(1997) 10 AHC CK 0107

Allahabad High Court

Case No: Habeas Corpus W.P. No. 9061 of 1994

Bal Mukund Jaiswal		APPELLANT
	Vs	
Superintendent, District Jail and Another		RESPONDENT

Date of Decision: Oct. 29, 1997

Acts Referred:

- Arms Act, 1959 - Section 25(1)
- Constitution of India, 1950 - Article 21, 22, 22(1), 32
- Criminal Procedure Code, 1973 (CrPC) - Section 107, 117, 151, 167, 209
- Explosive Substances Act, 1908 - Section 5
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21, 22, 25, 27, 8
- Penal Code, 1860 (IPC) - Section 120B, 121A, 122, 304B, 309
- Prisoners (Attendance in Courts) Act, 1955 - Section 3(2), 6

Citation: (1997) AWC 717 Supp

Hon'ble Judges: D.P. Mohapatra, C.J; Giridhar Malaviva, J; C.A. Rahim, J

Bench: Full Bench

Advocate: Daya Shankar Mishra, for the Appellant; G.A., for the Respondent

Judgement

Girdhar Malaviya, D.P. Mohapatra, C.J., and C.A. Rahim, JJ.
A Division Bench of this Court has referred the following question to be decided by the Full Bench:

Where an accused person is under judicial custody on the basis of a valid remand order passed u/s 209 or 309, Cr. P.C. by the Magistrate pending committal proceedings or trial, should he be set at liberty by issuing a writ of habeas corpus on the ground that his initial detention was violative of Constitutional guarantee enshrined in Articles 21 and 22 of the Constitution of India?

2. It may be mentioned here that the Petitioner filed the present petition challenging his detention in Varanasi Jail in Crime No. Nil of 1993/Special Trial No. 273 of 1993 u/s 8/21/22/25/27 of Narcotic Drugs and Psychotropic Substances Act of Police Station N.C.B. Varanasi. It was alleged that when the Petitioner was arrested in the said crime, he was not informed the grounds of his arrest with the result that his detention being in violation of the provisions of Section 50(1) of the Code of Criminal Procedure as also under Articles 21 and 22 of the Constitution was illegal particularly as his arrest was not in pursuance of any warrant of arrest. It is further mentioned in the petition that a complaint was filed against the Petitioner with the result that Case No. 273 of 1993 Union of India v. Bal Mukund Jaiswal, was registered against him under the provisions of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the Act) in the Court of the Sessions Judge, Varanasi which was at the time of filing of the petition, pending before the VIth Additional Sessions Judge, Varanasi. It was also mentioned in the petition that no order of remand was passed while sending the Petitioner to Jail in the abovementioned case nor was there any warrant directing detention of the Petitioner in connection with the said case and if stall there was any such warrant or order the VIth Addl. Sessions Judge had signed it like a rubber stamp without due application of mind in a mechanical manner. It was specifically pleaded that on 3.3.1994 while directing detention of the Petitioner in Jail the VIth Additional Sessions Judge had not signed the order sheet and had just completed a mere formality of putting his initial like a rubber stamp for which the relevant order sheet was annexed with the petition as Annexure-1. It was also alleged in the petition that the complaint before the Special Judge giving rise to Case No. 273/1993 was filed before the Sessions Judge on 12.2.1993 which, after being registered, was transferred to the Court of VIth Additional District and Sessions Judge, Varanasi on the same day but neither the Sessions Judge nor the Additional Sessions Judge passed any order to detain the Petitioner in custody. It was asserted that even on subsequent dates, i.e., 24.2.1993, 12.3.1993, 27.3.1993, 10.12.1993, 14.4.1993, 15.4.1993, 30.4.1993, 19.5.1993, 21.6.1993, 20.7.1993, 13.8.1993, 9.9.1993, 29.9.1993, 26.10.1993, 11.10.1993, 10.12.1993, 7.1.1994, 25.1.1994, 11.2.1994, 3.3.1994 and 8.3.1994 also there was no order directing detention of the Petitioner in the abovementioned case nor was there any warrant of remand directing detention of the Petitioner on the said dates and in any case the concerned Sessions Judge has only put his signatures as a rubber stamp in a mechanical manner on the order sheets of the said date. Accordingly it was prayed that the detention of the Petitioner being not in accordance with law the Petitioner was liable to be set at liberty.

