Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1845 OF 2011
(Arising out of S.L.P. (Criminal) No. 5908 of 2010)

Sadhwi Pragyna Singh Thakur ... Appellant

Versus

State of Maharashtra ...Respondent

J U D G M E N T

J.M. PANCHAL, J.

Leave granted.

2. This appeal, by grant of special leave, challenges the judgment dated March 12, 2010 rendered by the learned single Judge of the High Court of Judicature at Bombay in Criminal Application No. 3878 of 2009 by which prayer made by the

appellant to enlarge her on bail on the ground of violation of the mandate of Article 22(1) and 22(2) of the Constitution of India and also on the ground of non-filing of charge sheet within 90 days as contemplated by Section 167(2) of the Code of Criminal Procedure, is rejected.

3. The appellant claims to be the original resident of Surat. According to her she renounced material world and became Sadhwi in a religious ceremony, which was performed at Prayag, Uttar Pradesh and has settled herself at Jabalpur, Madhya Pradesh, in the premises offered by one Agrawal family.

On September 29, 2008 a bomb blast took place at about 9.30 PM in Azad Nagar locality of Malegaon city, killing six persons and injuring more than hundred persons. With reference to the said bomb blast A.C.R. I-130/08 is registered with Azad Nagar Police Station on September 30, 2008 against unknown persons under Sections 302, 307, 324, 427

and 153 of Indian Penal Code as well as under Sections 3, 4 and 5 of Explosive Substances Act and Sections 16, 18 and 23 of Unlawful Activities (Prevention) Act, 1957. The initial investigations revealed that the explosion was carried out by making use of a two wheeler (scooter) on which the bombs were fitted and blasted with the help of a timer.

In October, 2008 the investigation of the case was transferred to Anti Terrorists Squad (ATS), Mumbai headed by ACP Mohan Kulkarni. The investigation by the ATS revealed that the scooter had its origin in Gujarat. The name of dealer to whom manufacturer had sold the same was traced. On October 7, 2008 team headed by P.I. Sawant went to Surat to contact the two wheeler dealer to ascertain the name of the person to whom the scooter was sold. After contacting the dealer, it was learnt that the two wheeler was sold by the dealer to the appellant and it was registered at R.T.O., Surat, and its registration number being GJ 5 JR 1920. It was also learnt that the appellant was staying in an Ashram at Jabalpur. P.I. Sawant made a

call to the appellant to know about her vehicle. The appellant told P.I. Sawant that she had sold the same long back. P.I. Sawant was not satisfied with the explanation given by the appellant. Therefore, he asked the appellant to come down to Surat. The appellant expressed her inability to go to Surat and asked P.I. Sawant to come to Jabalpur, but P.I. Sawant refused to do so and insisted that the appellant should come to Surat. Therefore, the appellant arrived at Surat Railway Station on October 10, 2008. After reaching Surat Railway Station, the appellant straightaway went to the residence of her disciple Mr. Bhim Bhai. At about 10 AM P.I. Sawant met the appellant and revealed to the appellant that her two wheeler had been used in Malegaon blast and it was planted with explosives. The appellant told P.I. Sawant that she had sold the two wheeler in October, 2004 to one Mr. Sunil Joshi for Rs.24,000/- and she had also signed R.T.O. TT transfer form and had no control over the vehicle. P.I. Sawant repeatedly asked the appellant as to how that vehicle reached Malegaon and how it

was used to blast bombs, to which the appellant could not give satisfactory answers. P.I. Sawant, therefore, disbelieved the appellant and asked her to accompany him to Mumbai. Initially, P.I. Sawant had suggested to the appellant to take her father along with her, but the appellant had declined the said offer on the ground that physical condition of her father was not well. The appellant expressed her desire to be accompanied by her disciple and P.I. Sawant had granted the same. The appellant with her disciple Bhim Bhai reached Mumbai in the vehicle belonging to P.I. Sawant at 11.30 PM The case of the appellant is that she was taken to Kala Chowki office of ATS whereas the case of P.I. Sawant is quite different. On October 11, 2008 repetitive questions were put to the appellant pointing out her alleged involvement in Malegaon blast to which the appellant had said that she had no connection with the blast. According to the appellant on October 12, 2008, A.T.S. team became aggressive and asked Bhim Bhai to beat the appellant and when Bhim Bhai refused to do so, he was beaten up and, therefore,

Bhim Bhai had reluctantly complied the order by beating the appellant. According to the appellant on October 13, 2008 the appellant was beaten up day and night and subjected to vulgar abuse by senior officers. The case of the appellant is that on October 15, 2008 the appellant and her disciple were taken in ATS vehicle to Hotel Rajdoot in Nagpada and kept in room No. 315 and were made to sign hotel entry register. According to the appellant, money was paid by the ATS and while in hotel the appellant was asked to call from mobile No. 9406600004 to her friends and acquaintances to say that she was fine. The case of the appellant is that she developed bad health due to custodial violence and had acute abdominal and kidney pain as a result of which she was admitted in a hospital known as Shushrusha Hospital at Dadar. According to her after half an hour her disciple Bhim Bhai was also brought to the hospital and admission form of the appellant and other documents were got signed by him. The case of the appellant is that officer Khanwilkar deposited money at the hospital and the

disciple of the appellant left hospital after which his whereabouts are not known to the appellant.

