

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH JAIPUR.

O R D E R

THE STATE OF RAJASTHAN Vs. Ravishankar Srivastava

S.B. CRIMINAL MISCELLANEOUS CANCELLATION OF BAIL
APPLICATION NO.3980 OF 2004

STATE OF RAJASTHAN VS. AJAY DATA

S.B. CRIMINAL MISCELLANEOUS CANCELLATION OF BAIL
APPLICATION NO.3844 OF 2004

DATE OF ORDER ::: 24TH JUNE, 2005.

PRESENT

HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN

Mr. Mohd. Rafiq, Addl. Advocate General for the State
Mr. S.S. Hora, for non-applicant R.S. Srivastava
Mr. A.K. Gupta, for non-applicant Ajay Data

Reportable //

By the Court :

1. The State of Rajasthan has filed these two applications under Section 439 (2) Cr.P.C. for cancellation of order granting bail to the accused-non-applicants by Mr. R.S. Rathore, RHJS, Special Judge,

Sessions Court (Prevention of Corruption Act) Jaipur, (for short "Special Judge"), in FIR No.109/2004 of Anti Corruption Bureau, Jaipur. The Special Judge has granted bail to accused-non-applicant R.S. Srivastava (here-in-after referred as "an accused") vide order dated 10th August 2004 on an application under Section 167 (2) Cr.P.C., whereas the another accused-non-applicant Ajay Data (here-in-after referred as "co-accused") has been allowed bail under Section 437 Cr.P.C. vide order dated 11.08.2004. Both the applications under Section 439 (2) Cr.P.C. arise from FIR No.109/2004 of Anti Corruption Bureau, Jaipur and both the orders have been passed in the same FIR by the same Judge, therefore, both these applications are disposed of by a common order.

2. The facts in brief are that on 9th June, 2004, two first information reports bearing No.109/2004 (for short "First FIR") and 110/2004 (for short "second FIR") were registered against accused R.S. Srivastava and others by Anti Corruption Bureau, Jaipur for offences under Sections 7,8, 13 (1) (a) and 13 (1) (d) (2) of the Prevention of Corruption Act, 1988 read with Section 120-B IPC.

(i) In the first FIR, it was alleged

that on 23.05.2004, an information was received that accused R.S. Srivastava, IAS, who was holding the post of Member, Revenue Board, Rajasthan, Amer, had decided a revenue case pending before him, namely, Smt. Kamla Devi Vs. State on 21.05.2004 against the plaintiff. Later-on 9 persons came from Dholpur and met the Member, Board of Revenue, Mr. R.S. Srivastava, who agreed to decide the case in favour of plaintiff on bribe of Rs.30 lacs. Mr. Suresh Bansal, Raminwas Lawania, Mahesh and Others remained in contact with accused to finalize the deal and other terms as to when and where and to whom the amount of illegal gratification is to be paid. Thereafter, accused suggested to file review petition and assured that in case payment of Rs.5 lacs is made by 3rd or 4th June, then he will decide the case within 3-4 days. He also assured that he will grant interim stay order in review petition. It was also agreed that Shri Suresh Bansal, Advocate, resident of Dholpur and Ram Niwas Lawania will make the payment of first installment of Rs.5 lacs. During verification of the facts and investigation thereof, it transpired to the Anti Corruption Bureau that nine persons stayed in one hotel at

Jaipur. Thereafter payment of Rs.5 lacs was paid to co-accused Ajay Data at the instance of accused and ultimately the review petition was allowed by accused R.S. Srivastava, Member, Board of Revenue, Rajasthan, Ajmer, on 07.06.2004 itself without pronouncing judgment in open Court.

(ii) The second FIR was registered in respect of some other revenue cases bearing Nos.2001/04,2002/04 and 2003/04 relating to N.B.C. Unit of Birla Group situated at Jaipur in respect of a land measuring 54 acres. It was alleged that after settling huge amount as bribe or some share in the land, the accused decided the said revenue cases in favour of the concerned party.

(iii) The accused R.S. Srivastava was arrested on 10th June 2004 in second FIR No.110/04. He was not arrested in the first FIR No.109/04. The first FIR was relating to land situated at Dholpur and was subject matter of revenue case titled as Smt. Kamla Devi Vs. State. The second FIR was in respect of another land which was subject matter of other cases and the land in dispute was situated at different places. The co-accused persons in both the FIRs are also

different except Mr. Pande, P.A., of main accused.

3. Facts relating to accused R.S. Srivastava

(i) The accused, while in custody in second FIR, moved an application for anticipatory bail under Section 438 Cr.P.C., before the Special Judge in first FIR on 22nd June, 2004, a copy of which has been placed on record as Annex.1, wherein the main accused, in para 2, specifically mentioned that he has been arrested in second FIR but has not been arrested in the first FIR. The Investigating Officer filed written reply for rejection of above application, wherein it was mentioned that another co-accused Ajay Data is being searched and will be arrested very soon, thereafter, sufficient evidence will be available in the police diary and prosecution will make an application for taking police custody of accused in first FIR No.109/04. The aforesaid application was rejected by the Special Judge, vide its order dated 25.06.2004, which is reproduced as under:-

"APP present. Counsel for the accused present. ACB submitted an application, stating that some interrogation was done in the case

while the accused was in police custody in the other case 110/04, as per the note incorporated in the case diary of 109/04.

While some important evidence has been collected, yet much investigation needs to be done to bring about cogent evidence to make the arrest of the accused in this case and move a remand application for transferring the custody of the accused from J.C. To P.C.

In view of the above averments, I am not inclined to accept the application of the accused under Section 438 Cr.P.C. Hence it is rejected.