3. On this petition, a Bench of this Court on 16.3.1994 granted two weeks time to State counsel to file the counter-affidavit. Consequently a counter-affidavit was filed by the Dy. Jailor of district Varanasi who stated that in pursuance of a warrant of Jail custody dated 27.11.1992 which was received together with the Petitioner in Jailon

the said date the Petitioner has been confined in Jail. It is further mentioned that thereafter from time to time warrants of Jail custody in respect of the Petitioner having been received the Petitioner was in Jail custody in pursuance of the said warrants of remand. The counter-affidavit which was sworn on 24.3.1994 said that last warrant of remand was passed on 19.3.1994 directing Petitioner''s custody in Jail upto 1.4.1994. The allegations that there was no warrant of remand were denied. The warrant as received in Jail from the Court of the Sessions Judge, Varanasi bearing his initials was filed with various dates mentioned on the reverse authorising detention of the Petitioner upto 1.4.1994. The Petitioner thereafter filed the rejoinder-affidavit. Thereafter the matter came up before a Bench of Hon. R. B. Mehrotra, J. and Hon. S. K. Phaujdar, J. It was argued before the Division Bench by learned Counsel for the Petitioner that when the Petitioner was arrested on 12.2.1993, he was not informed the grounds of his arrest and as such the arrest being in contravention of the rights guaranteed to a citizen under Article 22(1) of the Constitution, the detention of the Petitioner was rendered bad and on this ground alone the Petitioner was entitled to be released. It was apparently contended that even if for argument''s sake the subsequent orders of remand directing detention of the Petitioner were passed, the Petitioner could not be detained in Jail in pursuance of those orders of remand as the initial defect of illegal detention on account of Article 22(1) being violated could not be cured. In support of this contention, the Petitioner relied on the case of Vimal Kishore Mehrotra Vs. State of Uttar Pradesh and Another, . as also on the case of Raghvendra Singh v. State 1983 ALJ 611. The Petitioner also relied on the case of Ashok Kumar Singh v. State of U.P. 1987 LLJ 273 and on the case of Hazari Lal v. State of U.P. 1991 LLJ 230, and it was argued that the non-fulfilment of the requirement of the provisions of Article 22(1) of the Constitution results in an incurable illegality with the result that subsequent orders could not validate detention of the Petitioner. In other words it was argued that the doctrine of curability could not be extended to a person whose initial orders of detention was in violation of the provisions of Article 22(1) of the Constitution.

4. Against all these judgments of the Division Benches, the State counsel relied on a Full Bench decision of this Court in the case of Surjeet Singh v. State of U.P. 1984 ALJ 375 , as also on the case of Talib Hussain Vs. State of Jammu and Kashmir, and particularly on the case of Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, . Reliance was also placed by the State counsel on the judgments of the Supreme Court which took the view that relevant date for consideration of illegality of detention in a habeas corpus petition was the date of filing of the return or the date of appearance in any such petition. Considering various submissions made by learned Counsel for the Petitioner the Division Bench hearing this petition said that following points require decision by the Division Bench:

1. Where an accused person is under judicial custody on the basis of a valid remand order passed u/s 209 or 309, Cr. P.C. by the Magistrate pending committal proceeding or trial, should be set at liberty by issuing a writ or habeas corpus on the

ground that his initial detention was violative of constitutional guarantee enshrined in Articles 21 and 22 of the Constitution of India.

2. Whether the subsequent order of detention through the remand orders as on record be : said to be legal?

3. What could be the relief that the Petitioner may be given by this Court?

So far as the point No. 2 was concerned, the Division Bench noted that a Full Bench of five Hon''ble Judges was already considering the said point and consequently till the decision of the Full Bench on point No. 2 the Division Bench could adjourn the matter more particularly as it was referring point No. 1 for being considered by a Full Bench as per the referring order quoted earlier. The third point was also considered by the Division Bench and they followed the earlier instances of this Court where while pending decision of a question before the Full Bench some Hon''ble Judges had granted bail to the Petitioner, with the result that the Petitioner was enlarged on bail on furnishing his personal bond and two sureties to the satisfaction of the Court below.

