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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 31.05.2024
Pronounced on: 01.07.2024

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W.P.(CRL) 1827/2024 & CRL.M.A. 17736/2024**BIBHAV KUMAR**

..... Petitioner

Through: Mr. N. Hariharan, Senior Advocate with Mr. Karan Sharma, Mr. Rajat Bhardwaj, Mr. Mudit Jain, Mr. Mohit Siwach, Mr. Kaustabh Khanna, Mr. Siddharth Yadav, Ms. Punya Rekha Angara & Mr. Aayush Goswami, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Sanjay Jain, Senior Advocate with Mr. Sanjeev Bhandari, ASC and Mr. Atul Kumar, APP for the State with Ms. Anvita Bhandari, Ms. Charu Sharma, Mr. Arjit Sharma & Mr. Vaibhav Vats, Advocates.
I.O. Anjitha Chapyala & Inspector Rajeev Kumar, SHO P.S.: Civil Lines.

CORAM:**HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****JUDGMENT**



SWARANA KANTA SHARMA, J.

1. The present criminal writ petition under Article 226 of the Constitution of India, read with Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'), has been filed by the petitioner praying for grant of following reliefs:

"A. Declaring the arrest of the Petitioner at the hand of the Respondent as illegal and, inter alia, in gross violation of the provisions of Section 41A of the Code of Criminal Procedure, and against the mandate of law laid down in *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 and *Amandeep Singh Johar Vs. State of NCT of Delhi and Anr.* 2018 SCC Online Del 13448; AND

B. Ordering that the Petitioner be paid appropriate compensation for his illegal arrest, in deliberate and blatant violation of the provisions of law, as may be determined by this Hon'ble Court; AND

C. Directing that Departmental Action be initiated in terms of the law laid down in *Arnesh Kumar v. State of Bihar*, 36 (2014) 8 SCC 273, against the unknown erring officials, who were involved in the decision making viz. the arrest of the Petitioner, AND

D. Pass any other order(s) as this Hon'ble Court deems fit, in the facts of the present matter."

2. Sh. Sanjay Jain, learned Senior Counsel appearing on behalf of the respondent, at the outset has raised certain preliminary objections and has opposed the issuance of notice in the present petition. He argues that the petition is not maintainable since the petitioner has not disclosed true facts and has not annexed the order passed by learned Magistrate on 20.05.2024 wherein a separate application filed by the petitioner specifically raising the issue of non-compliance of Section 41A of Cr.P.C. was disposed of by the learned Magistrate, with the



observations that the issue of non-compliance of Section 41A of Cr.P.C. had already been dealt with by the learned Magistrate at the time of grant of police custody remand of the accused/petitioner *vide* order dated 19.05.2024. Sh. Sanjay Jain argues that the petitioner has not challenged the order of the learned Magistrate dated 20.05.2024 before the Court of Sessions and, therefore, since an alternative remedy is available to the petitioner, the present writ petition under Article 226 is not maintainable. Therefore, he prays that the petition be dismissed on this ground itself.

3. Sh. N. Hariharan, learned Senior Counsel appearing on behalf of the petitioner, on the other hand, has argued that the petitioner herein has been challenged his arrest in the present case, primarily on the grounds of non-compliance of Section 41-A of Cr.P.C., directions of Hon'ble Apex Court in case of *Arnesh Kumar v. State of Bihar (2014) 8 SCC 273* and violation of fundamental rights of the petitioner guaranteed to him under Article 21 and 22 of Constitution of India. He also states that two other reliefs have been sought in the present petition i.e. grant of appropriate compensation to the petitioner for his illegal arrest and taking action against the erring police officers. Learned Senior Counsel also argues that it is not mandatory for the petitioner to specifically challenge the order passed by the learned Magistrate before the Court of Sessions, and he is well within his right to raise the issue of non-compliance of provisions of law and directions of the Hon'ble Apex Court before this Court under Article 226 of the Constitution of India since the same directly affects



his fundamental rights. Therefore, he prays that notice be issued in the present petition.

4. This Court has heard arguments addressed by learned Senior Counsel for the petitioner as well as learned Senior Counsel for the State, and has perused the material available on record.

5. Having gone through the records of the case, this Court is of the opinion that the petitioner herein had raised an objection regarding non-compliance of Section 41A of Cr.P.C. when his police custody remand had been sought by the State, and the same was dealt with and rejected by the learned Magistrate *vide* a detailed order dated 19.05.2024. Since a separate application in this regard had also been filed by the petitioner, the same was rejected by the learned Magistrate on the ground that the grounds raised in the said i.e. non-compliance of Section 41A of Cr.P.C., have already been dealt with by the learned Magistrate in his order dated 19.05.2024, and, therefore, the same had become infructuous.

6. It is true that the petitioner herein has not challenged the dismissal of the abovesaid application by the learned Magistrate, which he should have challenged before the learned Sessions Court as per the provisions of law, before approaching this Court. However, this Court is also of the opinion that it is not the non-compliance of Section 41A of Cr.P.C. alone which has been challenged before this Court, but also the manner in which he was arrested, the *malafide* of arrest and breach of his fundamental rights. Additionally, reliefs such as payment of compensation and taking action against the erring



officers who have arrested him without giving him a notice under Section 41A of Cr.P.C. have also been prayed for.

7. As far as the issue of maintainability of a writ petition, in light of availability of alternative remedy is concerned, it will be apt to take note of the observations of the Hon'ble Apex Court in case of *Radha Krishan Industries v. State of H.P. (2021) 6 SCC 771* which are extracted hereunder:

“27. The principles of law which emerge are that:

27.1. **The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.**

27.2. The High Court has the discretion not to entertain a writ petition. **One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.**

27.3. **Exceptions** to the rule of alternate remedy arise where: (a) **the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution;** (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. **An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case** though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ



petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.”

(emphasis supplied)

8. Thus, one of the exceptions to the general rule that a writ petition would not be maintainable when an alternative remedy is available, is when a writ petition has been filed for enforcement of fundamental rights as enshrined in the Constitution of India. As noted above, the petitioner herein has specifically alleged breach of his fundamental rights by the State/police, while challenging his arrest on grounds of non-compliance of Section 41A of Cr.P.C. and directions of the Hon’ble Apex Court.

9. This Court is, therefore, of the opinion that at this stage, the petition before this Court is maintainable to the extent of issuance of notice to the respondent. The merit of the case will, however, be decided only after a reply is filed in this case by the State.

10. In view thereof, it is ordered that notice be issued to the State who will file appropriate reply to the present petition within one week, and advance copy of the same will be provided to the other side.

11. Let the matter be listed on 08.07.2024.

12. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JULY 1, 2024/at/zp