The case pleaded by the appellant is that she was formally arrested on October 23, 2008, but reasons of her arrest were not communicated to her nor the names of her relations were ascertained from her to inform them about her arrest. The grievance made by the appellant is that no legal assistance was made available to her and on October 24, 2008 she was produced before learned Chief Judicial Magistrate, Nasik, where the police custody was sought which was granted upto November 3, 2008. According to her, her relations knew about her arrest only through media when news about her arrest appeared in the newspapers on October 25, 2008. Thereupon Bhagwan Jha, brother-in-law of the appellant and her sister met A.T.S. officers to permit them to meet the appellant but were not allowed to do so. According to the appellant, they could meet her on November 2, 2008 when the appellant was allowed to sign Vakalatnama of a lawyer engaged by her sister. The

claim of the appellant is that on November 1, 2008 she was subjected to a polygraphic test without her permission. The case pleaded by the appellant is that on November 3, 2008, she was produced before learned Chief Judicial Magistrate, Nasik and her police custody was sought but the same was declined by the learned Magistrate and she was remanded to judicial custody. According to the appellant her advocate moved an application seeking her medical examination, and demanding an enquiry into her illegal detention as well as treatment meted out to her. The advocate also prayed to direct BSNL to furnish outgoing call details from mobile of the appellant on October 15, 2008. The case pleaded by the appellant is that on November 3, 2008 the appellant got opportunity to have a dialogue with her advocate and she narrated atrocities committed by ATS on her. According to her, she filed a detailed affidavit-cum-complaint before the learned Chief Judicial Magistrate on November 17, 2008 and prayed to take action against police officers.

On November 20, 2008, the provisions of Maharashtra Control of Organised Crime Act, 1999 were invoked on the basis of permission granted by DIG, ATS, but application filed by ATS seeking police custody of the appellant was rejected on November 24, 2008.

4. According to the appellant she was under detention from October 10, 2008 and though the 90th day was to expire on January 09, 2009 the charge-sheet was filed on January 20, 2009. Therefore, the appellant filed an application for bail before the learned Special Judge under Section 167(2) Cr.P.C. and 21(4) MCOCA and also under Section 439 Cr.P.C. Subsequently, according to the appellant, opening part of the application was amended to read as an application for grant of Bail under Section 21(2)(b) of MCOCA.

It is relevant to note that the above application was not an application for bail on merits, but on the plea that charge sheet was required to be filed within

90 days from the date of arrest and as no charge sheet was filed within 90 days, she was entitled to bail under Section 21(2)(b) of MCOCA / Section 167(2) Cr.P.C. The case of the respondent is that the charge sheet was filed on January 20, 2009 which was 89th day from the date of first remand order i.e. October 24, 2008. The respondent had filed reply to the above application on 05.05.2009. The learned Special Judge rejected the said Bail Application by order dated July 09, 2009. Thereupon, the appellant filed Criminal Application No. 3878 of 2009 in the High Court of Mumbai. This was a petition under Sections 401 and 439 Cr.P.C against the order of the learned Special Judge. Prayer (b) was to set aside the order dated July 09, 2009 and, therefore, it was essentially a Revision Petition. The main ground on which bail was sought was that charge sheet was required to be filed within 90 days from the date of her arrest but it was filed beyond 90 days from the date of arrest which was on October 10, 2008. Most of the other grounds pleaded were challenging the correctness of the

findings of the learned Special Judge. The application filed in the High Court was rejected by judgment dated March 12, 2010 which has given rise to the present appeal.

5. This Court has heard the learned counsel for the parties at great length and in detail. This Court has also considered the documents forming part of the present appeal.

6. The judgment delivered by the learned Special Judge indicates that the appellant had failed to make out a case that she was in police custody from October 10, 2008 to October 22, 2008. The High Court has also held that the appellant was not arrested by the police on October 10, 2008 and has upheld the case of the respondent-State that the appellant was arrested on October 23, 2008. Normally, concurrent findings of facts are not interfered with in an appeal arising by grant of special leave. However, the appellant has made grievance that her rights guaranteed under Article

22(1) and 22(2) of the Constitution were violated by not producing her before the learned Magistrate within 24 hours of her arrest which was effected on October 10, 2008 and, therefore, in order to find out whether there is any violation of the rights guaranteed under Article 22(1) and 22(2) of the Constitution, this Court has undertaken exercise of ascertaining whether the appellant was arrested, as claimed by her, on October 10, 2008 or whether she was arrested on October 23, 2008, as claimed by the respondent.

7. Mr. Mahesh Jethmalani, learned senior counsel for the appellant, argued that all the facts and circumstances pertaining to visit of the appellant to Surat on October 08, 2008 and her submission to the ATS custody at Surat on that day and the complete restraint on her freedom of movement from that day onwards by the ATS till October 23, 2008, unambiguously disclose that the appellant had been arrested by the ATS on October 10, 2008 and was illegally detained in their custody till October 24,