5. The Division Bench before which the writ petition came up observed that the Supreme Court had drawn a distinction recustody on criminal charges and detentions under the preventive law. They noted that whereas in the case of Kanu Sanyal (supra) the Supreme Court recorded a finding that irrespective of initial non-observance of the provisions of Article 22(1) of the Constitution valid remand order could be made, in the case of Abdul Latif (supra) the Court held that in the case of preventive detention procedural safeguards had to be strictly adhered to. Thereafter noting that decisions of the Lucknow Bench of the High Court of Allahabad in the case of Ashok Kumar Singh (supra) having not noted the decision of the Allahabad Full Bench in Surjeet Singh''s case (supra) the Division Bench observed that although according to them the Court had to look to the legality of detention in a habeas corpus petition on the date of the writ petition overlooking initial defects even if the defect was an infringement of a constitutional right, yet since the view of the Division Bench was contrary to the Division Bench decisions of the Lucknow Bench of this Court hence it was necessary to refer the point to the larger bench. It is under these circumstances that the bench had referred the question formulated by it which has been quoted at the top of this opinion.

6. Before we proceed to consider the question referred, two things are very obvious. Firstly, that the question referred contemplates that in a habeas corpus petition, the detention of the Petitioner initially was violative of the constitutional guarantees enshrined under Articles 21 and 22 of the Constitution viz. that the detenu was not informed of the grounds of his arrest and/or was not afforded the constitutional guarantee to be represented by a lawyer of his choice and that person so arrested and detained in custody was not produced before the Magistrate within a period of 24 hours of such arrest excluding the time necessary for the challan from the place

of arrest to the Court and secondly, that thereafter by the time the matter came up before the Court there has been a valid order by a competent court directing such person to be detained in judicial custody. What this Full Bench has been asked to decide is that in such a situation can a subsequent valid order of remand passed u/s 209 or 309, Cr. P.C. by the Magistrate pending committal proceedings or trial should be set at liberty on the ground that his initial detention was violative of the constitutional guarantee enshrined under Articles 21 and 22 of the Constitution.

7. We have heard Sri D. S. Mishra learned Counsel for the Petitioner at great length. He has contended that once a person''s detention is rendered illegal on account of violation of his constitutional rights, then at no point of time his detention in Jail in pursuance of any order passed by any Court can cure the initial illegality. He has gone to the extent of saying that even in such a case where on his arrest and he has thereafter faced a full trial and the trial court has convicted him on a serious charge and has sentenced him to life imprisonment, even then detention in pursuance of such an order cannot cure initial illegality. We have to test whether the argument advanced by Sri D. S. Mishra is correct or has met the approval of any Court in any case. In this connection, Sri D. S. Mishra placed reliance on a Division Bench judgment of this Court in the case of Vimal Kishor Mehrotra (supra) in which both the Judges had held that if Petitioner''s detention on 26.5.1955 and on subsequent days was illegal, the fact that the necessary information somehow reached the Petitioner on 27.6.1955, would not render the detention legal. Therefore, the Petitioner had to be released. This view was taken by Oak, J. in paragraph 23 of his judgment and by Desai, J. in paragraph 34 of the said judgment. This case of Vimal Kishor Mehrotra was not dealing with the situation where a particular person''s detention at a subsequent stage had been legalised by a valid order of remand. The Court only considered the question whether the grounds of arrest were communicated to She Petitioner ''as soon as may be'' and since it was found that the grounds were not communicated forthwith, hence the bench found that the detention of the Petitioner was rendered illegal. The argument of the State that subsequent knowledge had cured the initial illegality was negatived by holding that the Petitioner had the fundamental right to be informed of the grounds of his arrest as soon as could be possible. It may also be noted that Hon. Judges of the High Court also observed that although it was possible that the release of the Petitioner in the said case could be very shortlived because he might be arrested again after full compliance of the provisions of Article 22 but that could be no ground for the Court not to release him from the unlawful detention which continued at the time of hearing of the petition. Sri Mishra also referred to the judgment of the Supreme Court in re Madhu Limaye AIR 1969 SC 1014. In the said case Madhu Limaye along with several other persons was arrested on 6.11.1968. On the same day Madhu Limaye addressed a petition in the form of a letter to the Supreme Court under Article 32 of the Constitution mentioning therein that he along with his companions had been arrested but had not been communicated grounds or the reasons for their

