitioners have stated that several irregularities have been committed by the Court as well as the police which affect their liberty and Constitutional Rights. It is therefore, submitted that they have been kept under illegal custody and hence, they are entitled for direction to be set at liberty forthwith.

3. We have heard Sri. Anees Ali Khan appearing for the petitioners and Sri. H.S. Chandramouli, the learned SPP. It is submitted on behalf of the State that it is true that the petitioners have been arrested and kept in judicial custody and transferred to the different place under orders from the Court. It is also stated that it is true that sometimes because of lack of escorts the prisoners could not be produced before the Court and in such circumstances the Court passed the remand orders which cannot be stated to be illegal orders.

4. The petitioners are involved in Crime No. 172/04 registered by the High Grounds Police, Bangalore for various offences punishable U/Ss. 399, 400, 332, and 307 r/w. Sec. 34 IPC and U/Ss.3 and 4 of the Arms Act.

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5. The only question to be considered is whether in a case where the accused is not produced before the Magistrate before he passes an order of remand, whether such order of remand is illegal and as to whether custody of the petitioners under such order also becomes illegal and whether under such circumstances when such person approaches the higher Courts seeking his release, whether they should be released on the ground that they are in illegal custody.

6. Several judgments have been cited and relied upon by the Learned Counsel appearing for the petitioner. Decisions have also been cited by the State.

7. After hearing the Learned Counsels the question for consideration is as to whether an order of remand made without producing the accused before the Court amounts to illegality and detention in prison under such remand order amounts to illegal custody which entitles the accused to seek his release from custody or on bail. The Hon'ble Supreme Court in RAMNARAYAN SINGH vs., STATE OF DELHI<sup>1</sup>, has held that the Court should have regard to the legality or otherwise of the detention at the time of the return and not with reference to institution of the proceedings. That was a case where the appellants therein were arrested and prosecuted for alleged defiance of an order prohibiting meetings and processions in a particular area which is an offence under Section 188 IPC. It was not a case where the person was involved in a serious offence.

8. In GYANU MADHU JAMKHANDI AND OTHERS vs. THE STATE OF KARNATAKA<sup>2</sup> it has been held that once the remand order granted under Section 167 comes to an end, fresh order of remand has to be made under Section 309(2) Cr P C. That was a case where the petitioners were allowed bail by this Court. It has no

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1. AIR 1953 SC 277

2. 1997 Criminal Law Journal 632

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application to the facts of the present case. The Allahabad High Court in *IZHAR AHMED vs. STATE*<sup>3</sup> has held that the remand order should be made in the presence of the accused and that the accused should be produced before the Magistrate when the orders of remand is to be passed and on that ground granted bail to the petitioners.

9. In *RAM DEO MAHTO vs. STATE OF BIHAR*<sup>4</sup>, in that case it was held that right to liberty of a person is a fundamental human right and his liberty can be curtailed only by law in the interest of society and that if a person has been illegally arrested and detailed in the absence of any law providing therefore, he has got to be released. The Patna High Court in the said case released the accused who was charged with the serious offence of murder on bail on the ground that the remand order was not legally passed.

10. In *SUNIL BATRA vs. DELHI*<sup>5</sup> Administration considered mainly Article 21 which is not applicable to the facts and circumstances of the present case. In *KHATRI vs. STATE OF BIHAR*<sup>6</sup> was a case where the prisoners were continued to remain in jail without any order of remand.

11. They have also relied upon judgment of the Madras High Court in *G K MOOPANAR, MLA vs., STATE OF TAMIL NADU*<sup>7</sup> where the Court held writ of habeas corpus could be maintainable when the detention is found to be in violation of procedure established by law and fundamental rights to equal justice. The Supreme Court held that the writ of habeas corpus cannot be granted when a person is committed to jail custody by a competent Court by an order which prima facie does not appear to be without jurisdiction. That in a deserving case

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3. 1978 CrI. Law Journal Page 58

4. 1978 CrI. L.J., 1074

5. 1980 SCC (CrI.) page 777

6. AIR 1981 SC 928

7. 1990 CrI. Law Journal 2685

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writ of habeas corpus can be granted when the detention is against law and in violation of the fundamental rights.