2008 when the appellant was produced before the learned Chief Judicial Magistrate, Nasik. It was argued by the learned counsel that the High Court failed to realise that the appellant was a stranger to Mumbai and had come to Mumbai from Surat at the instance of ATS without having any knowledge of the geography of Mumbai and, particularly, the location of lodging houses around the ATS office and, therefore, the High Court should not have held that between October 10, 2008 and October 23, 2008 while in Mumbai the appellant resided at lodging houses in Mumbai. According to the learned counsel, it was stated on oath by the appellant that throughout the period from October 10, 2008 to October 23, 2008 she was in illegal detention in the ATS office located at Kala Chowki, Mumbai and, therefore, onus should have been shifted to ATS to establish the fact that the appellant had resided at lodging houses in Mumbai. It was contended that no bills of the stay of the appellant in the lodging houses where she had

allegedly resided were produced by the ATS nor was it explained how the hotel bills could have been paid by the appellant and, therefore, the case of the respondent that between October 10, 2008 and October 23, 2008 the appellant had resided at lodging houses in Mumbai should have been disbelieved. The learned counsel emphatically pleaded that no notice was issued to the appellant under Section 160 of the Code of Criminal Procedure, 1973 requiring her attendance before Mr. Sawant to interrogate her and in view of the requirements of the proviso to sub-section(1) of the Section 160, the appellant could not have been summoned at police station for the purpose of interrogation and, therefore, it was evident that the appellant was in illegal custody and detention of the ATS between October 10, 2008 and October 23, 2008. The learned counsel emphasised that the circumstances pertaining to the case of the appellant from October 7, 2008, when she was first contacted in Jabalpur till October 23, 2008 when

she was produced before the learned Chief Judicial Magistrate, Nasik, leave no room for doubt on any judicious appreciation of the facts that the appellant was manifestly illegally detained by the ATS. What was stressed was that because of third degree methods adopted by the officers of ATS, the appellant had to be admitted in hospital and, therefore, the High Court committed obvious error in coming to the conclusion that the appellant was not in illegal custody of the ATS, Mumbai from October 10, 2008 to October 23, 2008. After referring to the two separate complaints : one filed by Mr. Dharmendra Bairagi and another filed by Mr. Dilip Nahar before the learned Judicial Magistrate First Class, Indore against the officers of A.T.S. Mumbai, in which allegations about their kidnapping, beating, illegal custody etc. from October 14, 2008 to November 3, 2008 are made, the learned counsel for the appellant submitted that in the complaints it is also stated that the appellant who was kept in a room adjoining the room in which

they were confined, was also beaten up day and night by the accused named in the complaints and they had heard screams of the appellant and, therefore, the case of illegal arrest and custody from August 10, 2008 as pleaded by the appellant should be accepted by this Court. The learned counsel read out affidavit dated November 17, 2008 filed by the appellant wherein it was mentioned that she was in illegal custody of ATS from October 10, 2008 and was produced before the learned Chief Judicial Magistrate on October 23, 2008 which according to the learned counsel indicate violation of provisions of Article 22(1) and 22(2) of the Constitution. According to the learned counsel after the appellant was finally arrested on October 23, 2008, ATS had not made any effort to comply with the provisions of Section 50-A of the Code of Criminal Procedure nor the ATS had enlightened the appellant about the grounds/reasons of her arrest and her right to engage a lawyer, but on the contrary till November 2, 2008, ATS had denied to the appellant

access to any lawyer and also to her relations when she was at Kala Chowki Police Station though she was remanded to police custody for eight days on October 24, 2008 and, therefore, case of illegal custody, as pleaded by the appellant, should have been accepted by the Court. It was pointed out that the first meeting of the appellant with her immediate relation, i.e., her sister took place only on the evening of Sunday, i.e., November 2, 2008, when a blank Vakalatnama tendered by her sister was allowed to be signed in the ATS Police Station at Kala Chowki and, therefore, the case of illegal custody pleaded by the appellant could not have been disbelieved by the High Court.

8. On re-appreciation of the evidence on record this Court finds that the case of the appellant that she was arrested on October 10, 2008 is not correct and has been rightly rejected by the learned Special Judge as well as by the High Court, in view of the following circumstances.

The appellant was arrested on October 23, 2008 and was produced before the CJM, Nasik on October 24, 2008 on which date the appellant was remanded to Police custody till November 3, 2008. On the said date, there was no complaint made to the learned CJM that the appellant was arrested on October 10, 2008 nor there was any complaint about the ill-treatment meted out to her by the officers of A.T.S. Mumbai. Also there was no challenge at any time to the order of remand dated October 24, 2008 on the ground that the appellant was not produced before the learned C.J.M. within 24 hours of her arrest.

The appellant was next produced before the learned C.J.M., Nasik on November 3, 2008. On that date an application was filed that she was picked up on October 10, 2008 and was illegally detained at the ATS Office, Mumbai. The reply was filed on behalf of the respondent on that very date denying the said allegation. The order of remand dated November 3, 2008, noticed the allegation and thereafter the appellant was remanded to judicial custody till

November 17, 2008. This order was also not challenged by the appellant.