arrest and had consequently prayed for a writ of habeas corpus requesting that they be set at liberty. In a similar petition sent from Jail on 7.11.1968 to the Supreme Court it was also mentioned that the arrested persons have been produced before the Sub Divisional Magistrate who offered to release them on bail but Madhu Limaye and his companions had refused to furnish bail bonds whereupon they were remanded to custody upto 20.11.1968 On notice being issued by the Supreme Court the State of Bihar filed a return on 25. 11.68. As the Supreme Court wanted the relevant documents to be produced the hearing was adjourned to December 2, 1968. Meanwhile on 20.11.1968 the Magistrate had again remanded Madhu Limaye and his companions u/s 151/107/117, Cr. P.C.

8. When the matter was heard by the Supreme Court Madhu Limaye raised, inter alia, the following main contentions:

1. The arrest on November 6, 1968, were illegal inasmuch as they had been effected by Police Officers for offences which were non-cognizable.

2. There was a violation of the mandatory provisions of Article 22(1) of the Constitution.

3. The orders for remand were bad and vitiated.

4. The arrest were effected for extraneous considerations and were actuated by mala fides.

9. Considering the first question in paragraphs 10, 11 and 12, the Supreme Court in paragraph 11 quoted with approval judgment of the House of Lords in Christie v. Leachinsky 1947 (1) All ER 567, the following passage:

1. If a policeman arrest without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charges or on suspicion of what crime he is seized.

2...

3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

Lord Simonds gave an illustration of the circumstances where the accused must know why he is being arrested:

There is no need to explain the reason of arrest if the arrested man is caught red-handed and the crime is patent to high heaven.

In Paragraph 12. quoting with approval their judgment in the case of Ram Narayan Singh Vs. The State of Delhi and Others, , their lordships reiterated "that those who feel called upon to deprive other persons of liberty in the discharge of what they conceive to be their duty must, strictly and scrupulously, observe the forms and rules of law. Wherever that is not done the Petitioner would be entitled to a writ of habeas corpus directing his release."

Thereafter in paragraph 13, their lordships approved the view in Ram Narain Singh''s case (supra) that Court must have regard to the legalities or otherwise of the detention at the time of return and since they found what the return did not contain any information as to when and by whom Madhu Limaye and others were informed of the grounds of their arrest nor were they covered under proposition No. 3 in Christie''s case (supra) it was observed by their lordships of the Supreme Court that Madhu Limaye and others were, therefore, entitled to be released on their ground alone.

10. Sri D. S. Mishra has placed very strong reliance on this observation of the Supreme Court in paragraph 13 in Madhu Limaye''s case (supra) that the Petitioners were entitled to be released on this ground alone. However, what is to be noted at this very juncture is another important observation in the case of Madhu Limaye. In the very next paragraph, i.e., paragraph 14, their lordships observed as follows:

Once it is shown that the arrest made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand the Magistrate directed detention in Jail custody after applying his mind to all relevant matters. This the State has failed to do. The remand orders are patently routine and appear to have been made mechanically. All that Mr. Chagla has said is that if the arrested persons wanted to challenge their legality the High Court should have been moved under appropriate provisions of the Criminal Procedure Code. But it must be remembered that Madhu Limaye and others have, by moving this Court under Article 32 of the Constitution, complained of detention or confinement in Jail without compliance with the constitutional and legal provisions. If their detention in custody could not continue after their arrest because of the violation of Article 22(1) of the Constitution they were entitled to be released forthwith. The orders of remand are not such as would cure the constitutional infirmities. This disposes of the third contention of Madhu Limaye.