Sd/- R.S Rathore
Special Judge (PCA), Jaipur

(ii) Thereafter, the accused moved another application on 05.07.2004 under Section 167 Cr.P.C. to the effect that on 10.06.2004, he was arrested in second FIR and during custody in second FIR, he was interrogated in first FIR also but no formal arrest memo was prepared in first FIR. He contended that the said interrogation was custodial interrogation and his custody in second FIR No.110/04 was also deemed custody in first FIR No.109/04. He further submitted that a remand for

police custody was given only in second FIR for five days on 11.6.2004 and again further remand was given in second FIR, therefore, his continued detention beyond 24 hours, without proper remand, in first FIR (in which he was not arrested) be treated as illegal and he should be set free on suitable bail bonds. The prosecution opposed the said application of the accused under Section 167 Cr.P.C. The Special Judge, after hearing the arguments, vide order dated 7.7.2004, rejected the application of accused moved under Section 167 Cr.P.C. in first FIR. The operative portion of the order is reproduced as under :-

"After hearing the above arguments and the inferences drawn from them, as enumerated above, I am in agreement with the correct position of law laid down by the learned counsel for the accused. However, the Court cannot become immune to the gravity of the offence and the fact that the lapses/inadvertence of the

Investigating Agency should not, in any manner, thwart the fair and proper investigation of the case of corruption of such magnitude. This again would be sabotaging the investigation in its infantile stage and would certainly not serve the larger public interest which, in my humble view, the Court should perceive and be sensitive about it. Therefore, the application of the accused is not accepted."

It is relevant to mention that the above order was not challenged by accused.

(iii) Subsequently, the accused moved another application under Section 167 Cr.P.C., on 10th August, 2004, at 4 p.m. in the first FIR to the effect that he was arrested on 10th June 2004 in second FIR and his custody was a deemed custody in the first FIR also and a period of sixty days has passed from 10th June 2004 and no charge-sheet has been filed in first FIR, therefore, he should be granted bail in terms of Section 167 Cr.P.C. The Special P.P. Filed reply to the above application and made a request in writing that the accused has not been taken into custody in first FIR. The accused remained most of the time

sick and hospitalized during the custody and investigation in second FIR, therefore, he could not be arrested in first FIR. It was also mentioned that application has been filed at 4.30 p.m., and it was not possible to call Investigating Officer as well as the case diary, therefore, in the interest of justice, a reasonable time should be granted to call the I.O., case diary and for arguments. A copy of this reply was delivered to the learned counsel for the accused after taking his receipt on 10.08.2004 at 5.15 p.m., certified copy of which has been placed on record as Annex.8. The Special Judge did not grant time to prosecution to call I.O., police diary or for arguments and allowed application under Section 167 (2) Cr.P.C., filed on behalf of accused in first FIR No.109/04 on the same day and released the main accused on bail in first FIR deeming his custody in this FIR also.

(iv) The aforesaid order dated 10th August 2004 has been impugned by the State of Rajasthan in S.B. Criminal Misc. Cancellation of Bail Application NO.3980/2004.

4. Facts relating to co-accused Ajay Data.

(i) So far as co-accused Mr. Ajay Data is concerned, he was an accused in first FIR. His house No. D-47, Hanuman Nagar, Jaipur was searched by a team of Anti Corruption Bureau. However, he remained absconded and was not available. On 20th July, 2004, he moved an application for anticipatory bail under Section 438 Cr.P.C., in the Court of Special Judge, who vide his order dated 30.07.2004, rejected the application but in the same order, he granted interim bail to co-accused with certain conditions.

(ii) On 3rd August 2004, the Investigating Officer, moved an application before the Special Judge stating that co-accused had not appeared before him as directed regularly and further that as and when he appeared he avoided interrogation alleging physical and mental agony. He did not cooperate with the investigation. Therefore, it was prayed that interim bail granted to co-accused Ajay Data be cancelled. The Special Judge dismissed the application on 3rd August 2004 itself.

(iii) Subsequently, on 11.08.2004,

the co-accused Ajay Data surrendered himself before the Special Judge along with application under Section 437 Cr.P.C. The Special Judge allowed the same on the same day and released him on bail. The State has challenged all the three orders dated 30.7.2004, 3.8.2004 and 11.8.2004 in S.B. Criminal Misc. Cancellation of Bail Application NO.3844/2004.

5. The learned Additional Advocate General and the learned counsels for both the accused persons have argued the case at length. They have also cited number of judgments in support of their contentions.

In the present case, an important question of law has arisen as to whether the arrest of main accused Mr. Srivastava in second FIR, can be treated as deemed custody in first FIR also and on failure of filing charge-sheet in first FIR within stipulated period from the date of so called deemed custody, is the accused entitled to be released on bail under proviso (a) of sub-section (2) of Section 167 Cr.P.C.?

6. The Additional Advocate General has contended that in the case of accused Ravi Shanker Srivastava, the Special Judge has wrongly relied upon the judgment of

the Division Bench of this Court in the case of Jawahar Singh Vs. State (1990 Cr.L.R. (RAJ) 95) to the effect that if an accused is available in one case then his custody will be deemed to have been treated in second case also from the date of custody in one case. He submits that aforesaid view of the Division Bench is contrary to the law laid down by the Hon'ble Supreme Court in CBI Vs. Anupam J. Kulkarni (AIR 1992 SC 1768), wherein the Hon'ble Supreme Court has specifically laid down that if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case, they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation, he must be formally arrested in connection with other case and then obtain the order of the magistrate for detention in police custody. He further contended that the Division Bench of this Court in State Vs. Sukh Singh (AIR 1954 Raj. 290) had already laid down the principle that an accused could be taken into police custody in another case while in judicial custody in first case. He submits that a Division Bench of this Court in Jawahar Singh's case (supra) did not consider the principles laid down by earlier Division Bench judgment of this Court itself in State Vs. Sukh Singh (supra).

