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

Date of decision: 01st October, 2024

+ W.P.(CRL) 1929/2024 & CRL.M.A. 18784/2024

THOKCHOM SHYAMJAI SINGH & ORS.Petitioners

Through: Mr. Siddhartha Borgohain, Mr. Aditya Giri and Mr. Hemant Kalra, Advocates.

versus

UNION OF INDIA THROUGH HOME SECRETARY & ORS.
.....Respondents

Through: Mr. Amit Tiwari, CGSC with Mr. Vedansh Anand, G.P., Ms. Chetanya Puri, Mr. A. Tanwar, Mr. Rahul Bhaskar and Mr. Soumyadip Chakraborty, Advocates for UOI. Mr. Rahul Tyagi, SPP with Mr. Sangeet Sibou, Mr. Jatin, Mr. Mathew M. Philip, Ms. Priya Rai and Mr. Abhishek Tomar, Advocates with DSP Neeraj Mishra, CIO for NIA.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition filed under Article 226 read with Article 227 of the Constitution of India, the petitioners challenge their arrest made on 13.03.2024 by respondent No.2/National Investigation Agency ('NIA'). The petitioners also seek quashing of remand orders



made by the learned Special Court, whereby the petitioners have been remanded to NIA custody, and subsequently, to judicial custody where they are presently lodged.

2. Notice on this petition was issued *vide* order dated 02.07.2024; consequent whereupon the main contesting party, *viz.* respondent No.2/NIA has filed their counter-affidavit dated 11.08.2024.
3. Briefly, the petitioners have been arrested by the NIA, alleging that they are involved in a trans-national conspiracy hatched by a foreign-based leadership of terror outfits, to exploit the ethnic unrest and to execute terrorist attacks in the State of Manipur; and to wage war against the Government of India. The petitioners have accordingly been arrested on 13.03.2024 in case FIR No. RC-23/2023/NIA/DLI dated 19.07.2023 registered under sections 120-B/121-A/122 of the Indian Penal Code, 1860 read with sections 18/18-B/39 of the Unlawful Activities (Prevention) Act, 1967.
4. According to the NIA, petitioner No.1 is the self-styled Army Chief of the United National Liberation Front ('UNLF') and petitioners Nos.2 and 3 are his associates, who are alleged to have been involved in raising funds for the UNLF (by committing extortion), as well as recruiting cadres and procuring weapons to incite violence in Manipur.
5. By way of a preliminary objection raised in the counter-affidavit, the NIA submits that the present writ petition is not maintainable, since the grounds of challenge raised hereby have already been agitated by the petitioners by way of an earlier writ petition bearing W.P. (CRL.) No. 975/2024; which writ petition was subsequently dismissed as



withdrawn *vide* order dated 16.04.2024 after notice had been issued and after lengthy arguments were heard by a Division Bench of this court.

6. The NIA accordingly submits that the principle of ‘constructive res-judicata’ applies to the present case; and that a second writ petition based on the same facts and agitating the same cause of action is not maintainable. It is further submitted that even if the second writ petition cites some additional grounds, those grounds were available to the petitioners at the time of hearing of the first writ petition and ought to have been raised at that time, but since that was not done, those grounds cannot be cited as the basis for filing a second writ petition.
7. In view of the preliminary objection raised by the NIA, this court has heard Mr. Rahul Tyagi, learned SPP appearing for the NIA, as well as Mr. Siddhartha Borgohain, learned counsel appearing for the petitioners at length on the issue of maintainability of the present writ petition.
8. At the outset, it is beneficial to extract the prayers made in the earlier writ petition bearing W.P. (CRL.) No. 975/2024 that had been filed by the petitioners, which read as follows :

“a) Issue a Writ in the nature of Habeas Corpus thereby setting aside the arrest of the Petitioners which was in violative (sic, violation) of the Article 21 and 22(1) of the Constitution of India and the statutory provisions contained in the Code;

b) Pass any other order/ order(s) as this Hon’ble Court may deem fit in favour of the Petitioners to meet the ends of justice.”



9. Notice on the earlier writ petition was issued on 22.03.2024, whereafter the matter is stated to have been argued at some length before a Division Bench of this court; but was subsequently dismissed as withdrawn *vide* order dated 16.04.2024, with the Division Bench observing as follows :

*“1. After some arguments, learned counsel for the petitioner seeks permission to withdraw the present petition **with liberty to agitate the same issues before Competent Court/Forum.***

*2. The present petition is dismissed as withdrawn and **liberty as prayed** is granted.”*

(emphasis supplied)

10. Arguing for dismissal of present writ petition on the preliminary ground that it is barred by constructive res-judicata, Mr. Tyagi, learned SPP appearing for the NIA submits, that it is clear from a perusal of order dated 16.04.2024 made by the Division Bench, that no *specific liberty* was sought or granted to the petitioners to file a *fresh writ petition* under Article 226 of the Constitution of India before this court. Learned SPP submits, that though the principle of ‘res-judicata’ would not apply in the circumstances of the present case, since the first writ petition was not decided on merits, nevertheless, since the petitioners are seeking to raise the same grounds in relation to the same cause of action as were pleaded in the earlier writ petition before the Division Bench of this court, the present writ petition is barred by the principle of ‘constructive res-judicata’.
11. Learned SPP further submits that in these circumstances, the liberty granted to the petitioners by the Division Bench to approach a



“Competent Court/Forum” *did not include* the liberty to file a fresh writ petition before a Single Bench of the same High Court.