11. From this observation of their lordships of the Supreme Court in the case of Madhu Limaye (supra), it is clear that their lordships, did not stop after holding in paragraph 13 that Madhu Limaye and others were entitled to be released on the ground of non-compliance of the provisions of Article 22(1) of the Constitution but they further examined the second point formulated in paragraph 7 of the said judgment to examine whether a valid order of remand existed or not. Once their lordships found that the remand order by the Magistrate directing detention in Jail custody was without application of mind to all relevant matters and were not such

as could cure the constitutional infirmities, their lordships observed that the detention in custody being in violation of Article 22(1) of the Constitution Madhu Limaye and others were entitled to be released forthwith. This observation negatives the contention of Sri D. S. Mishra that the Courts are not competent to examine in a case similarly placed where despite violation of the provisions of Article 22(1) of the Constitution rendering initial detention illegal that the custody at a subsequent stage had been validated by a valid order of remand passed by the Magistrate.

12. Sri D. S. Mishra then relied upon a judgment of the Division Bench of this Court in the case of Hazari Lal v. State of U.P. (supra) in which case a writ of habeas corpus was sought on the ground that grounds or reasons of detention were not disclosed to the Petitioner at the time of his arrest on 16.7.1989. Hazari Lal was arrested in connection with an offence u/s 304B, Indian Penal Code. His bail application had been rejected by the High Court. Still the Petitioner challenged his continued detention in Jail on the ground of violation of Article (1) of the Constitution. On the notice being issued, the Court was apprised of the fact that the Petitioner had been informed the grounds of his detention as was borne out from the general diary entry dated 16.7.1989 which was to the following effect:

Abhiyukta Ko Giraftari Ka Karan Wa Jamanat Ka Adhikar Batakar Hirasat Me Liya Gaya.

Relying upon another judgment of the same Court in the case of Ashok Kumar Singh (supra) which relied on some other judgments of the Lucknow Bench of the Allahabad High Court, the Division Bench in Hazari Lal''s case observed that entry in the general diary did not meet the recruitment of the provisions of Article 22(1) of the Constitution, as in Ashok Kumar Singh''s case it had been held that the statement of the grounds to the person arrested must contain such, details as are mentioned in a charge framed for the purpose of trial in a Court of law. Thereafter the Bench observed as follows in paragraph 5:

We may also express that non-fulfilment of the requirements of the provisions of Article 22(1) of the Constitution of India results in an uncurable illegality to which doctrine of curability cannot extend. The contention of learned Counsel Sri Siddhartha Verma for the State to the contrary is not acceptable to us.

The petition was accordingly allowed.

13. Counsel for the parties have also addressed the Court on the point as to what should be the date to consider the legality of detention order, viz.. whether it should be the date of filing of the petition, the date of return or whether it should be the date of hearing. According to the State counsel, the validity should be judged on the date of hearing.

14. Sri D. S. Mishra, on the other hand, contended that the legality or validity of the detention order in cases where there has been a constitutional violation of any of fundamental rights has to be judged neither on the date when the petition is presented nor on the date of return. Sri Mishra strongly contended that since the detention of such a person becomes illegal right from the beginning and since detention of person rendered illegal on account of constitutional violation cannot be cured, hence the question of examining the legality or validity on the date of filing of the petition or on the date of filing of the return or on the date of hearing does not arise in such cases. His contention was that observation of the Supreme Court in this regard in some cases would not apply to the question for opinion before this Court where violation of a fundamental right has been alleged. We have to, therefore, examine if in a habeas corpus petition the continued detention of a person is sought to be set aside on the ground of a fundamental right being violated at the stage of initial arrest, whether in those cases the question of detention getting revalidated at some subsequent stage can arise before the Court or. not.

15. Sri Mahendra Pratap learned Additional Government Advocate who has argued this case on behalf of the State of U.P. has plated reliance on the judgment of the Supreme Court in the case of Kanu Sanyal v. District Magistrate, Darjeeling (supra). It would be necessary to go into the facts of the case of Kanu Sanyal to appreciate the points involved therein as also the points decided in the said case.

