2012 (1) MWN (Cr.) 4 (DB)

IN THE HIGH COURT OF MADRAS
(*Madurai Bench*)

M. Jaichandren & S. Nagamuthu, JJ.

Crl.O.P. (MD) No.13683 of 2011

3.11.2011

State by Inspector of Police, Anti Land Grabbing Special Cell, City Crime Branch, Trichy. *.....Petitioner*

Vs.

K.N. Nehru **2.** K.N. Ramajayam **3.** M. Anbhazhagan *.....Respondents*

Remand

Production of Accused pursuant to PT Warrant beyond 24 hrs. — Order refusing to remand for not producing Accused within 24 hrs. — Held, not sustainable.

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 46, 57, 167 & 267 — CONSTITUTION OF INDIA, Article 22(2) — "Formal arrest" in prison — If, constitutes "custody of Police" as embodied in Article 22(2) & Section 57, Cr.P.C. — Accused after formal arrest if not produced before Magistrate for remand within 24 hrs., whether detention beyond 24 hrs. shall be illegal — Whether Magistrate can pass order subsequently authorizing detention either in Police custody or judicial custody — Whether such remand order passed subsequently will cure/legalise illegal detention beyond 24 hrs. from time of formal arrest — Accused in remand to judicial custody in connection with one case — No legal compulsion for I.O. in other case to effect a formal arrest of Accused — I.O. has discretion either to arrest or not to arrest Accused in latter case — When formal arrest effected in prison, Accused does not come into physical custody of Police at all but continues to be in judicial custody in earlier case — Therefore, no legal compulsion for production of Accused before Magistrate within 24 hrs. from said formal arrest — For production of Accused before Magistrate after such formal arrest, Police Officer shall file Petition under Section 267, Cr.P.C. before jurisdictional Magistrate for issuance of PT warrant [Prisoner Transit Warrant] — After production of Accused before jurisdictional Magistrate, Police may seek remand either in Police custody or judicial custody — Magistrate after considering request of Police, representation of Accused, case diary and other relevant materials, shall pass appropriate remand order under Section 167(1) — Where Police Officer decides not to effect formal arrest, he can straightaway make Application for issuance of PT Warrant for transmitting Accused from prison for purpose of remand. (Paras 10, 11, 15, 16, 28-34, 41 & 42)

a. Personal liberty is one of the cherished objects of the Indian Constitution and the deprivation of the same can only be in accordance with the procedure established by law and in conformity with the provisions thereof, as stipulated in Article 21 of the Constitution of India. Article 22(2) of the Constitution mandates that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate. Similar provision is found in Section 57 of the Code of Criminal Procedure, which also mandates that no Police Officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. These two provisions came up for consideration on several occasions before the Hon'ble Supreme Court, as well as this Court and the Courts have in no uncertain terms held that without the authorisation of a Magistrate, no arrestee shall be detained in the custody of the Police beyond 24 hours from the time of arrest excluding the time taken for the journey from the place of arrest to the Court. In this regard, there could be no controversy that when an Accused is detained in the custody of the Police after arrest beyond 24 hours excluding the time taken for the journey from the place of arrest to the Court, such detention beyond the said period is surely illegal. *[Para 10]*

b. As is mandated under Article 22(2) of the Constitution of India and under Section 57 of the Code of Criminal Procedure, for getting the authorisation from the Court for detention, either in judicial custody or Police custody, the Accused has to be physically produced before the Magistrate under Section 167, Cr.P.C. Section 167(1) of Cr.P.C. is the law which regulates and empowers a Magistrate to authorise the detention of the Accused either in Police custody or in judicial custody, as the case may be. It is too well settled that while passing an order of remand, either judicial custody or Police custody, as mandated in Section 167(1) of Cr.P.C., since the said detention deprives the personal liberty guaranteed under Article 21 of the Constitution of India, such order of remand shall not be passed in a mechanical fashion. The learned Magistrate is required to apply his mind into the entries in the Case Diary, representation of the Accused and other facts and circumstances, and only on satisfaction that such remand is justified, the learned Magistrate shall pass such order of remand. [vide *Elumalai v. State of Tamil Nadu,* 1983 LW (Crl) 121]. *[Para 11]*

c. But, if an Accused already is in judicial custody in connection with some other case, when the Investigating Officer wants to arrest him in connection with a different case, some confusion may surface regarding the mode of arrest. As has been held by the Hon'ble Supreme Court in *CBI v. Anupam J. Kulkarani,* 1992 (3) SCC 141, he can effect formal arrest of the Accused in prison. As provided in Section 46(1) of the Code of Criminal Procedure by effecting arrest in prison, the Police Officer cannot take him into custody at all, because the detention of such Accused in judicial custody has already been authorized by the Magistrate in connection with some other case. Therefore, without the authority of the Magistrate, it is not possible in law for the Police Officer to remove the Accused after effecting arrest in prison either to the Jurisdictional Magistrate or to the