12. Mr. Tyagi argues that the liberty granted to the petitioners was to approach a “Competent Court/Forum”, which would mean a court or forum other than the Delhi High Court, as may be permissible, in accordance with law. Counsel submits that if it was the petitioners’ intention to file another writ petition before the same High Court, specific liberty to file such petition ought to have been taken from the Division Bench while withdrawing the earlier writ petition, which was not done.
13. Mr. Tyagi points-out, that in fact, the remedy available to the petitioners is to either file a writ petition before the Supreme Court under Article 32 of the Constitution of India; or to otherwise challenge their remand orders before the learned Special Court, as may be available under the National Investigation Agency Act, 2008 (‘NIA Act’).
14. In support of his arguments, Mr. Tyagi places reliance upon the decision of a Full Bench of the Punjab & Haryana High Court in ***Ram Kumar vs. District Magistrate, Delhi***,¹ where the Full Bench has explained that the power to issue writs resides *in the High Court* and *not in any single or particular Judge, or a Division Bench, or a Larger Bench* of the High Court. This, it is argued is the legal position, regardless of the fact that by way of distribution of work the Letters Patent or Rules of a High Court may contain provisions for hearing of

¹ 1965 SCC OnLine Punj 191



certain causes by a Single Judge and others by a Division Bench or a Full Bench. Counsel points-out, that the Full Bench of the Punjab & Haryana High Court has observed that such distribution of work is however merely an internal arrangement of the High Court for the exercise of its jurisdiction; but when a decision is given either by a Single Judge or by a Division Bench on a petition seeking issuance of a writ, *that decision is the decision of High Court as a whole.*

15. Learned SPP submits therefore, that the withdrawal of the earlier writ petition bearing W.P. (CRL.) No. 975/2024 before the Division Bench would not entitle the petitioners to approach a Single Bench by way of another writ petition, agitating the same cause of action. Learned SPP submits that the actions of the petitioners in this case amount to Bench-hunting, which cannot be permitted.
16. Mr. Tyagi has also placed reliance on *Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P., Gwalior & Ors.*,² to submit that in the said verdict the Supreme Court has made it clear that the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by a petitioner once he has withdrawn a writ petition without taking *specific permission to file a fresh writ petition.*
17. On the other hand, Mr. Siddhartha Borgohain, learned counsel appearing for the petitioners submits that during the course of submissions before the Division Bench, it had transpired that the petitioners were not ‘missing’ but that they were in the custody of the

² (1987) 1 SCC 5



NIA since they had been arrested on 13.03.2024, and had subsequently been remanded to NIA custody *vide* order dated 14.03.2024 made by the learned Special Court; and that therefore the plea seeking a writ of *habeas corpus* was not maintainable.

18. Counsel for the petitioners submits that accordingly, after making some submissions before the Division Bench, the petitioners sought permission to withdraw the *habeas corpus* petition with liberty to agitate the same issues before the “Competent Court/Forum”; and it was in these circumstances that the earlier writ petition was dismissed as withdrawn; and the Division Bench *expressly* granted to the petitioners “liberty as prayed”, namely, the liberty “to agitate the same issues before Competent Court/Forum”.
19. Mr. Borgohain submits that the earlier writ petition had also been filed with the prayer for setting-aside of the petitioners’ arrest, as being violative of Articles 21 and 22(1) of the Constitution of India, as well as for non-compliance of the law laid down by the Supreme Court in *D.K. Basu vs. State of W.B.*,³ and for breach of the guidelines passed by this court in the case of *Sandeep Kumar vs. State (Govt. of NCT of Delhi) & Ors.*⁴
20. Learned counsel further submits, that it is nobody’s case that the Division Bench adjudicated the challenge raised before it on merits; and that therefore, the question of applicability of the principles of res-judicata or constructive res-judicata does not arise. Counsel

³ (1997) 1 SCC 416

⁴ 2019 SCC OnLine Del 11901



submits that the earlier writ petition was filed at a point in time when the petitioners were unaware as to the basis of their detention and once they learnt the basis, they withdrew the earlier writ petition, with the *express* liberty to “agitate the same issues before Competent Court/Forum”, which is how the present writ petition has come to be filed.