Kanu Sanyal was arrested by the police on 19.8.1970 along with some of his associates from a hideout within the jurisdiction of Phansidewa police station where a case was registered u/s 5 of the Explosive Substance Act and u/s 25(1)(a) of the Arms Act and Sections 120B, 121A, 122, 309 and 402 of the Indian Penal Code. Immediately after his arrest Kanu Sanyal was produced before the Sub-Divisional Magistrate, Siliguri who passed an order of remand directing his detention in District Jail, Darjeeling with a further direction to produce him before the Sub-Divisional Magistrate. Darjeeling from time to time and orders of remand were passed by the Sub-Divisional Magistrate, Darjeeling at regular intervals. Meanwhile, since the Petitioner was also wanted in a case which was pending in the Court of the Special Magistrate, Visakhapatnam, a warrant for production of Kanu Sanyal in the Court of Special Magistrate, Visakhapatnam was issued by him on 30.5.1972 u/s 3(2) of Prisoners (Attendance in Courts) Act, 1955. The officer-in-charge of District Jail, Darjeeling, consequently, sent Kanu Sanyal to the Court of the Special Magistrate, Visakhapatnam on 14.6.1972 where he was produced in the Court of Special Magistrate on 17.6.1972. Thereafter the Special Magistrate remanded Kanu Sanyal to judicial custody from time to time.

16. Kanu Sanyal, on 6.1.1973, preferred a writ petition from Central Jail, Visakhapatnam before the Supreme Court under Article 32 of the Constitution challenging the legality of his detention right from the time of its inception and prayed that he may be set at liberty by issuing a writ of habeas corpus. District

Magistrate, Darjeeling, Sub-Divisional Judicial Magistrate, Siliguri, Kursean and Darjeeling, the State of West Bengal. The Superintendent, Central Jail, Visakhapatnam and the Post Master General, West Bengal were made the Respondents in the writ petition. Meanwhile, the committal proceedings were heard by Special Judge, Visakhapatnam against the Petitioner and sixty six other accused who were all committed to the Court of Sessions to stand their trial for various offences in Sessions Case No. 46 of 1973 which was pending when the matter was heard by the Supreme Court. Their lordships of the Supreme Court noted in their judgment that the Petitioner was under detention in Central Jail, Visakhapatnam pursuant to the orders made by IInd Addl. Sessions Judge, Visakhapatnam pending trial.

17. Three contentions were made before the Supreme Court at the time of arguments of the said habeas corpus petition:

(A) The initial detention of the Petitioner in the District Jail, Darjeeling was illegal because he was detained without being informed of the grounds for his arrest as required by Clause (i) of Article 22 of the Constitution.

(B) The Sub-Divisional Magistrate, Darjeeling had no jurisdiction to try the two Phansidewa P.S. cases against the Petitioner and he could not, therefore, authorise the detention of the Petitioner u/s 167 of the Code of Criminal Procedure for a term exceeding fifteen days in the whole. It was only the Sub-Divisional Magistrate, Siliguri who had jurisdiction to try the two Phansidewa P.S. cases and he alone could remand the Petitioner to custody after the expiration of the initial period of fifteen days u/s 344 of the Code of Criminal Procedure. The orders of remand under which the Petitioner was detained in the District Jail, Darjeeling were, however, made by the Sub-Divisional Magistrate, Darjeeling and (he detention of the Petitioner in the District Court, Darjeeling was, therefore, illegal.

(C) The officer-in-charge of the District Jail, Darjeeling was bound to abstain from complying with the warrant for production issued by the Special Judge, Visakhapatnam by reasons of Section 6 of the Prisoners (Attendance in Courts) Act, 1955 and the production of the Petitioner before the Special Judge, Visakhapatnam pursuant to such warrant for production and his detention in the Central Jail. Visakhapatnam were consequently without the authority of law.

