M.Cr.C.No.6270/2017

M.Cr.C No. 6260/2017

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1. No act, however abhorrent it may be to the collective conscience of the society or the State is an offence, unless proscribed by law and met with sanctions for its transgression. An offence is a creature of statute, clear and unambiguous, which puts the prospective offender on guard with the liability he would suffer in the event he violated it. These applications under Section 439 of the Code of Criminal Procedure, 1973 raises two important questions. The **first** question being, whether there can be an investigation by the police

without registration of an FIR u/s. 154 Cr.P.C? and the **second** question that arises is whether the Magistrate, in exercise of his powers u/s. 167 Cr.P.C, can remand a person to judicial custody where no FIR has been registered against such a person u/s. 154 Cr.P.C? The applicants herein have been arrested by the police in connection with Istgasa No.1/2017 under sections 102/41(1-4) of Cr.P.C. and 379 of IPC registered at Police Station-MISROD, District-Bhopal.

2. The genesis of the instant case can be traced back to decision of the Government of India to cancel overnight, the "legal tender" character of bank notes in the denomination of Rs. 500 and Rs. 1000 by an executive fiat being notification bearing number S.O.3407(E) dated 08/11/2016 issued by the Ministry of Finance with the hallowed intention of curbing the

menace of unaccounted wealth or "black money". Citizens were given time to exchange or deposit into their account with banks, the old currencies in their possession. A grace period, expiring on 31/12/2016 was given to all resident Indians and 31/03/2017 to Non-Resident Indians (hereinafter referred to as "NRI") to deposit the old currency notes in retail banks (for resident Indians) and directly in the Reserve Bank of India for the NRI's.

3. In order to create a liability upon persons still holding demonetized notes after the expiry of the grace period, the Government of India promulgated the **"The Specified Bank Notes (Cessation of Liabilities) Ordnance, 2016"** (hereinafter referred to as the "Ordnance of 2016") on 30/12/2016 which came into effect from 31/12/2016 after receiving the assent of the President of India. Section 2(1)(e) of the

Ordnance of 2016 defined the term "Specified Bank Note" to mean bank notes of the denominational value of rupees five hundred and one thousand in the series existing before 08/11/2016. After the expiry of the grace period, possession of the demonetized notes was prohibited under section 5 of the Ordnance of 2016. The only exception being in circumstances enumerated in Sections 5(a)(ii)(A) and 5(a)(ii)(B) of the Ordnance of 2016. Section 5(a)(ii)(A) legitimised the possession of the demonetised notes where a person possessed not more than ten notes of either denomination and Section5(a)(ii)(B) legitimised the possession of not more than twenty five notes of the demonetised currency, where the same was held for the purposes of study, research or numismatics. But for possession under the aforementioned conditions, it was illegal to bear in hand the demonetised

currency after 31/12/2016 (for resident Indians) and 31/03/2017 (for NRI's) and the said act was made punishable under sections 6 and 7 of the Ordnance of 2016.

4. For the purposes of the present case, only the provision under section 7 of the Ordnance of 2016 is relevant and is as such referred to. It provides as hereunder;

> **7. Whoever contravenes the provisions of section 5, shall be punishable with fine which may extend to ten thousand rupees or five times the amount of the face value of the specified bank notes involved in the contravention, whichever is higher.**

Section 7 is unambiguous and simply worded. It made the act of being in possession of the demonetised currency after the expiry of grace period punishable only with fine. There was no provision for imprisonment of such a person who fell foul of Section 5. The Ordnance of

2016 does not provide whether the offence under Section 7 is cognizable or non-cognizable and whether same is bailable or non-bailable. Under the circumstances, recourse must be had to Part II of The First Schedule of the Cr.P.C, according to which, the offence under Section 7 of the Ordnance of 2016 is Non-Cognizable and Bailable. The power of imposing the fine for an offence under Section 7 was vested under Section 9 of the Ordnance of 2016, in the Judicial Magistrate First Class or the Metropolitan Magistrate, as the case may be. From the above, it is clear that the Government of India was aware of the fact that possession of demonetised notes after the expiry of the grace period would not constitute an offence under the general law as no such provision existed in the IPC or any other law for the time being in force in the country, and so Section 5 was engrafted in the Ordnance of 2016

specifically delegitimising the possession of the demonetised notes after the expiry of the grace period and made punishable under Sections 6 and 7 of the Ordnance of 2016. The Ordinance was promulgated to punish those who were in possession of demonetised currency after the grace period not because the notes were of any value but for the fact that those persons who possessed the said notes were prima facie guilty of having unaccounted money which was hidden away from the tax authorities. The demonetised notes by themselves were worth their weight in waste paper and their only purpose on being discovered and seized was to assess the amount of tax that the person holding them had wilfully evaded, thereby making such a person’s accounts open to scrutiny by the Income Tax Department for assessing the liabilities of such a person under the Income Tax Act and also for the purpose of

being fined under Section 6 and 7 of the Ordnance of 2016.