However, he submits that in view of the judgment of Hon'ble Supreme Court in the case of C.B.I. Vs. Anupam J. Kulkarni (supra), the ratio laid down by the Division Bench of this Court in Jawahar Singh's case is not binding and the same is impliedly over-ruled. He has also referred the recent Full Bench decision of this Court in the case of State of Rajasthan Vs. Santosh Yadav (2002 (2) WLC (RAJ) 1), wherein it has been held that police can seek permission to remove an accused from judicial custody to police custody for completion of investigation in another case. Therefore, he submits that without formal arrest of an accused, there cannot be deemed custody of an accused in another case. He further contended that the Special Judge himself rejected the bail application of the accused under Section 438 Cr.P.C., vide order dated 25.06.2004, therefore, the accused had knowledge that he had not been arrested in first FIR; that the Special Judge rejected the first application of the accused filed under Section 167 Cr.P.C., after considering the judgment of Division Bench in the case of Jawahar Singh Vs. State of Rajasthan (1990 Cr.L.R.) (RAJ) 95), vide detailed order dated 7.7.2004 which was not challenged by accused. Thereafter, there was no occasion or change of circumstances to allow second application under Section 167 CR.P.C., filed by the accused, by the

Special Judge on 10.8.2004. He contended that passing of impugned order dated 10.8.2004 amounts to review, by Special Judge, to his own orders dated 25.6.2004 rejecting the application for anticipatory bail and second order dated 7.7.2004 rejecting application of the accused under Section 167 Cr.P.C. He submits that Section 362 Cr.P.C., completely bars review of an order by any criminal Court. He has placed reliance on the following judgments of the Hon'ble Supreme Court in this regard :-

(a) (2001) 1 SCC 169, Hari Singh Mann Vs. Har Bhajan Subgg Bajwa;

(b) J T 2004 (7) SC 243, Adalat Prasad Vs. Rooplal Jindal and others; and

(c) (2001) 4 SCC 752, State of Kerala Vs. M.M. Manikantan Nair.

He further submits that in the present case, the Special Judge has exercised his discretion on the basis of irrelevant and extraneous grounds and has wrongly granted bail under Section 167 (2) CR.P.C., by holding deemed custody of the accused in first FIR. This order has occasioned miscarriage of justice and has been passed ignoring relevant provisions of law as

well as material evidence on record. He submits that impugned order is absolutely incorrect and contrary to the provisions of law as well as to the judgment of the Hon'ble Supreme Court in the case of CBI Vs. Anupam J. Kulkarni (supra) and in such circumstances, the incorrect passed by the Special Judge should be corrected by this Court while exercising powers under Section 439 (2) Cr.P.C. He further contends that the impugned order is based on extraneous consideration for the reason that on 10th August 2004, second application under Section 167 (2) Cr.P.C., was moved at 4.30 p.m., just half an hour before the Court's time and at 5.15 p.m., the public prosecutor made a request in writing that it is not possible to call the case diary and the I.O., and he should be given time for calling the case diary as well as the I.O., and also for arguments as point involved in the present case is legal. However, no time was granted and on the same day, i.e., 10th August, 2004 itself, after court hours, the Special Judge passed a detailed order and allowed bail to accused Ravi Shanker Srivastava under Section 167 (2) CR.P.C. It has further been contended that even in custody of accused in second case, in most of the period, he either remained sick or hospitalized, therefore, investigation could not be completed and as such he could not be arrested in another case. In

support of his contention, learned AAG has placed reliance on the following judgments :-

(a) (2001) 6 SCC 338, Pooran Vs. Ram Bilas and another;

(b) (1985) 2 SCC 597, Pokar Ram Vs. State of Rajasthan;

(c) (2003) 3 SCC 183, Ghanchi Rubinassalim Bhaj vs. Metubha Diwan Singh Solanki;

(d) (2001) 4 SCC 224; State of Maharashtra Vs. Rinesh;

(e) (1998) 1 SCC 52, Dukhishyam Benepani, Astt. Director, Enforcement Directorate (FERA) Vs. Arun Kumar Bajoria; and

(f) (2003) 1 SCC 15, Ram Pratap Yadav Vs. Mitrasen Yadav and another.

7. With regard to co-accused Ajay Data, learned AAG contended that while rejecting the anticipatory bail application filed by co-accused, vide order dated 30.07.2004, the Special Judge committed an error in granting interim bail to the accused by the same order date 30.7.2004, therefore, impugned order dated

30.7.2004 is contradictory and illegal. He further contends that when the co-accused did not comply with the terms and conditions of interim bail dated 30.7.2004, then an application was moved on 3.8.2004 by the I.O., regarding non-cooperative attitude on the part of the co-accused. The Special Judge, instead of vacating the order granting interim bail, passed more favorable order by putting more favorable conditions in favour of the co-accused as mentioned in the order dated 3.8.2004. He next contended that the Special Judge has committed an illegality in allowing the application under Section 437 Cr.P.C., as co-accused was neither taken into police custody nor in judicial custody. He further submits that even if he was presumed to have been taken into judicial custody, then without any recovery and interrogation from him, it was not proper to allow the co-accused on bail under Section 437 Cr.P.C., an order for remand of police custody ought to have been passed. In support of his contention, learned AAG has placed reliance on the following judgments:—

(a) JT 2004 (7) SC 161, Nirmal Jeet Kaur Vs. State of M.P. And another;

(b) AIR 2005 SC 498, Sunita Devi Vs. State of Bihar;

(c) (1997) 7 SCC 187, State Vs.
Anil Sharma; and

(d) 2001 (2) Crimes (SC) 239,
Muraleedharan Vs. State of Kerela.