9. A detailed affidavit was filed by the appellant on November 17, 2008 setting out in detail the events from October 10, 2008 up to October 23, 2008. A perusal of the said affidavit shows that even if all the allegations in the said affidavit are taken on their face value, a case of arrest on October 10, 2008 is not made out. Paragraph 3 of the said affidavit states that on October 7, 2008 when the appellant was at Jabalpur Ashram, she had received a call from the police about her LML Freedom Motor Cycle and that the Police insisted that she should come to Surat as the Police Officer "wanted to question me at length about it". It is important to note that according to the appellant, she herself was asked to come to Surat as the Police only wanted to question her. Para 4 of the affidavit is to the effect that the appellant travelled from Jabalpur to Ujjain and arrived at Surat on October 10, 2008 and stayed with her disciple, Bhim Bhai Pasricha. Para

6 speaks of her interrogation whereas para 8 speaks of the Police Officer telling the appellant that she would have to accompany him to Mumbai for "further interrogation" and that she would be free to go to the Ashram thereafter. Para 9 is to the effect that the Police Officer told the appellant to take her father along with her but due to his old age the appellant suggested that her disciple Bhim Bhai Pasricha could accompany her to Mumbai. Paras 8 and 9 make it clear that the appellant had understood that her coming to Surat and going to Mumbai were for interrogation only. She further states, "Even though no formal summons to attend as a witness was served upon me to make myself available for interrogation in Mumbai…….. I agreed to accompany the ATS team to Mumbai". This makes it clear that the appellant understood that her going to Mumbai was for interrogation and in her capacity as a potential witness and not as an accused. Further the appellant was not arrested on October 10, 2008 is made clear by her own

statement in Para 9 – "It is significant to mention that I was not formally arrested on October 10, 2008".

10. According to the appellant, she, Bhim Bhai Pasricha and others reached Mumbai on the night of October 10, 2008. In para 10 she had claimed that for the next two days she was detained and interrogated by the ATS team in Mumbai. There is no manner of doubt that this statement is factually incorrect. The record shows that after reaching Mumbai at midnight i.e. the beginning of the October 11, 2008, the appellant and Bhim Bhai Pasricha stayed in Hotel Satguru from October 11th to 15th, 2008. This is noticed by the learned Special Judge. It is also so stated by the respondent in the reply sent to the National Human Rights Commission which is produced on the record of the case. The relevant entry in the station diary for October 11, 2008 also mentions about the stay of the appellant in a lodge. The fact that the appellant and her companion attended the office of A.T.S. on the 11th and on subsequent dates

and left after interrogation is also recorded in the station diary for 11th to 15th October, 2008. In para 11 of the affidavit it is mentioned by the appellant that during interrogation the police had asked Bhim Bhai Pasricha to beat her with sticks etc. This would show that Bhim Bhai Pasricha was with the appellant. If a person is arrested, the person is isolated from others and is completely deprived of his/her personal liberty. A person who is arrested and kept in police custody is not provided any companion. The averments in the affidavit would show that disciple Bhim Bhai Pasricha was all along with the appellant, which would negate her case that she was illegally arrested and detained by the police.

11. In para 14 of the affidavit, the appellant had stated that on 15th the appellant and Bhim Bhai Pasricha had stayed in Hotel Raajdoot in room nos. 314 and 315. Para 16 of the affidavit is to the effect that within few hours of shifting to Hotel Raajdoot the appellant became unwell and she was admitted in Shushrusha Hospital. According to the appellant, she

had undergone treatment in the hospital for 3-4 days and since her condition had not improved, she was taken to another hospital known as Dr. Vaze's Hospital. What is important is that in para 17 of the affidavit, the appellant has clearly and expressly averred as under: -

> "I say that no female constable was by my side either in Hotel Rajdoot or in either of the two hospitals".

This statement of appellant is very important in as much as this clearly shows that the appellant was alone and was not under custody or detention of police. If this was a case of arrest of the appellant, a police constable would have always been around, which is not the case. This positive averment of the appellant belies her plea raised later on about her arrest on August 10, 2008.

The Hospital documents of the Shushrusha Hospital would show that the appellant was admitted in the hospital on October 15, 2008 and was discharged on October 17, 2008. It also shows that all

the medical investigation reports were handed over to the patient's relative. If it was a case of arrest and police admitting the appellant to the hospital, all hospital records would have been handed over to the Police and the appellant also would have been handed over to the police which is not the case. The letter dated November 20, 2008 of Doctor P.K. Solanki of the chest clinic shows that the appellant was brought to the hospital by Bhim Bhai Pasricha, described as a relative of the appellant. If the appellant was under arrest she would have been brought to the hospital by the police and doctor would have so recorded it, in medical papers which is not the case. The doctor only records that a Police Officer merely had called up for the same patient i.e. made enquiries about the condition of the patient. The doctor has further recorded that the appellant was transferred to another hospital namely Vaze Hospital for further treatment. The appellant was in Vaze Hospital between October 17, 2008 and October 20, 2008 which is evident from the payments made to the said hospital. It may be

mentioned that hospital receipts are in the name of the appellant and not in the name of police. Her case that she was in police custody and she did not have sufficient means to foot the bill of the two hospitals does not inspire confidence of this Court because firstly her disciple Bhim Bhai was never in custody of the police and secondly panchnama prepared at the time of the arrest of the appellant on October 23, 2008 mentions the articles seized from the appellant including one hundred notes, each of which was of denomination of rupees one hundred i.e. in all Rs. 10,000/-. It is no where pleaded by the appellant that the said amount did not belong to her. Even if it is assumed that amount mentioned in the bills of the two hospitals was paid by the police such payment itself would not indicate illegal arrest and custody of the appellant.