5. Having so examined the legal position of being in possession of demonetised notes after the expiry of the grace period, this Court now turns its attention to the bare facts of the present case. On 31/03/17, the officials of Police Station, Misrod, District Bhopal, are stated to have received a source information to the effect that two persons are standing near Ashima Mall, on the 80 feet road near the central school, with the intention of exchanging the demonetised currency notes to legal tender. The police arrived at the scene and took the applicants herein into the custody and seized about Rs. 14,70,000/- (rupees fourteen lakhs and seventy thousand) in the demonetised currency. The police seized the notes under section 102 Cr.P.C and arrested the applicants in the exercise of their powers under section 41 of Cr.P.C. However, it is the case of the police that they subsequently added section 379 of IPC to the isthagasa proceedings, **but an FIR was not registered**.

6. In order to get a clear picture of this case, the Investigating Officer was summoned by this Court vide order dated 25.04.2017. The Investigating Officer in this case, namely, Mr. Govind Singh, Sub Inspector, is present before the Court today. He has confirmed categorically that no FIR under section 154 Cr.P.C has been registered against the applicants herein and they are only being held in judicial custody upon remand by the Judicial Magistrate First Class, since 31/03/2017, on the suspicion of having committed an offence u/s. 379 IPC. Thus, it is clear that there is no criminal case under any provisions of the IPC or any other law is pending against the applicants herein. However, they are in judicial custody since 31.03.2017 and their status cannot be accepted as that of under trials, as there is no case registered against them.

7. It is undisputable that the police can arrest a person in exercise of its powers under the section 41 Cr.P.C on the grounds provided therein. It is also trite law that having so arrested the person, the police cannot detain

him for more than twenty-four hours without an order of remand from the Magistrate u/s. 167 Cr.P.C, as mandated u/s. 57 Cr.P.C failing which, the continued detention shall become illegal. “Investigation” is defined u/s. 2(h) of the Cr.P.C as all proceedings associated with the “collection of evidence” (a) by a police officer or (b) by any other person, so authorised by a Magistrate but other than a Magistrate. The definition clause of the term “Investigation” in section 2(h) of the Cr.P.C does not provide any assistance to answer the first question viz., whether the police can investigate an offence without registering an FIR. Chapter XII of the Cr.P.C titled “INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE”, answers the question. The chapter starts with section 154 which mandates that every information relating to the commission of a cognizable offence shall

be reduced into writing which in common parlance is called a First Information Report or simply as FIR. Thereafter, section 156 Cr.P.C vests the police with the authority to investigate into the commission of a cognizable offence without the order of a Magistrate. Section 157 lays down the procedure for investigation by the police wherein it is mandated that before entering investigation of an offence, which the officer in charge of a police station is empowered to investigate (which when read in conjunction with S. 154 and 156 would mean a cognizable offence), upon information received or upon reasonable belief of the police leading to suspect the commission of a cognizable offence, the police shall send a report of the offence viz., the FIR, forthwith to the Magistrate empowered to take cognizance upon a police report and shall proceed to investigate the offence himself or

through an officer subordinate to him. A conjoined reading of section 154, 156 and 157 Cr.P.C reveals that investigation succeeds the registration of an FIR.

8. The abovesaid view of this Court is reflected, by necessary implication, in **State of Haryana Vs. Bhajan Lal – 1992 Supp (1) SCC 335**, wherein at paragraph 41, the Supreme Court held **"…….We have already found that the police have under Section 154(1) of the Code a statutory duty to register a cognizable offence and thereafter under Section 156(1) a statutory right to investigate any cognizable case without requiring sanction of a Magistrate"**. Thereafter in paragraph 49 of the same judgement, the Supreme Court held **"Resultantly, the condition precedent to the commencement of the investigation under Section 157(1) of the Code is the existence of the reason to suspect the**

commission of a cognizable offence which has to be, prima facie, disclosed by the allegations made in the first information laid before the police officer under Section 154(1)……". In paragraph 49 of Bhajan Lal's judgement, the Supreme Court has rather clearly held that the registration of the FIR is a condition precedent to an investigation, viz., that without the registration of an FIR there can be no investigation that is sustainable in the eyes of the law. The same view was again taken by the Supreme Court in **Lallan Chaudhary Vs. State of Bihar – (2006) 12 SCC 229**, wherein at paragraph 8 the Supreme Court was pleased to observe that **"Section 154 of the Code thus casts a statutory duty upon the police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation"**.