8. The learned counsels for the accused-non-applicants have vehemently opposed the applications under Section 439 (2) Cr.P.C.

9. Mr. S.S. Hora, learned counsel for the main accused R.S. Srivastava contended that the order granting bail is based on the judgment of Division Bench of this Court in the case of Jawahar Singh (Supra). Therefore, there is no illegality in the order passed by the Special Judge granting bail to the accused R.S. Srivastava under Section 167 (1) and (2) CR.P.C., deeming custody of the accused in first FIR also w.e.f., 10.6.2004. A person is arrested as per Section 46 Cr.P.C. He submits that no formal order is required for arrest of accused and in case no arrest memo is prepared then still implied arrest of the accused was in accordance with Section 46 Cr.P.C. He has also referred Sections 41, 57 and 167 Cr.P.C. The accused was interrogated in first FIR also while in custody in second FIR. Therefore, that interrogation

should be treated as custodial interrogation and his arrest in second FIR should be treated as deemed arrest in first FIR also. So far as the moving of application under Section 438 Cr.P.C., by accused in first FIR on 22.6.2004 is concerned, he submits that it was moved on wrong advice, otherwise there was no need to move such application in view of judgment of Division Bench of this Court in the case of Jawahar Singh (supra). He also submitted that the same mistake was committed by the Special Judge while rejecting the first application of the accused under Section 167 (1) Cr.P.C., vide order dated 7.7.2004. So far as moving of second application under Section 167 Cr.P.C., on 10.08.2004 at 4.30 p.m., is concerned, he submits that he was granted bail in second FIR on 10.8.2004 and in case he would not have moved the said application, then there were chances that the accused could have been arrested in first FIR. He submits that as per the judgment rendered in the case of Jawahar Singh (supra), the accused was in deemed custody, therefore, the provisions of Section 167 (2) Cr.P.C., were fully applicable in the present case also and there is nothing wrong on the part of the Special Judge in passing the impugned order dated 10.8.2004. He also contended that Anti Corruption Bureau itself has issued a circular dated 17.12.1996 to the effect that

normally an accused should not be arrested. He has referred the following judgments in support of his contentions:-

(a) (1999) 3 SCC 715, Manoj Vs. State of M.P.;

(b) AIR 1993 SC 1, Aslam Babalal Desai Vs. State of Maharashtra;

(c) AIR 1980 SC 785, Niranjan Singh and another Vs. Prabhakar Rajaram;

d) 1990 Cr.L.R. (Raj.) Jawahar Singh Vs. State;

(e) 1983 CR.L.J., 1748, Jagannathan and others Vs. the State;

(f) 1996 Cr.L.J. 2600 Mrs. Iqbal Kaur Kwatra Vs. The Director General of Police, Rajasthan State, Jaipur and others.

(g) AIR 1977 SC 1096, Govt., of Andhra Pradesh and another Vs. Anne Venkateshwara Rao etc.,

(h) 1992 CR.L.J. 1173, Kultej Singh Vs. Circle Inspector of Police and others.

(i) AIR 1980 SC 1632, Gurbaksh Singh

and another Vs. the State of Punjab;
and

(j) 1991 (1) Kar.L.J., 494, Ramu Vs.
State of Karnataka.

10. Mr. A.K. Gupta, counsel for the accused non-applicant Ajay Data has contended that this is an application for cancellation of bail order already passed by the Special Judge and factors for granting bail and for cancellation of bail already granted are altogether different. This application under Section 439 (2) Cr.P.C., should not be heard as an appeal or revision. He further contended that co-accused similarly situated, namely, Lalit Goyal, Girish Goyal, Suresh Bansal and Ram Niwas Lawania have already been granted bail. So far as Suresh Bansal and Ram Niwas Lawania are concerned, they preferred writ petition before this Court to quash the FIR. But while, rejecting their writ petition, this Court converted the warrant of arrest into bailable warrant. Therefore, he submits that the bail of co-accused granted under Section 437 Cr.P.C., should not be cancelled. He also contended that from the bare reading of FIR, it is clear that Ajay Data has been made as an accused with the aid of Section 120-B IPC whereas from the contents of FIR, no prima facie case is made out against him for

the offence under Section 120-B IPC. The ACB has brought in three telephone transcripts pertaining to the alleged conversation between Ajay Data and suspected officer. However, he submits that tapping of telephone is illegal in view of Section 5 (2) of the Indian Telegraph Act. In support of his contention, he has referred the judgment reported in (1997) 1 SCC 301, People's Union for Civil Liberties (PUCL) Vs. Union of India and anr. It is further contended that no-one can be compelled to give information under Section 27 of the Evidence Act. Therefore, there is no need of any interrogation from Ajay Data. Hence, bail order should not be cancelled. He has referred the case of the State of Rajasthan Vs. Akhlesh Chandra Sharma (1984 (6) R. Cr.C. 156). He submitted that the co-accused surrendered before the Court and moved an application under Section 437 Cr.P.C., therefore, it was a judicial custody and application under Section 437 CR.P.C., has rightly been allowed. Mr. Ajay Data was out of India during the period from May 11, 2004 to May 27, 2004, therefore, it is clear that he was not a member of conspiracy. He has referred the following judgments :-

(a) AIR 2004 SC 4207, Samarendra Nath Bhattacharjee Vs. State of West Bengal and anr;

(b) AIR 2003 SC 18 Mahant Chand Nath Yogi Vs. State of Haryana;

(c) AIR 1993 SC 1 Aslam Babalal Desai Vs. State of Maharashtra;

(d) JT 2005 (1) SC 361, Jayendra Saraswathi Swamigal Vs. State of Tamil Nadu;

(e) AIR 1980 SC 1632, Gurbaksh Singh Vs. State of Punjab;

(f) AIR 1994 SC 1349, Joginder Kumar Vs. State of U.P. And others; and

(g) (1995) 1 SCC 349, Dolat Ram and Ors. Vs. State of Haryana.