18. After the points were formulated, the Supreme Court then observed Re : Grounds A & B as follows:

These two grounds relate exclusively to the legality of the initial detention of the Petitioner in the District Jail, Darjeeling. We think it unnecessary to decide them. It is now well-settled that the earliest date with reference to which the legality of detention challenged in a habeas corpus proceeding may be examined is the date on which the application for habeas corpus in made to the Court. This Court speaking through Vanchoo, J. (as he then was) said in A.K. Gopalan Vs. The

Government of India, . It is well settled that in dealing with the petition for habeas corpus, the Court is to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of application and the date of hearing." In two early decisions of this Court, however, namely, Naranjan Singh Nathawan Vs. The State of Punjab, and Ram Narayan Singh Vs. The State of Delhi and Others, , a slightly different view was expressed and that view was reiterated by this Court in Col. Dr. B. Ramachandra Rao Vs. The State of Orissa and Others, , where it was said : "In habeas corpus the Court is to have regard to the legality of otherwise of the detention at the time of the return and not with reference to the institution of the proceedings." And yet in Talib Hussain Vs. State of Jammu and Kashmir, , Mr. Justice Dua, sitting as a single Judge, presumably in the vacation, observed that "In habeas corpus proceedings, the Court has to consider the legality of the detention on the date of the hearing." Of these three views taken by the Court at different times, the second appears to be more in consonance with the law practice in England and may be taken as having received the largest measure of approval in India, though the third view also cannot be discarded as incorrect, because an inquiry whether the detention is legal or not at the date of hearing of the application for habeas corpus would be quite relevant, for the simple reason that if on that date the detention is legal, the Court cannot order release of the person detained by issuing a writ of habeas corpus. Bui, for the purpose of the present case, it is immaterial which of these three views is accepted as correct, for it is clear that, whichever be the correct view, the earliest date with reference to which the legality of detention may be examined in the date of filing of the application for habeas corpus and the Court is not, to quote the words of Col. Dr. B. Ramachandra Rao Vs. The State of Orissa and Others, "concerned with a date prior to the initiation of the proceedings for a writ of habeas corpus". Now the writ petition in the present case was filed on 6th January, 1973 and on that date, the Petitioner was in detention in the Central Jail, Visakhapatnam. The initial detention of the Petitioner in the District Jail, Darjeeling had come to an end long before the date of the filing of the writ petition. It is, therefore, unnecessary to examine the legality or otherwise of the detention of the Petitioner in the District Jail, Darjeeling. The only question that calls for consideration is whether the detention of the Petitioner in the Central Jail, Visakhapatnam is legal or not. Even if we assume that grounds ''A'' and ''B'' are well founded and there was infirmity in the detention of the Petitioner in the District Jail, Darjeeling, that cannot invalidate the subsequent detention of the Petitioner in the Central Jail, Visakhapatnam.
(underlined by us)

See para 7 of the judgment of this Court in Col. Dr. B. Ramachandra Rao Vs. The State of Orissa and Others, . The legality of the detention of the Petitioner in the Central Jail, Visakhapatnam would have to be judged on its own merits. We, therefore, consider it unnecessary to embark on a discussion of grounds ''A'' and ''B'' and decline to decide them."

19. The abovementioned passage quoted from the judgment of Kanu Sanyal makes it clear that although before the Supreme Court, the detention of Kanu Sanyal was challenged right from the time of its inception and it was specifically pleaded vide question formulated at ''A'' that initial detention of the Petitioner was illegal for violating Article 22(1) of the Constitution, yet their lordships of the Supreme Court refused to go into that question once they found that subsequently the Petitioner Kanu Sanyal had been sent to Visakhapatnam Jail where it could be further judged whether his detention was in accordance with law or not. A perusal of the said judgment indicates that since the Supreme Court found that detention of Kanu Sanyal in Visakhapatnam Jail was valid in pursuance of the Orders of the Special Judge, hence the writ petition was dismissed by the Supreme Court. Accordingly, in view of the judgment of the Supreme Court in Kanu Sanyal''s case, the contention of Sri B. S. Mishra learned Counsel for the Petitioner that if at all initial detention of the Petitioner is rendered invalid for violation of some constitutional provision, then in no circumstance can the detention of such person be validated even at a subsequent stage cannot be accepted.