9. In **Lalita Kumari Vs. State of U.P. – (2014) 2 SCC 1**, a Constitution Bench of the Supreme

Court, while emphasising on the duty of the police to register an FIR on the disclosure relating to the commission of a cognizable offence, held at paragraph 38 that **"The precursor to the present Code of 1973 is the Code of 1898 wherein substantial changes were made in the powers and procedure of the police to investigate. The starting point of the powers of police was changed from the power of the officer in charge of a police station to investigate into a cognizable offence without the order of a Magistrate, to the reduction of the first information regarding commission of a cognizable offence, whether received orally or in writing, into writing and into the book separately prescribed by the Provincial Government for recording such first information. As such, a significant change that took place by way of the 1898 Code was with respect to the placement of Section 154 i.e. the**

provision imposing requirement of recording the first information regarding commission of a cognizable offence in the special book prior to Section 156 i.e. the provision empowering the police officer to investigate a cognizable offence. As such, the objective of such placement of provisions was clear which was to ensure that the recording of the first information should be the starting point of any investigation by the police. In the interest of expediency of investigation since there was no safeguard of obtaining permission from the Magistrate to commence an investigation, the said procedure of recording first information in their books along with the signature/seal of the informant, would act as an "extremely valuable safeguard" against the excessive, mala fide and illegal exercise of the investigative powers by the police". The Constitution Bench of the Supreme Court also placed its seal of approval on the view that

the registration of the FIR U/s. 154 Cr.P.C must precede any investigation by the police u/s. 156 Cr.P.C. Therefore, under the law, there can be no investigation by the police without the registration of an FIR.

10. The second question that begs an answer is whether the Magistrate can extend the remand of a person who has been arrested u/s. 41 Cr.P.C in the absence of an FIR? Section 167 Cr.P.C also falls in Chapter XII. It provides for the extension of remand/detention of a person in custody when the investigation cannot be completed within twenty-four hours. Therefore, as stated hereinabove in paragraph 9 that there can be no investigation where no FIR has been registered and where there is no investigation in progress under the law, there can be no remand of an accused u/s. 167 Cr.P.C. Under the circumstances, where a person is produced by the police before the

Magistrate u/s. 167 Cr.P.C for the extension of his remand in judicial custody or police custody after he has been arrested u/s. 41 Cr.P.C and where no FIR has been registered by the police, the Magistrate must refuse to exercise jurisdiction u/s. 167 and secure the release of the person so arrested forthwith as his custody has been rendered illegal after the passage of twenty-four hours. Even otherwise, the exercise of jurisdiction by the Magistrate u/s. 167 Cr.P.C is not a hollow formality but a solemn exercise, where the discretion exercised by the Magistrate can negatively affect the civil liberties of an individual gravely infracting his fundamental right to life itself. The Magistrate has to arrive at the subjective satisfaction that accusation or information against such a person is well founded. In other words, the Magistrate must satisfy himself that the material so far gathered in the course of

investigation, prima facie discloses the involvement of the person in the offence.

11. In the instant case, the Ld. Magistrate erred on two counts. Firstly, he failed to appreciate that the applicants produced before him for the purpose of remand were not accused in a case and that there was no investigation pending against them and that even the case of the police was that they were suspected of being involved in an offence of theft. Secondly, the Magistrate failed to appreciate that the allegations in the isthagasa proceedings only revealed that the applicants were found in possession of demonetised notes after the expiry of the grace period and that there was no complaint of theft against them by anyone, and so the offence if any, was only under section 7 of the Ordnance of 2016, which was non-cognizable and bailable and for which, the

applicant could not have been sent to judicial custody at all. The police ought to have released the applicants when they realised that besides being in possession of demonetised note with the intention of changing the same to legal tender, there was no other evidence to show their involvement in a cognizable offence. The action of the police under section 102 Cr.P.C was legitimate and well founded as the seizure could have been made as the notes were subject matter of an offence, albiet a non-cognizable offence. The police ought to have acted in accordance with the law laid down by the Supreme Court in **Joginder Kumar v. State of U.P., - (1994) 4 SCC 260**, wherein the Supreme Court had elaborated that the mere power to arrest would not always justify the arrest. In paragraph 20 of the said judgement, the Supreme Court held **".....The existence of the power to arrest is one thing. The justification for the exercise of it**

is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter…….".

In this case, the police have acted in a cavalier manner by arresting the applicants for an offence, which the police did not realize was non-cognizable and bailable.

Having apprehended the applicants with the demonetized notes, the police were caught in a cleft stick and were completely at sea on how to proceed in the matter and instead added section 379 IPC to the isthagasa proceedings which was a patent illegality. If the police had cause to suspect the commission of an offence u/s. 379 IPC, they should have registered an FIR and then taken it into investigation and thereafter produced the applicants before the Magistrate for remand. Having not done so, the arrest and subsequent remand of the applicants has resulted in their illegal detention.

12. As no FIR has been registered against the applicants and as powers under section 439 of Cr.P.C. can only be exercised by the Court where the applicant is in judicial or police custody in relation to a case registered against them. There can be no order of bail u/s. 439 Cr.P.C. However, looking at the peculiar facts

and circumstances of the case which reveals that that applicants are in illegal detention, this Court is inclined to exercise its plenary power under section 482 Cr.P.C. and direct that the applicants herein be released forthwith from custody.

C.C. as per rules.

(ATUL SREEDHARAN)
JUDGE

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