11. I have considered the submissions of learned counsels for their respective parties. I find no substance in the submission urged on behalf of accused Srivastava but there is substance in the submissions urged on behalf of co-accused Ajay Data.

12. The Special Judge, while passing impugned order dated 10.8.2004, granting bail to accused R.S. Srivastava treating him as in deemed custody in FIR No.109/2004, has also placed reliance on the judgment of Division Bench in the case of Jawahar Singh (Supra).

Paras 8 and 9 of the said judgments are reproduced as under:-

"8. From the language of Sec. 167 of the Code and from the policy behind the said Section it can be safely said that the starting point of limitation would be the date on which the accused person is available to the police for interrogation, while in detention under the order of the Court. It is not disputed that the accused-petitioner was in the judicial custody and joined the investigation in jail on 16th December, 1988 when the Identification Parade was arranged. The joining of the accused in the Identification Parade by the I.O., impliedly amounted to his arrest in the present case. It is not disputed that even when the arrest memo was prepared the accused was in jail and only formal arrest was shown by preparing the memo dated 8th June, 1989.

9. We, therefore, answer the above question by saying that if an accused person is already in custody in another case and is available to the police in a subsequent case for investigation, the period of

limitation would start running from the date when he was so available to the Police. The reference stands answered accordingly."

13. In state Vs. Sukh Singh (supra), the Division Bench of this Court has held as under;—

"(4) We have read - 'Dhaman Hiranand's case (a)' with all the care that it demands and have not been able to understand why it was necessary to discuss the provisions of Ss.167 (2) and 344 of the Criminal P.C., there. The only question that really arose for decision was whether taking the facts which were proved in that case a certain confession could be relied upon as voluntary and true, even through it had been retracted. There is certainly an observation in this case that an accused cannot be in magisterial custody in one case and police custody in another case. But we have not been able to understand why this is inherently impossible.

Supposing a person is accused of one offence, and investigation of that case is complete and the challan has been submitted to Court, he will, in these circumstances, be sent to

Jail or to judicial custody to await his trial. Supposing later evidence is discovered of his complicity in another case, and police, in order to complete the investigation of that case, requires to question the accused, or the handingover of the accused to police custody, would aid the investigation in some way; in such a case we fail to understand why it may not be open to a Magistrate under S.167 (2) to take the accused out of jail or judicial custody and hand him over to the police for maximum period of 15 days provided in that section. Of course, before the Magistrate does so, he will have to satisfy himself that a good case made out for detaining the accused in police custody in connection with the investigation of the order case.

5. We, therefore, accept the reference, set aside the order of the District Magistrate refusing to hand over Shera accused to the police of Thana Tharad for 15 days for investigation and the District Magistrate is directed, if the police of Thana Tharad still require the accused, to hand him over to them after satisfying himself that it is really necessary to do so for purposes of investigation of the

case relating to Thana Tharad. So far as Sukh Singh is concerned, he is no longer in judicial custody, and we pass no order with respect to him."

14. In the above two judgments of this Court, the Division Bench has laid down the principles in respect of Section 167 (2) Cr.P.C. I could have referred the matter to Hon'ble the Chief Justice to refer the matter to the Larger Bench as the case of State Vs. Sukh Singh (supra) was not considered in subsequent judgment of Division Bench of this Court in the case of Jawahar Singh Vs. State of Raj. (supra). However, the Hon'ble Supreme Court, in CBI Vs. Anupam J. Kulkarni (supra), has already resolved the controversy and while considering the provisions of Section 167 (2) Cr.P.C., has held as under ;-

"A question may then arise whether a person arrested in respect of an offence alleged to have been committed by him during an occurrence can be detained again in police custody in respect of another offence committed by him in the same case and which fact comes to light after the expiry of the period of first fifteen days of his arrest. The learned Additional Solicitor General submitted that as a result

of the investigation carried on and the evidence collected by the police the arrested accused may be found to be involved in more serious offences than the one for which he was originally arrested and that in such a case there is no reason as to why the accused who is in magisterial custody should not be turned over to the police custody at a subsequent stage of investigation when the information discloses his complicity in more serious offences. We are unable to agree. In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation, his complicity in more serious offences during the same occurrence is disclosed that does not authorize the police to ask for police custody for a further period after the expiry of first fifteen days. If that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly. This would defeat the very object underlying

sec.167. However, we must clarify that this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case, they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation, he must be formally arrested in connection with other case and then obtain the order of the magistrate for detention in police custody.

15. In S. Harsimran Singh Vs. State of Punjab (1984 Cr.L.J. 253), a Division Bench of Punjab and Haryana High Court considered the provisions whether the period of police custody exceeding 15 days as prescribed by Sec.167 (2) Cr.P.C., is applicable to a single case or is attracted to series of different cases requiring investigation against the same. The Division Bench held that there is no bar against a person in custody with regard to the investigation of a particular offence. He is re-arrested for the purpose of investigation of an altogether different offence. The

aforesaid Division Bench judgment of Punjab and Haryana High Court was approved by the Hon'ble Supreme Court in the case of CBI Vs. Anupam J. Kulkarni (Supra).

