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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ W.P.(CRL.) 1773/2023 & CRL.M.A. 16555/2023, CRL.M.A.
16556/2023

RAHUL LUNIA

..... Petitioner

Through: Mr. Sahil Mongia, Mr. Prateek
Mehta, Mr. Vikas, Mr. Rahul Yadav, Mr. Sahil
Rao, Ms. Megha Mehta, Advs.

versus

STATE – GOVT. OF NCT OF DELHI & ORS.

..... Respondent

Through: Mr. Sanjeev Bhandari, ASC with Mr.
Kunal Mittal, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

HON'BLE MR. JUSTICE VIKAS MAHAJAN

ORDER

16.06.2023

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1. This is a petition under the writ of *habeas corpus* seeking direction to the respondent Nos. 3 and 4 to produce the petitioner before this Hon'ble Court and also to set aside the impugned order dated 15.06.2023 passed by the learned Duty MM, South East Distt., Saket Courts.
2. It is stated by Mr. Mongia, learned counsel for the petitioner that in the present case, the Duty Magistrate should have seen the Case Diary (CD) and thereafter opined whether a case of transit remand has been made out. He further states that the Duty Magistrate could not have seen the Case Diary as it was in Marathi language and states that the order of transit remand is illegal and hence, the petition under *habeas corpus*.

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3. Mr. Bhandari, learned ASC states that the present petition is misconceived.
4. The petitioner is in custody pursuant to the orders of the concerned Court dated 14.06.2023 and hence, his custody is not illegal. He further states that the Duty Magistrate has duly applied his mind and thereafter held that the I.O. will take the accused before the jurisdictional MM, wherein his bail application would be adjudicated upon merits.
5. Mr. Bhandari, learned ASC states that the petition in the present Court is not maintainable. He further states that the Duty Magistrate has applied his mind and thereafter passed the transit remand order.
6. Mr. Mongia, learned counsel for the petitioner also relies upon the judgment of “***Gautam Navlakha vs. National Investigation Agency***” [(2021) SCC OnLine SC 382].
7. We have heard learned counsel for the parties.
8. A perusal of the order dated 15.06.2023 shows that the application filed by the petitioner under Section 437 Cr.PC was not considered by the Duty Magistrate and the Duty Magistrate granted transit remand.
9. We are of the view that the Duty Magistrate has the power to decide the application under Section 437 Cr.PC.
10. We find support from the judgment of “***Gautam Navlakha vs. National Investigation Agency***” (supra) [(2021) SCC OnLine SC 382]. Paragraphs 63, 64 and 65 read as under:-

“63. Thus, an order under Section 167 is purely an interlocutory order. No revision is maintainable. A petition under Section 482 cannot be ruled out. Now at this juncture we must notice the following dimension. When a person arrested in a non-bailable offence is in

custody, subject to the restrictions, contained therein, a court other than High Court or Court of Session, before whom he is brought inter alia, can release him on bail under Section 437 of the Cr.P.C. Section 439 of the Cr.P.C. deals with special powers of High Court and court of session to grant bail to a person in custody. The said courts may also set aside or modify any condition in an order by a Magistrate.

64. *In Central Bureau of Investigation, Special Investigation Cell v. Anupam J. Kulkarnis, we may notice the following statement:-*

"Now coming to the object and scope of Section 167 it is well- settled that it is supplementary to Section 57. It is clear from Section 57 that the investigation should be completed in the first instance within 24 hours; if not the arrested person should be brought by the police before a Magistrate as provided under Section 167. The law does not authorise a police officer to detain an arrested person for more than 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate court. Sub- section (1) of Section 167 covers all this procedure and also lays down that the police officer while forwarding the accused to the nearest Magistrate should also transmit a copy of the entries in the diary relating to the case. The entries in the diary are meant to afford to the Magistrate the necessary information upon which he can take the decision whether the accused should be detained in the custody further or not. It may be noted even at this stage the Magistrate can release him on bail if an application is made

and if he is satisfied that there are no grounds to remand him to custody but if he is satisfied that further remand is necessary then he should act as provided under Section 167"

65. Thus, ordinarily, when the court considers a request for remand there would be an application for bail. It is for the court to grant bail failing which an order of remand would follow."

11. Hence, we set aside the impugned order dated 15.06.2023 passed by the learned Duty MM, South East Distt., Saket Courts and direct that the application under Section 437 CrPC filed by the petitioner should be heard and decided on merits.
12. As far as the maintainability of writ of *habeas corpus* is concerned, we find support in paragraph 71 of the judgment "***Gautam Navlakha vs. National Investigation Agency***" (supra) which reads as under:-

"71. Thus, we would hold as follows :

If the remand is absolutely illegal or the remand is afflicted with the vide of lack of jurisdiction, a habeas corpus petition would indeed lie. Equally, if an order or remand is passed in an absolutely mechanical manner, the person affected can seek the remedy of habeas corpus. Barring such situation, a habeas corpus petition will not lie."
13. Since the order or remand has been set aside, we are of the view that the *habeas corpus* petition lies before this Court. The order dated 15.06.2023 is hereby set aside with the direction to the Duty Magistrate

to consider and decide the application moved by the petitioner under Section 437 CrPC within 2 days from receiving of the order.

14. The petition is disposed of.
15. The concerned I.O. from the GK, Police Station is present and has been apprised of the order to communicate this order to the Jail Superintendent.

**JASMEET SINGH, J
(VACATION JUDGE)**

**VIKAS MAHAJAN, J
(VACATION JUDGE)**

JUNE 16, 2023 / (MS)

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