21. Mr. Borgohain submits that the interpretation being sought to be placed by the NIA on words used by the Division Bench while granting liberty to the petitioners to agitate the same issues before “Competent Court/Forum” is extremely narrow and incorrect; and the present writ petition is accordingly maintainable before this court.
22. Learned counsel submits that there is no reason why the filing of the present writ petition before a Single Bench should not be covered within the words “Competent Court/Forum” used by the Division Bench in its order dated 16.04.2024, especially since the petitioners have no other statutory remedy available to them. It is submitted that upon a combined reading of sections 21(1) and 21(3) of the NIA Act, it is clear that the appellate remedy available under those provisions is not available against an ‘interlocutory order’; and that orders granting remand, such as the ones challenged in the present proceedings, are interlocutory orders.
23. It is argued that since no other statutory remedy is available to them, the petitioners are therefore left only with the option of invoking the extraordinary jurisdiction of a High Court under Article 226 of the Constitution if they wish to challenge the remand orders. It is also pointed-out that on a combined reading of section 6(9) and section



2(1)(c) of the NIA Act, it is seen that the only High Court that would have jurisdiction in relation to a matter arising under the NIA Act is the Delhi High Court, since the Special Court under section 6(9) of the NIA Act falls within the jurisdiction of this High Court as per section 2(1)(c) of the NIA Act; and the petitioners therefore cannot approach any other High Court.

24. It is argued that, in the circumstances, the petitioners have no alternate remedy available to them and cannot therefore be deprived of their remedy under Article 226 of the Constitution.
25. To address the reliance placed by the NIA on the decision of the Supreme Court in *Sarguja Transport Service* (supra), Mr. Borgohain submits that the said decision addresses a situation where the petitioners had withdrawn an earlier writ petition *without* taking permission of the High Court to file a fresh petition. Counsel submits that it was in those circumstances, that the Supreme Court ruled that on the principles of Order XXIII Rule 1(3) of the Code of Civil Procedure, 1908 ('CPC') where a party *abandons* a suit or *withdraws* from a suit *without* permission to file afresh, such party is precluded from instituting a fresh suit in respect of the same subject-matter, or in respect of the same claim or part of the claim. It is submitted that in *Sarguja Transport Service* the Supreme Court has extended the principle underlying Order XXIII Rule 1 CPC to cases of withdrawal of writ petitions in the interests of administration of justice, not on the ground of res-judicata but on the ground of public policy, so as to discourage a litigant from indulging in Bench-hunting.



26. Mr. Borgohain argues that the Supreme Court has however *expressly excluded* from the ambit of that principle a writ petition filed concerning the personal liberty of an individual in which a party prays for issuance of a writ petition in the nature of *habeas corpus* or seeks enforcement of some other fundamental right guaranteed under the Constitution, which question was left open in the said decision.
27. In the circumstances, it is argued that the present petition is most certainly maintainable before the Single Bench of this court.
28. Upon a careful consideration of the rival contentions raised by the parties, the following inferences can be safely drawn :
- 28.1 By way of the present writ petition, the petitioners have raised matters of serious consequences to them relating to their personal liberty, inasmuch as they seek to challenge their arrest at the hands of the NIA on 13.03.2024. It is the petitioners' contention that their arrest is illegal, being in violation of their fundamental rights guaranteed under Articles 14, 21 and 22 of the Constitution. The petitioners further seek to challenge the remand orders made by the learned Special Judge (NIA), Patiala House Courts, Delhi directing their detention in NIA custody, and subsequently in judicial custody, arguing that the arrest and remand are *non-est* in law *inter-alia* for violation of the mandate in *Pankaj Bansal vs. Union of India & Ors.*⁵ and *Prabir Purkayastha vs. State (NCT of Delhi)*⁶ which *inter-alia*

⁵ (2024) 7 SCC 576

⁶ (2024) 8 SCC 254



require that the ‘grounds of arrest’ ought to have been communicated to the petitioners in writing at the time of their arrest.

28.2 Though there is no doubt that the petitioners had filed an earlier writ petition bearing W.P. (CRL.) No. 975/2024, it is also not disputed that the earlier writ petition *was withdrawn* before the Division Bench, with the following specific order having been passed by the Division Bench, which bears repetition :

“1. After some arguments, learned counsel for the petitioner seeks permission to withdraw the present petition with liberty to agitate the same issues before Competent Court/Forum.

2. The present petition is dismissed as withdrawn and liberty as prayed is granted.”

A plain reading of the Division Bench order shows that *there was no adjudication* of the issues raised before the Division Bench; and *no order on the merits* of the issues was at all passed by the Division Bench.