16. In Manoj Vs. State of M.P. (supra), the accused was arrested in connection with a case involving Section 15 of the NDPS Act, 1985 in Rajasthan on 22.6.1998. On 7.8.1998, while still in custody, he was recorded as arrested in another case under the NDPS Act in Madhya Pradesh. In the Rajasthan case, the Rajasthan High Court directed him to be released on bail but the M.P. High Court did not grant him the bail in the M.P. Case. Therefore, he remained in jail. Since, in the M.P. Case, no charge-sheet was filed within ninety days of the appellant's arrest, he moved an application under the provision (a) to Section 167 (2) Cr.P.C., for bail before the Special Judge, who rejected that application. Then the appellant approached the M.P. High Court which also held the appellant to be not entitled to the benefit of the said provisions on the premise that having not been produced before any Court pursuant to his arrest on 7.8.1998, he could not be treated to be in judicial custody in the M.P. Case. The Hon'ble Supreme Court held that it is settled that benefit of the proviso (a) to Section 167 (2) Cr.P.C., would endue to an accused involved in the offences

under the NDPS Act as well. But, in the present case, the position is slightly different because the appellant is not continuing in custody pursuant to any order passed under that section. Section 167 (2) Cr.P.C., would apply only to an accused who was forwarded to a Magistrate under Section 167 (1) because further detention of the accused can be made only if it is so authorized by such a Magistrate.

17. In Aslam Babulal Desai (*supra*), it was held that once an accused is released on bail under Section 167 (2), he cannot be taken back in custody merely on the filing of a charge-sheet. It was held that order passed under Section 167 (2) would be an order under Section 437 (1) or (2) or 439 Cr.P.C. The grounds for cancellation of bail have also been stated.

18. In Niranjan Singh and anr. Vs. Prabhakar Rajaram, AIR 1980 SC 785, it has been held that custody in the context of Section 439, is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and order of the court.

19. In Chaganti Satyanarayana and ors. Vs. State of A.P., AIR 1986 SC 2130, it has been held that subsection (1) of Section 167 Cr.P.C., is a mandatory

provision governing what a police officer should do when a person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fixed by Section 57.

20. In Jaganath Vs. State (supra), learned Single Judge of the Madras High Court held that expression "arrest" includes taking of a person in custody by Magistrate on his surrender.

21. In Iqbal Kaur Kwatra Vs. Director General of Police, Jaipur (Supra), the Division Bench of Andhra Pradesh High Court held that a person in custody cannot be detained without producing him before a Magistrate under the colourable pretension that no actual arrest is made.

22. In Govt. of Andhra Pradesh and anr. Vs. Anne Venkateshwara Rao (supra), the Hon'ble Supreme Court, while considering the provisions of Section 428 Cr.P.C., held that the period of detention, which it allows to be set off against the term of imprisonment imposed on the accused on conviction, must be during the investigation, inquiry or trial in connection with the same case in which he has been convicted.

23. In Kultej Singh Vs. Circle Inspector of Police (Supra), the Division Bench of Karnataka High Court held that mere keeping a person or confining him in police station or restricting his movements within precincts of a police station amount to arrest in terms of Section 46 Cr.P.C.

24. In State of Punjab Vs. Sukhminder Singh @ Mundri, 1998 Cr.L.J. 3090, the Punjab and Haryana High Court held that even if the accused is wrongly granted bail irrespective of legal position but if charge has been framed and trial is at evidence stage and the accused is regularly attending every hearing, then the bail should not be cancelled.

25. In People's Union for Civil Liberties Vs. Union of India (Supra), Section 5 (2) of the Telegraph Act was considered and it was held that right to transmit telephone message or hold telephone conversation in privacy forms part of right to privacy protected by Art.21 of the Constitution of India as well as by Art.17 of the International Covenant on Civil and Political Rights. Telephone tapping by Govt. under S.5 (2) of the Telegraph Act amounts to infraction of these fundamental rights. Hence, it can be resorted to only in accordance with procedure established by law which

must be just, fair and reasonable and should fall within the grounds of reasonable restriction permissible under Art.19(2).

26. In Ramu Vs. State of Karnataka (supra), a Single Bench of Karnataka High Court held that a man can be in custody without his being formally arrested when restriction is imposed on his movements either by police surveillance or some other restrictions by the police.

27. In Ashok Hussan Allah Detha Vs. Asstt. Collector of Customs (P) Bombay, a Single Judge of Bombay High Court held that the word "arrest" is a term of art. It starts with the arrester taking a person into his custody by action or words restraining him from moving anywhere beyond the arrester's control, and it continues until the person so restrained is either released from custody or, having been brought before a Magistrate, is remanded in custody by the Magistrate's judicial order.

28. In State of Rajasthan Vs. Akhlesh Chandra Sharma (Supra), this Court held that accused cannot be compelled to give information for making any recovery under Section 27 of the Evidence Act and it is sweet

will of the accused and as such, there is no justification for allowing the cancellation of bail and remand the accused to the police. In Jayenra Saraswathi Swamigal (Supra), it was held that confessional statements by co-accused is a very weak type of evidence.

29. In Puran Vs. Rambilas and another, (2001) 5 SCC 338, the Apex Court negatived the submission that the High Court could not sit in appeal or revision over an order of the Court of Sessions. It was held that a restrictive interpretation which would have the effect of nullifying Section 439 (2) cannot be given.

30. In Dolat Ram and ors. Vs. State of Haryana, (1995) 1 SCC 349, the Hon'ble Apex Court held that rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis.

31. In State Vs. Anil Sharma, (1997) 7 SCC 187, the Hon'ble Supreme Court held as under ;-

"Custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect

who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful information and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders".