12. In so far as October 21st and 22nd, 2008 are concerned the appellant has not given any specific details except claiming that she was brought back to the ATS Office. This appears to

be factually incorrect. In para 18 of the report sent to the National Human Rights Commission it has been specifically stated by the respondent that after being discharged from Vaze Hospital on October 20, 2008 the appellant had checked into Hotel Parklane. As per the records of the said hotel, the appellant remained in the said Hotel till she was arrested on October 23, 2008. Further in paras 18 and 19 of the counter affidavit to the SLP it has been specifically stated that the appellant checked into Hotel Parklane after being discharged from Vaze hospital. It is further averred that after questioning on October 20th, 21st and 22nd, 2008 the appellant was allowed to go. In para 36 the Rejoinder which is reply to what is stated in paras 18 and 19 of the counter affidavit, there is no specific denial of the above averment. The contention that the averments made in the complaints filed by Mr. Dharmendra Bairagi and Mr. Dilip Nahar support the case of the appellant that she was illegally detained by

the officers of A.T.S. Mumbai and subjected to third degree interrogation cannot be accepted because the averments made in the complaints are untested and no action, till date, is taken by the learned Judicial Magistrate, on those complaints.

13. The above facts would clearly show that there was no arrest of the appellant on October 10, 2008 as is sought to be claimed now. The appellant was called for interrogation which is not equivalent to her arrest and detention. All throughout between October 10, 2008 and prior to her arrest on October 23, 2008 her disciple, Bhim Bhai Pasricha was with her. The averments made by the appellant indicate that the appellant had stayed in three different lodges and was admitted in two different hospitals along with Bhim Bhai Pasricha. Her own specific case is that there was no female Police with her either in the lodges or in the hospitals which cannot be ignored. After detailed discussion of the

materials on the record, both, the Trial Court and High Court have held that the case of her arrest on October 10, 2008 is not made out by the appellant. In paragraph 19, the appellant herself has stated that she "was finally arrested on 23.10.2008 and produced before the learned Chief Judicial Magistrate, Nasik on 24.10.2008". This is her specific case namely that she was arrested on October 23, 2008. However, at a later stage, before the learned Special Judge in her application for default bail dated January 14, 2009, the word "finally" was changed to "officially" and before the High Court it was sought to be pleaded that the appellant was "formally" arrested instead of the expression "finally" arrested on October 23, 2008.

14. The findings recorded by the learned Special Judge as well as by the High Court that the appellant was not arrested on October 10, 2008 but was arrested on October 23, 2008 and was thereafter produced before the learned Chief

Judicial Magistrate, Nasik are concurrent findings of facts. This Court does not find substance in the contention that the appellant was arrested on October 10, 2008 and therefore the findings recorded by the learned Special Judge and the High Court are liable to be interfered in this appeal which arises by grant of special leave. It was agreed by the learned counsel for the appellant that if this Court comes to the conclusion that the appellant was arrested on October 23, 2008 then the charge sheet was submitted within 90 days from the date of first order of the remand and therefore there would neither be breach of provisions of Section 167(2) of the Criminal Procedure Code nor would there be breach of Articles 22(1) and 22(2) of the Constitution.

As this Court has come to the conclusion that the appellant was arrested on October 23, 2008, the appeal is liable to be dismissed. However, alleged violation of Section 160 of Criminal Procedure Code

and allegations of torture etc. are argued by the learned counsel for appellant at length and, therefore, this Court proposes to advert to the same at this stage itself.

According to the appellant there was no written notice requiring her attendance to appear for any investigation or interrogation. The further argument of the appellant is that absence of a written notice requiring her attendance for interrogation would establish that she was kept in illegal custody by officers of A.T.S., Mumbai. However, according to the prosecution, she had agreed to come to Surat and Bombay and therefore the point of issuance or non-issuance of notice u/s 160 Cr.P.C. is not relevant.

This issue has been considered in detail by the High Court. The High Court has held that "assuming that she was called for interrogation and questioned by the ATS without any order or notice, still, such attendance is only for interrogation and questioning and nothing more. The High Court has noticed that

the appellant was not detained or taken into custody but was only questioned and was thereafter allowed to go. It was also noticed that she had stayed in different lodges and was in hospitals and was free to move around and contact everybody. According to the High Court, the appellant was in touch with her disciple and was using her mobile phone which was not disputed. The High Court has observed that once the applicant's movements were not restricted nor was she confined to the ATS Office after interrogation, then it is difficult to hold that in the garb of interrogating and questioning her she was taken into custody by the ATS. The High Court has explained that assuming that the custody and arrest are synonymous terms, yet in the facts of this case, it is not possible to conclude that the appellant was in custody and was arrested by the ATS. After recording above conclusions, the High Court has ultimately observed that assuming that the appellant was not told by an order in writing to attend the office of A.T.S. at Kala Chowki, Mumbai, yet it is clear that she accompanied the officer of A.T.S. from Surat to

Mumbai on her own volition. Every single act and movement is of her own volition and no force was used. High Court, therefore, did not go into the wider question as to whether the non-compliance with 160(1) including its proviso would enable the appellant to apply for release on bail. It may be stated that the prosecution has produced and relied upon written intimation dated October 10, 2008 and entries from the Station Diary to show that Section 160 of Cr.P.C. was substantially complied with but it is not necessary to refer to the same in detail as this Court broadly agrees with the view taken by High Court mentioned above. Essentially Section 160 of Cr.P.C. deals with the procedure to be adopted by Police Officer at pre-arrest stage. Once a person is arrested and is in judicial custody the prayer for Bail will have to be considered on merits. Prayer for Bail cannot be automatically granted on establishing that there was procedural breach irrespective of, the merits of matter. The appellant has not claimed bail on merits. Therefore, even if assuming that procedure mentioned

in Section 160 was not followed, the prayer of bail cannot be granted at this stage. The reliance on the decision **Nandini Satpathy vs. P.L. Dani and another AIR 1978 SC 1025,** by the appellant is misconceived. In the said case, the Court quashed the proceedings, mainly having regard to the nature of allegations and the context in which such allegations were made.