28.3 The prayers made in the earlier writ petition bearing W.P. (CRL.) No. 975/2024, as extracted above, show that the petitioners had sought a writ in the nature of *habeas corpus* seeking the setting-aside of their arrest.

28.4 The NIA does not dispute that at the time of withdrawing the earlier writ petition, the petitioners had specifically sought liberty to “agitate the same issues” again, but it is NIA’s contention that liberty was sought to raise the same issues “before a Competent Court/Forum”, which would not include



another Bench of the same High Court. In support of this contention, the NIA relies upon the decision of the Full Bench of the Punjab & Haryana High Court in *Ram Kumar* (supra). Though there cannot be any cavil with the theoretical proposition that every Judge or Bench of a High Court is not a High Court in itself, and that all Judges or Benches together comprise the High Court, however that proposition cannot be extrapolated to mean that the allocation of rosters to various Judges or Benches is a meaningless exercise. Article 226 of our Constitution comprises what is arguably the widest ambit of extraordinary powers conferred upon a constitutional court, and the powers comprised in that provision are exercised by various Judges or Benches sitting singly or in Division Benches or in a Full Bench, both in relation to civil and criminal matters, dealing with various constitutional and statutory rights. It therefore does not stand to reason why the words “before Competent Court/Forum” appearing in order dated 16.04.2024 would, for any conceivable reason, exclude a Bench dealing with a different subject-matter allocation, even if the different Bench exercises powers under the same Article 226 of the Constitution. Since Article 226 of the Constitution confers very wide powers on a High Court, which are exercised by different Benches holding different subject-matter allocations, what is relevant is that the Bench before which the petition is filed must be *competent* to deal with that subject matter.



28.5 Shorn of unnecessary verbiage, it is evident that the petitioners had moved a petition seeking the writ of *habeas corpus* before the Division Bench, since *at that stage* they were unaware of the basis of their detention and were therefore seeking the relief that they be produced before a court of law. Subsequently however, the petitioners withdrew the petition filed before the Division Bench, whereby they sought and were granted specific liberty “to agitate the same issues before Competent Court/Forum.” It is neither necessary nor proper for this court to speculate as to what transpired before the Division Bench, since at the risk of repetition, the Division bench did grant to the petitioners liberty to agitate the same issues before a competent court/forum.

28.6 From a perusal of the provisions of the NIA Act, it is seen that since the Special Court before which the petitioners were produced by the NIA is at Delhi,⁷ by virtue of section 2(1)(c) of the NIA Act, the Delhi High Court is the jurisdictional High Court for matters relating to the petitioners’ arrest. Furthermore, the remedy under section 21 of the NIA Act is also not available to the petitioners, since no appeal is available under section 21 from interlocutory orders, and an order

⁷ The court has been informed that since, according to the NIA, the Scheduled Offence in the present case has been committed at a place outside India, the case was registered and investigated as if the offence has been committed in India; and by reason of sections 6(8) read with 6(9) of the NIA Act, the Special Court at New Delhi has jurisdiction over the matter.



allowing remand is an interlocutory order. Learned SPP has in fact not contested this position.

28.7 It is also noteworthy that in the prayers made before the Division Bench, the petitioners had challenged their arrest only in the context of a *habeas corpus* plea; whereas by way of the present petition they have challenged, both their arrest as well as their remand on the anvil of the recent decisions of the Supreme Court referred-to above, which challenge was not before the Division Bench.

28.8 If there were to remain any doubt as to the primacy accorded by the law to the right to liberty of an individual, suffice it to point-out that the decision of the Supreme Court in *Sarguja Transport Service* (supra), which has been cited by both sides with equal vehemence, clearly *carves-out an exception holding that matters relating to personal liberty are outside the ambit of the semantics of 'withdrawal' and 're-filing' of proceedings*. This has been clarified by the Supreme Court in the concluding para of that decision, which reads as follows :

*“... ... While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition **when he withdraws it without such permission**. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter*



***since the earlier writ petition had been withdrawn without permission to file a fresh petition.** We, however, make it clear that whatever we have stated in this order **may not be considered as being applicable to a writ petition involving the personal liberty of an individual** in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since **such a case stands on a different footing altogether.** We, however leave this question open.”*

(emphasis supplied)

- 28.9 All else apart, this court is of the view that in matters concerning questions of personal liberty, it would *never be just or proper* to reject a plea based on a pedantic, hyper-technical or restrictive construction of order dated 16.04.2024 made by the Division Bench, especially when that order expressly grants to the petitioners liberty to agitate the same issues before the competent court or forum.
29. In the above view of the matter, this court is of the opinion that the present petition is maintainable; and is entertained as such.
30. The preliminary objection raised by the NIA is rejected.
31. The matter be now listed for arguments on merits.

ANUP JAIRAM BHAMBHANI, J.

OCTOBER 01, 2024

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