12. Even though it was mainly contended that a remand order cannot be passed in the absence of the accused and if such an order is passed, it will be illegal and hence such custody would also become illegal was not accepted by the Hon'ble Supreme Court in *RAJNARAYAN vs. SUPERINTENDENT, CENTRAL JAIL*.<sup>8</sup> In para 8 of the said judgment the Hon'ble Supreme Court has held that Courts trying cases may find it necessary to order a remand in the absence of an accused. Eg. Where an accused is so seriously ill that the trial has to be adjourned and he cannot be brought to Court and in such case the order made without production of accused in Court will not be invalid.

13. Thus in the above decision the Hon'ble Supreme Court despite finding that the order of remand has been passed in the absence of the accused, held that such order cannot be said to be illegal. It further held that there could be occasions where it was not possible to produce the accused before the Magistrate.

14. Similarly in *GOWRISHANKAR vs. STATE OF BIHAR*<sup>9</sup> the Hon'ble Supreme Court has held that remand orders could be passed validly in the absence of the accused if his presence at that time could not be secured. The Supreme Court in this case has followed the judgment in *Rajnarayan's supra*.

15. In *SANDEEP KUMAR DEY vs. OFFICER INCHARGE*<sup>10</sup>, a Division Bench of the Hon'ble Supreme Court has held as follows:

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8. AIR 1971 SC 178  
10. AIR 1974 SC 871

9. AIR 1972 SC 711 in para 7

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"4. The counter affidavit filed on behalf of the respondents is not clear on the question whether the petitioner was produced before the Magistrate when the various orders of remand were passed and therefore we asked the respondents' counsel to furnish to us a copy of the proceedings of the Magistrate's Court at Jamshedpur. Those proceedings also do not indicate clearly whether the petitioner was produced before the Magistrate when the remand orders were passed. This is a highly unsatisfactory state of affairs and must be deprecated. Orders of remand ought not to be passed mechanically and even though this Court has ruled that the non-production of the accused will not vitiate an order of remand, the Magistrate passing an order of remand ought, as far as possible, to see that the accused is produced in the Court when the order of remand is passed. It appears from the proceedings that the accused was transferred to Gaya Jail partly for reasons of security and that is why he could not be produced in the Jamshedpur Court which passed the various orders of remand."

In the said case the Supreme Court has held that the order of remand passed in the absence of the prisoner in Court is not vitiated but such order is highly unsatisfactory. It further held that though a direction cannot be given by issuing writ of habeas corpus, but a direction could be given to the lower Court whether they could be released on bail.



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16. Thus on considering all the above judgments what is to be seen is that the Hon'ble Supreme Court has taken the view that there could be a valid order of remand when made without producing the accused before Court if it is found that it was impossible to produce the prisoner or the accused before the Court. It depends upon the factual circumstances. However, the Hon'ble Supreme Court has observed that it is always desirable to see that the remand orders are passed in the presence of the accused. There may be situations where the accused could not be produced because of his illness as happened in one of the cases before the Hon'ble Supreme Court or the accused could not have been produced because of some other circumstances and in such cases the Court can pass an order of remand in the absence of the accused. The Hon'ble Supreme Court has also held that such orders passed even if it is unsatisfactory cannot be said to be illegal.

17. It has to be kept in mind that the fundamental rights of a person cannot be trampled. The accused also enjoys the fundamental rights which have to be safeguarded. Therefore, it is necessary on the part of the police to produce the accused before the Court before seeking an order of remand. But if under any circumstances, the accused cannot be produced, the Court should insist the officer seeking the remand order to file an affidavit stating the reasons for not producing the accused and also as to the state of health of the accused. While reamnding the accused without he being produced in Court, the Court shall give reasons for not getting the accused produced before the Court. The Court can dispense with the presence of the accused only on special reasons.

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18. Thus after consideration of all the facts and circumstances of the present case, we are of the view that the petitioners, who are involved in serious offences under the IPC, are not entitled to be released merely on the ground that the remand orders have been passed against them without they being produced before the Magistrate. In the present case, the reasons for not producing the accused are that there was no escort available during that period. Thus the non production of the petitioners was not without any reasons.

Writ petition is accordingly dismissed.

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