31. In Aslam Babalal Desai (*supra*), the Hon'ble Apex Court held as under; -

"The purpose of the proviso to S.167 (2) read with Chapter XXXIII of the Code is to impress upon the need for expeditious completion of the investigation by the police officer within the prescribed limitation and to prevent laxity in that behalf. On its default, the Magistrate shall release the accused on bail if the accused is ready and does furnish the bail. At the same time, during investigation or trial, the power of the Court to have the bail cancelled and have the accused taken into custody are preserved. But as interpreted by this Court on the happening of the catalyst act, i.e. expiry of 90/60 days the hammer of release on default would fall. Later filing of the charge-sheet (challan) is not by itself relevant to have the bail cancelled on committing the accused for trial or taking cognizance of the offence".

33. The full Bench of this Court in State of Raj. Santosh Yadav (supra), has held under; -

"The police can seek permission to remove an accused from judicial custody to police custody for completion of investigation in another case and for this purpose,

production warrant under Section 267 Cr.P.C., can be issued. The expression 'other proceeding' used in Section 267 (1) and 'for the purpose of any proceedings' occurring in Section 267 (1) (a) would include 'investigation' as defined under Section 2 (h) Cr.P.C.

34. In Mahant Chand Nath Yogi Vs. State of Haryana, AIR 2003 SC 18, it has been held that judicial discretion exercised in granting anticipatory bail, which is not found to be perverse, should not have been cancelled in mechanical manner without considering contentions raised by parties such as about false involvement of accused because of political rivalry.

35. In Joginder Kumar Vs. State of U.P. and ors., AIR 1994 SC 1349, it was held that a person is not liable to be arrested merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified.

36. In Samarendra Nath Bhattaharjee Vs. State of West Bengal (Supra), the Hon'ble Apex Court considered the facts and circumstances of that case and held that cancellation of bail order by High Court was not

proper.

37. The aforesaid discussion of facts and law show that how a person is to be arrested is mentioned in Section 46 Cr.P.C. Here is the case where admittedly two FIRs Nos.109/2004 and 110/04 were registered by Anti Corruption Bureau against the accused non-applicant R.S. Srivastava. Both the first information reports relate to different offence. FIR No.109/04 was relating to case titled as Smt. Kamla Vs. State in respect of land situated at Dholpur wherein case had already been decided against the plaintiff on 21.5.2004 and as per allegation of the prosecution, there was deal in between co-accused and the accused R.S. Srivastava about deciding the case in favour of the plaintiff and the accused suggested for filing the review petition, which was ultimately filed and the same was allowed within 17 days itself, i.e., on 7th June 2004 and the present FIR was registered on 9th June 2004 against the accused non-applicant alleging that the accused non-applicant R.S. Srivastava had a deal of Rs.30 lacs as per prosecution case and Rs.5 lacs were given to co-accused Ajay Data as directed by accused non-applicant R.S. Srivastava.

38. So far as the FIR No.110/04 is concerned, the

same was relating to different cases which were decided by the accused non-applicant R.S. Srivastava relating to land situated at different places measuring about 54 acres. Therefore, it is clear that allegation in both the FIRs were altogether different and cannot be said to be connected with each other.

39. The above discussions also reveal that Mr. R.S. Srivastava was arrested on 9th June 2004 in FIR No.110/04 and he was not arrested in FIR No.109/04. It is also clear that this fact was in knowledge of the accused as well as in the knowledge of the Special Judge. The accused R.S. Srivastava moved an application for anticipatory bail in FIR No.109/04 on 22.6.2004 wherein he admitted that he has not been arrested in FIR No.109/04. The said application was rejected by the same Special Judge on 25.6.2004. Further an application under Section 167 Cr.P.C., was moved on 5.7.2004 by Mr. Srivastava which was opposed by the prosecution and it was specifically mentioned in the reply that Mr. Srivastava has not been arrested in FIR No.109/04. The same Special Judge, by detailed order, rejected the application of Mr. Srivastava under Section 167 Cr.P.C., holding that the Court cannot become immune to the gravity of the offence and the fact that the lapse/inadvertence of the Investigating

Agency should not in any manner thwart the fair and proper investigation of the case of corruption of such magnitude. The Special Judge further observed that this again would be sabotaging the investigation in its infantile stage and would certainly not serve the larger public interest, which in his humble view, the Court should perceive and be sensitive about it.

40. After rejection of first application under Section 167 Cr.P.C. vide order dated 7.7.2004, on the basis of deemed custody in FIR No.109/04, if accused Srivastava was aggrieved, then he could have challenged the said order before the higher Court. There was no occasion to file second application under Section 167 Cr.P.C. on 10.8.2004. The Special Judge could not have reviewed his own orders which he passed while rejecting the application for temporary bail under Section 438 CR.P.C. and first application of the accused under Section 167 Cr.P.C. vide order dated 25.6.2006 and 7.7.2004 respectively. There is no provision in Criminal Procedure Code for review, rather there is a specific Section 362, which completely bars review of an order by any criminal Court which it had passed earlier and signed except to correct a clerical or arithmetical error as held by the Hon'ble Supreme Court in the cases reported in Hari Singh Vs. Har