15. So far as allegations of torture etc. are concerned. this Court finds that when the appellant was produced before the Chief Judicial Magistrate, Nasik on October 24, 2008, there was no allegation of any ill treatment by the Police. When the appellant was again produced on November 3, 2008, there was no allegation of any torture in Police custody.

16. Allegation of ill treatment in the Police custody was made for the first time, in the affidavit dated November 17, 2008, a perusal of which would show that it is not believable as primarily it has been alleged that the Police made her companion

Bhim Bhai Pasricha to beat her. No injury was found on her body by any of the doctors in the two hospitals. The High Court has noticed that the allegations of ill treatment are pending examination before the National Human Rights Commission and in Para 11 the High Court has recorded as under :-

> "I am not concerned with allegations of ill-treatment and harassment, as also alleged torture, in as much as I am informed that a separate application in that behalf is made and is pending before the National Human Rights Commission".

17. So far as merits of the case are concerned under the Criminal Procedure Code, bail has to be only on consideration of merits, except default bail which is under Section 167(2). Section 21 of the MCOC Act is to the effect that unless the Court is satisfied that the accused is not guilty of the offence alleged, bail shall not be granted, which is similar to Section 37 of the NDPS Act. Considerations for grant of bail at the stage of investigation and after the charge sheet is filed

are different. In the present case, charge sheet has been filed on January 20, 2009 and the application for bail before the High Court, if it is to be treated as not merely a revision from the order of the learned Special Judge declining bail but also as a fresh application, is an application dated August 24, 2009, after the filing of the charge sheet on January 20, 2009 and therefore filed after right, if any, under Section 167(2) is lost and having regard to the provisions of Section 21 of the MCOC Act the appellant is not entitled to grant of bail, apart from the fact that no argument had been addressed on the merits of the case and only technical pleas under Section 167(2) of the Criminal Procedure Code and Article 22(2) of the Constitution have been taken.

18. As far as Section 167(2) of the Criminal Procedure Code is concerned this Court is of the firm opinion that no case for grant of bail has been made out under the said provision as charge sheet was filed before the expiry of 90 days from

the date of first remand. In any event, right in this regard of default bail is lost once charge sheet is filed. This Court finds that there is no violation of Article 22(2) of the Constitution, because on being arrested on October 23, 2008, the appellant was produced before the Chief Judicial Magistrate, Nasik on October 24, 2008 and subsequent detention in custody is pursuant to order of remand by the Court, which orders are not being challenged, apart from the fact that Article 22(2) is not available against a Court i.e. detention pursuant to an order passed by the Court.

19. The appellant has not been able to establish that she was arrested on October 10, 2008. Both the Courts below have concurrently so held which is well founded and does not call for any interference by this Court.

20. Though this Court has come to the conclusion that the appellant has not been able to establish

that she was arrested on October 10, 2008, even if it is assumed for the sake of argument that the appellant was arrested on October 10, 2008 as claimed by her and not on October 23, 2008 as stated by the prosecution, she is not entitled to grant of default bail because this Court finds that the charge sheet was filed within 90 days from the date of first order of remand. In other words, the relevant date of counting 90 days for filing charge sheet is the date of first order of the remand and not the date of arrest. This proposition has been clearly stated in the **Chaganti Satyanarayana and Others vs. State of Andhra Pradesh (1986) 3 SCC 141**. If one looks at the said judgment one finds that the facts of the said case are set out in paragraphs 4 and 5 of the judgment. In paragraph 20 of the reported decision it has been clearly laid down as a proposition of law that 90 days will begin to run only from the date of order of remand. This is also evident if one reads last five lines of Para 24

of the reported decision. Chaganti Satyanarayana and Others (Supra) has been subsequently followed in the following four decisions of this Court :

(1) **Central Bureau of Investigation, Special Investigation Cell-I, New Delhi vs. Anupam J. Kulkarni (1992) 3 SCC 141**, para 9 placitum d-e, para 13 placitum c where it has been authoritatively laid down that :

> "The period of 90 days or 60 days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police".

(2) State through **State through CBI vs. Mohd. Ashraft Bhat and another (1996) 1 SCC 432,** Para 5.

(3) **State of Maharashtra Vs. Bharati Chandmal Varma (Mrs) (2002) 2 SCC 121** Para 12, and (4) **State of Madhya Pradesh vs. Rustom and Others 1995 Supp. (3) SCC 221**, Para 3.

Section 167(2) is one, dealing with the power of the learned Judicial Magistrate to remand an accused

to custody. The 90 days limitation is as such one relating to the power of the learned Magistrate. In other words the learned Magistrate cannot remand an accused to custody for a period of more than 90 days in total. Accordingly, 90 days would start running from the date of first remand. It is not in dispute in this case that the charge sheet is filed within 90 days from the first order of remand. Therefore, the appellant is not entitled to default bail.