20. Sri Mishra vehemently argued that judgment in the case of Kanu Sanyal was delivered by a Bench of two Hon''ble Judges of the Supreme Court whereas the judgment in the case of Madhu Limaye (supra) was by a Bench of three Hon''ble Judges of the Supreme Court and since the view taken in Kanu Sanyal''s case was contrary to the view taken by the Supreme Court in Madhu Limaye''s case, hence the judgment in Kanu Sanyal''s case cannot be preferred over the judgment in Madhu Limaye''s case. The contention of Sri D. S. Misra was that in Madhu Limaye''s case, the Supreme Court after finding that arrest of Madhu Limaye and others was in violation of the provision of Article 22(1) of the Constitution, held that Madhu Limaye and others were entitled to be released on this ground alone which makes it clear that the question to examine the legality of detention in pursuance of any subsequent valid order of remand could not arise and hence following Madhu Limaye''s case, it must be held that consideration by the Supreme Court of the question of validity of detention order at a subsequent stage in Kanu Sanyal''s case being not in conformity with the judgment of the Supreme Court in the case of Madhu Limaye, this Court should not follow the case of Kanu Sanyal (supra).

21. We are afraid that Sri Misra is not right in his contention that in the case of Madhu Limaye (supra), the Supreme Court was not considering the question of legality of detention on the ground whether after the initial arrest of Madhu Limaye and others had been found to be bad in the eyes of law, it could be still validated by a subsequent valid order. We have quoted paragraph 14 of the judgment of the Supreme Court in the case of Madhu Limaye (supra) earlier which clearly shows that their lordships in the case of Madhu Limaye also considered the question of validity of Madhu Limaye''s detention pursuant to orders of remand. It is a different matter that in the case of Madhu Limaye, their lordships of the Supreme Court did not find the remand orders to be valid and hence the petition of Madhu Limaye was allowed,

whereas in the case of Kanu Sanyal, the subsequent order passed by the Visakhapatnam Court was found to be valid and hence the petition was dismissed. That however does not mean that the Supreme Court in the case of Madhu Limaye did not consider the question of illegal detention being validated at subsequent stage despite the fact that the initial illegality was rendered on account of non-compliance of the provisions of the Constitution.

22. Learned Addl. Government Advocate also brought to our notice the view of the Federal Court in the case of Basants Chandra Ghose v. Emperor AIR 1945 FD 18. In the last paragraph of the said judgment, their lordships of the Federal Court observed as follows:

It was finally contended that as the previous order of this Court directed an enquiry into the validity of the detention under the order of 19th March, 1942, the decision of the High Court must be limited to that question and that it was not open to the High Court to base its decision on the subsequent order of 3rd July, 1944. This contention proceeds on a misapprehension of the nature of habeas corpus proceedings. The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked here. If at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the Petitioner. The appeal fails and is dismissed.

The same view has been expressed by the Supreme Court in the case of Talib Husain (supra).

23. Learned Addl. Government Advocate also relied on a Division Bench judgment of this Court in the case of Vimal Kumar Sharma v. State of U.P. 1995 AWC 424, in which the Division Bench has held that illegality at the time of arrest cannot render subsequent remand orders passed by the competent courts invalidated. We have gone through this judgment and we find ourselves in agreement with the view expressed therein.

24. We have not been able to agree with the view taken in the case of Hazari Lal v. State of U.P. (supra) as also in the case of Ashok Kumar Singh v. State of U.P. (supra) which have gone to the extent of saying that once the detention of a person is rendered illegal on account of non-fulfilment of provisions of Article 22(1) of the Constitution, then such an illegality cannot be cured even by a subsequent valid order of remand. Accordingly, the case of Hazari Lal and Ashok Kumar Singh as also the cases mentioned therein taking the same view are overruled.

25. Our answer to the question referred, therefore, is as follows:

Where an accused person is in judicial custody on the basis of a valid remand order passed u/s 209 or 309, Code of Criminal Procedure by the Magistrate or by any other competent court, then such accused person cannot be set at liberty by issuing a writ of habeas corpus solely on the ground that his initial detention was violative of a constitutional guarantee enshrined in Articles 21 and 22 of the Constitution of India.

Let the papers be now placed before the Division Bench with this opinion.