Bhajan Singh (2001 1 SCC 169), Adalat Prasad Vs. Rooplal Jindal and ors. (JT 2004 (7) SC 243) and State of Kerela Vs. M.M. Manikantan Nair (2001 4 SCC 752). The trial Court, therefore, committed an error in passing the impugned order dated 10.8.2004 which is apparently review of its earlier order dated 7.7.2004. The Division Bench of this Court in State Vs. Sukh Singh (supra), has held that where an accused is kept in jail by orders of adjournment or remand under S.344, he can be handed-over to the police in some other case for purposes of investigation. The Full Bench of this Court in State of Raj. Vs. Santosh Yadav (supra), after considering the provisions of Sec.267 CR.P.C., held that police can seek permission to remove the accused from judicial custody to police custody for completion of investigation in another case. The point involved in the present case is fully covered by the judgment of the Hon'ble Supreme Court in the case of CBI Vs. Anupam J. Kulkarni as referred above. The Hon'ble Supreme Court has categorically held that we must clarify that this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case, they can require his

detention in police custody for the purpose of associating him with the investigation . In such a situation, he must be formally arrested in connection with other case and then obtain the order of Magistrate for detention in police custody. The action of Mr. R.S. Rathore, Special Judge (PCA), Jaipur, was not proper and reasonable in allowing the application under Section 167 CR.P.C., on 10.8.2004 itself which was filed at 4.30 p.m. on 10.8.2004. An opportunity ought to have been given to P.P. to call for case diary and I.O. and to argue the case as a legal question was involved in the case.

41. Therefore, in view of the aforesaid discussion, it is clear that the Special Judge (PCA), Jaipur committed a serious error and an illegality in presuming the deemed custody of the accused R.S. Srivastava (without any formal arrest) in first FIR No.109/04 w.e.f., 10.06.2004, a date on which he was arrested in second FIR No.110/04. The impugned order dated 10.8.2004 passed by the Special Judge, allowing the application of the accused R.S. Srivastava under Section 167 (2) CR.P.C., and releasing on bail is, therefore, contrary to the judgment of the Hon'ble Supreme Court in the case of CBI Vs. Anupam J. Kulkarni reported in AIR 1992 SC 1768 and Division

Bench judgment of this Court in State Vs. Sukh Singh and the judgment of the Full Bench of this Court in the case of State of Raj. Vs. Santosh Kumar Yadav. Therefore, this is a case wherein the impugned order is per-se illegal and is liable to be cancelled under Section 439 (2) CR.P.C. by this Court.

42. Accordingly, I allow application for cancellation of bail No.3980/2004 filed by the State of Rajasthan against accused R.S. Sriastava and set aside the bail order passed in his favour by the Special Judge dated 10.8.2004 in bail application No.51/2004 in FIR No.109/04 of Anti Corruption Bureau, Jaipur. The personal bonds and surety bonds filed by him in pursuance to bail order No.10.8.2004 stands automatically cancelled. The prosecution is free to proceed further in FIR No.109/04 in accordance with law.

43. So far as another application for cancellation of bail No.3844/2004 relating to co-accused Ajay Data is concerned, it is borne out that although vide order dated 30.7.2004, the Special Judge rejected his bail application under Section 438 Cr.P.C. but by the same order, he directed the co-accused to appear before the I.O., as per terms and conditions imposed in the order

dated 30.07.2004 itself. Although the prosecution moved an application dated 3.8.2004 alleging that he is not cooperating with the investigating agency but the said allegation is denied by him before the Special Judge. The Special Judge dismissed the application of the prosecution. Subsequently, co-accused Ajay Data surrendered himself before the Special Judge and moved an application under Section 437 Cr.P.C., on the same day. The Special Judge, after hearing both the parties, vide its order dated 11.8.2004, allowed the application of co-accused Ajay Data and released him on bail as per terms and conditions imposed in the order dated 11.8.2004. The Special Judge has passed a detailed, speaking and reasoned order. The co-accused was taken in judicial custody by Special Judge and he considered that the co-accused had already appeared for interrogation as per order dated 30.7.2004 and 3.8.2004 and his presence is now not required. Therefore, he allowed the application and released him on bail under Section 437 Cr.P.C. The facts mentioned in the FIR disclose that allegation against the main accused R.S. Srivastava is serious in nature whereas the allegation against the co-accused relates to Section 120-B IPC only. The prosecution has not controverted the submission of Mr. A.K. Gupta, learned counsel for co-accused Ajay Data, that other similarly situated co-

accused persons filed writ petition before this Court to quash the FIR and this Court although rejected their writ petition but converted the warrant of arrest of the similarly situated co-accused persons into bailable warrant. I have cancelled the bail order of main accused R.S. Srivastava on legal ground that his custody in FIR No.110/04 could not have been treated as deemed custody in the present FIR No.109/04 in view of the Division Bench Judgment of this Court in State of Raj. Vs. Sukh singh (Supra), the judgment of Full Bench of this Court in State of Raj. Vs. Santosh Yadav (supra) and the judgment of the Hon'ble Supreme Court in CBI Vs. Anupam J. Kulkarni (Supra), as referred above. Therefore, the case of co-accused Ajay Data is altogether different and in these circumstances, I am not inclined to interfere in the order granting bail to co-accused Ajay Data by the Special Judge. Therefore, application for cancellation of bail No.3844/2004 filed by the State of Rajasthan against co-accused Ajay Data is rejected.

44. Consequently, the application for cancellation of bail No.3980/2004 filed by the State of Rajasthan against accused R.S. Srivastava is allowed and the impugned order dated 10.8.2004 passed by the Special Judge granting bail to him under Section 167 (2)

CR.P.C., is set aside. The application for cancellation of bail No.3844/2004 filed by the State of Rajasthan against co-accused Ajay Data is dismissed. The prosecution is at liberty to proceed further against accused R.S. Srivastava in FIR No.109/04 in accordance with the provisions of law. However, it is made clear that any observations made here-in-above, will not come in the way of accused R.S. Srivastava while considering his bail application after his arrest.

(Narendra Kumar Jain) J.