21. There is yet another aspect of the matter. The right under Section 167(2) of Cr.P.C. to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet. In other words, even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge sheet is filed, the said

right to be released on bail would be lost. After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from Constitution Bench decision of this Court in **Sanjay Dutt vs. State** (1994) 5 SCC 410 [Paras 48 and 53(2)(b)]. The reasoning is to be found in paras 33 to 49. This principle has been reiterated in the following decisions of this Court :

(1) **State of M.P. vs. Rustam and Others 1995 Supp. (3) SCC 221**, para 4, (2) **Dr. Bipin Shantilal Panchal vs. State of Gujarat (1996) 1 SCC 718** para 4. It may be mentioned that this judgment was delivered by a Three Judge Bench of this Court. (3) **Dinesh Dalmia vs. CBI (2007) 8 SCC 770** para 39, and (4) **Mustaq Ahmed Mohammed Isak and others vs. State of Maharashtra (2009) 7 SCC 480** para 12.

In **Uday Mohanlal Acharya vs. State of Maharashtra (2001) 5 SCC 453**, a Three Judge Bench of this Court considered the meaning of the expression

"if already not availed of" used by this court in the decision rendered in case of Sanjay Dutt and held in para 48 and held that if an application for bail is filed before the charge sheet is filed, the accused could be said to have availed of his right under Section 167(2) even though the Court has not considered the said application and granted him bail under Section 167(2) Cr.P.C. This is quite evident if one refers para 13 of the reported decision as well as conclusion of the Court at page 747.

22. It is well settled that when an application for default bail is filed, the merits of the matter are not to be gone into. This is quite evident from the principle laid down in **Union of India vs. Thamisharasi and Others (1995) 4 SCC 190** para 10 placitum c-d.

23. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, before the consideration of the same and

before being released on bail if charge sheet is filed, the said right to be released on bail, can be only on merits. So far as merits are concerned the learned counsel for the appellant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all.

24. According to the appellant, she was arrested on October 10, 2008 and was not produced within 24 hours of her arrest and, therefore, she is entitled to be released from custody.

As held earlier the plea that the appellant was arrested on October 10, 2008 and was in police custody since then is factually found to be incorrect by this Court. The appellant was arrested only on October 23, 2008 and within 24 hours thereof, on October 24, 2008 she was produced before the learned CJM, Nasik. As such there is no violation of either Article 22(2) of the Constitution or Section 167 Cr.P.C.

In the grounds seeking bail either before the Trial Court or before the High Court, bail was not sought for

on the ground of violation of Article 22(2) of the Constitution but it was confined only to the plea that charge sheet was not filed within 90 days and, therefore, this issue cannot be gone into in the S.L.P. more particularly in view of weighty observations made by this Court in para 14 of **Chaganti Satyanarayana and Others (Supra)** wherein it is clearly laid down that an enquiry as to exactly when the accused was arrested is neither contemplated nor provided under the Code. Even if it is assumed for the sake of argument that there was any violation by the police by not producing the appellant within 24 hours of arrest, the appellant could seek her liberty only so long as she was in the custody of the police and after she is produced before the Magistrate, and remanded to custody by the learned Magistrate, the appellant cannot seek to be set at liberty on the ground that there had been non-compliance of Article 22(2) or Section 167(2) of the Cr.P.C. by the police.

25. In **Saptawna vs. The State of Assam AIR (1971) SC 813**, this Court has observed as under in paras 2 and 3 of the reported decision :

> "2. The learned counsel for the petitioner says that the petitioner is entitled to be released on three grounds : (1) The original date of arrest being January 10, 1968 and the petitioner not having been produced before a Magistrate within 24 hours, the petitioner is entitled to be released; (2) The petitioner having been arrested in one case on January 24 1968 and he having been discharged from that case, he is entitled to be released; and (3) As the petitioner was not produced for obtaining remand he is entitled to be released.
>
> 3. A similar case came before this Court from this very District V.L. Rohlua v. Dy. Commr. Aijal Dist. Writ Petitin No.238 of 1970, D/- 29-9-1970 (SC) (reported in 1971 Cri LJ (N) 8) and the first point was answered by a Bench of five Judges thus :
>
> > "If the matter had arisen while the petitioner was in the custody of the Armed Forces a question might well have arisen that he was entitled to be released or at least made over to the police. However, that question does not arise now because he is an undertrial prisoner."
>
> It seems to us that even if the petitioner had been under illegal detention between January 10 to January 24, 1968 – though we do not decide this point – the detention became lawful on January 24, 1968 when

> he was arrested by the Civil Police and produced before the Magistrate on January 25, 1968. He is now an undertrial prisoner and the fact that he was arrested in only one case does not make any difference. The affidavit clearly states that he was also treated to have been arrested in the other cases pending against him."

Again a Constitution Bench of this Court has made following observations in paragraphs 5, 6 and 8 of **V.L. Rohlua vs. Deputy Commissioner, Aijal, District Mizo (1970) 2 SCC 908.**

> "5. The State authorities have produced the order-sheets from the cases. From them it appears that the petitioner was charged in the Court of the Additional District Magistrate on March 3, 1968, and was kept in judicial custody. He has since been remanded to jail custody from time to time. On July 28, this Court in the habeas corpus petition ordered his production in Court and appointed Mr. Hardev Singh, Advocate, as amicus curiae.
>
> 6. The petitioner then filed a second affidavit on August 3, 1970. In that affidavit he has alleged that he was handed over to the Civil Authorities by the Armed Forces after 2 months from his arrest, his confessional statement was obtained at gun-point, that no order was served on him under the Assam Maintenance of Public Order Act, 1953, that he was tortured, that the detention order was vague and that as the remand order

expired on July 18, 1970, his further detention became illegal.

8. From the order-sheets produced before us it is clear that the petitioner was first produced before the Magistrate on March 3, 1968. That was roughly two months after his arrest by the Armed Forces. Under Section 5 of the Armed Forces (Assam and Manipur) Special Powers Act, he had to be made over to the officer in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. What is the least possible delay in a case depends upon the facts, that is to say, how, where and in what circumstances the arrest was effected. From the affidavit of Mr. Poon, it prima facie appears that the petitioner is connected with the Mizo hostiles who are waging war against India. It was, therefore, necessary to question him about his associates, his stores of arms and like matters. The difficulty of the terrain, the presence of hostile elements in the area must be considered in this connection. Although it seems to us that the Armed Forces delayed somewhat his surrender to the Civil Authorities, which is not the intention of the law, there is not too much delay. If the matter had arisen while the petitioner was in the custody of the Armed Forces a question might well have arisen that he was entitled to be released or at least made over to the police. However, that question does not arise now because he is an undertrial prisoner. The only question is one of remand. Here, too, if the matter had been for the application of the Rules of the Code of Criminal Procedure, no remand could have been longer than 15

> days at a time. The fact of the matter, however, is that the Criminal Procedure Code is not applicable by reason of the Sixth Schedule to the Constitution in this area. This was laid down in *State of Nagaland* v. *Rattan Singh* (1996) 3 SCR 830. Only the spirit of the Criminal Procedure Code applies. In this view of the matter we cannot insist on a strict compliance with the provisions of Section 344 of the Code of Criminal Procedure. The petitioner had to be kept at Dibrugarh for want of space at Aijal. Long distances, difficult terrain and hostile country, are considerations to take into account. The period each time was slightly longer than 15 days but not so unconscionably long as to violate the spirit of the Code. There was a gap when the petitioner was in the custody of this Court but no request was made for his release then. Now he is on a proper remand and in fact has been remanded to the custody of the Magistrate by us. We cannot now hold his detention to be illegal."

26. The decisions relied upon by the learned counsel for the appellant do not support the plea that in every case where there is violation of Article 22(2) of the Constitution, an accused has to be set at liberty and released on bail. Whereas, an accused may be entitled to be set at liberty if it is shown that the accused at that point of time is in illegal detention by the police, such a right is not

available after the Magistrate remands the accused to custody. Right under Article 22(2) is available only against illegal detention by police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order.

27. The decision in **Manoj vs. State of M.P. (1999) 3 SCC 715** relied upon by the learned counsel for the appellant was a case where the accused was not produced before the Magistrate in the second case and, therefore, was directed to be released. It was not a case where the person was produced before the learned Magistrate and remanded to custody and then directed to be released because there was infraction by the police.

Similarly, the decision relied upon in the case **In the matter of Madhu Limaye and Others (1969) 1 SCC 292** is not relating to arrest and detention without being produced before the Magistrate, but is relating to non-communication of the grounds of

arrest. Further the decision in **Bhim Singh, MLA vs. State of J & K and Others (1985) 4 SCC 677**, relied upon by the learned counsel for the appellant was a case where the person had already been released on bail and the Court finding that there was infraction of law by the police directed an amount of Rs.50,000/- to be paid to him by way of compensation.

28. In **Khatri and Others (II) vs. State of Bihar and Others (1981) 1 SCC 627** persons were in jail without being produced before the Judicial Magistrate. It was not a case where the persons were in Jail after being remanded to custody by the Judicial Magistrate. Similarly the decision in **The State of Bihar vs. Ram Naresh Pandey and another AIR 1957 SC 389** was one relating to withdrawal from the prosecution when the learned Magistrate is required to apply his mind and not one relating to Article 22(2).

29. At the time when the appellant moved for bail she was in judicial custody pursuant to orders of

remand passed by the learned CJM/Special Judge. The appellant did not challenge the orders of remand dated October 24, 2008, November 3, 2008, November 17, 2008 and subsequent orders. In the absence of challenge to these orders of remand passed by the competent court, the appellant cannot be set at liberty on the alleged plea that there was violation of Article 22(2) by the police.

30. The plea that Article 22(2) of the Constitution was violated is based on the averment by the appellant that she was arrested on October 10, 2008. Factually this plea has not been found to be correct. The appellant was in fact arrested only on October 23, 2008. The affidavit filed by the appellant on November 17, 2008, on a careful perusal shows that the appellant was not arrested on October 10, 2008. Prayer in the said application did not ask for being set at liberty at all and only ask for an enquiry. Finding recorded by both the Courts i.e. the Trial Court and the

High Court is that the appellant could not make out a case of her arrest on October 10, 2008. Having regard to the totality of the facts and circumstances of the case, this Court is of the opinion that question of violation of Article 22(2) does not arise.

31. The result of the above discussion is that this Court does not find any merits in the present appeal and the same is liable to be dismissed. Therefore, the appeal fails and is dismissed.

.....J.
(J.M. PANCHAL)

.....J.
(H.L. GOKHALE)

New Delhi;
September 23, 2011.