nearest Magistrate for the purpose of remand. It is only to meet such exigency, the Hon'ble Supreme Court developed a concept known as formal arrest in *C.B.I. v. Anupam J. Kulkarni* cited supra. As in the instant case, in that case also, the Accused was already in prison in connection with a former case. In connection with the subsequent case, the Accused was arrested in prison. Thereafter, he was produced before the learned Magistrate. By that time, the initial period of 15 days of remand in the former case had expired. When Police custody was sought for in the latter case, it was opposed by the Accused that during the subsequent period, after the initial period of 15 days of remand, the Police custody cannot be granted. While declaring the law that the detention of the Accused in Police custody can be made by the Magistrate either having jurisdiction or not, only during the initial period of 15 days from the date of first remand, the Hon'ble Supreme Court went on to analyse the legal position as to the effect of formal arrest made in connection with a latter case after the expiry of the initial period of 15 days in connection with the former case. The Hon'ble Supreme Court in Paragraph No.13 of the said Judgment, has held as follows:

> "There cannot be any detention in the Police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested Accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the Proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the Proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the Accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the Police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody."

It is only after the said judgment, the concept of formal arrest in prison while the Accused is already in prison in connection with some other case came into being and thereafter invariably in most of the cases, we are informed, the Police officials do effect formal arrest in prison and thereafter get the Accused remanded to either judicial custody or Police custody under Section 167 of the Code of Criminal Procedure. *[Para 15]*

d. When such formal arrest is effected in prison, practically, if not in all cases at least in some cases, it may not be possible for producing the Accused before either the nearest Magistrate or the Jurisdictional Magistrate within 24 hours for the purpose of further remand, the reason being that the Accused cannot be moved from the jail to the Court either by the Jail Authority or by the Police without the authorisation of the Court. In such a situation, the only mode available for the Police Officer to produce the Accused before the Magistrate for the purpose of remand is to apply to the Jurisdictional Magistrate for P.T. Warrant under Section 267, Cr.P.C. At this juncture, it is needless to point out

that P.T. Warrant can be issued only by the Jurisdictional Magistrate and not by any other Magistrate. When such a request for production of the Accused from prison in the Court is needed, the Magistrate shall issue P.T. Warrant and in pursuance of the said P.T. Warrant, the Accused shall be thereafter produced before the Magistrate. This process will mostly take more than 24 hours. For example, let us assume that an Accused is lodged in Central Prison, Chennai, in connection with a case. Later on, in connection with a case relating to Kanyakumari District, the Investigating Officer effects formal arrest of the Accused in Central Prison, Chennai, as per the procedure indicated above and thereafter it will take at least one full day for the Police Officer to rush back to Kanyakumari to make an Application for issuance of P.T. Warrant. Assuming that the learned Magistrate issues P.T. Warrant on the same day, it will take yet another day for the Police Officer to take P.T. Warrant to the prison authorities at Chennai. It is only thereafter, the Accused will be again taken from Chennai to Kanyakumari for the purpose of remand. This process would certainly consume at least 3 to 4 days. If we have to say that the detention during the interregnum period in prison is illegal, necessarily, we have to hold that the Accused was in the custody of the Police. In our considered opinion, such interpretation cannot be made, as the same would make the law meaningless. *[Para 16]*

e. A close reading of *Dinesh Dalmia's case,* as referred to above, would keep things beyond any shadow of doubt that unless the Accused is "in the physical custody" of the Police on arrest, the question of production of the Accused within 24 hours from the time of such formal arrest cannot be insisted upon. To put it otherwise, if a formal arrest is effected, as held in *Anupam Kulkarni's case*, when the Accused is already in custody, in connection with a different case, the Accused continues to be in judicial custody in connection with the former case and he never comes to the physical custody of the Police, in connection with the case relating to which formal arrest is effected. *[Para 28]*

f. Therefore, there is no legal mandate that the Accused should be thereafter produced before the Jurisdictional Magistrate or nearest Magistrate, within 24 hours of such formal arrest. The contention of the learned Senior Counsel, Mr. N.R. Elango is that after effecting the formal arrest, the Accused should be taken to a Magistrate who has or has no jurisdiction for the purpose of remand, within 24 hours of such arrest. When a question was posed to him as to how it is practically possible for the Police to move the Accused from jail to the Court after effecting formal arrest, he had submitted that such a course is possible only by getting a P.T. Warrant from the "nearest Magistrate", so as to save the time limit of 24 hours. When it was pointed out to the learned Counsel that as per Section 267 of the Code of Criminal Procedure, P.T. Warrant can be issued only by a jurisdictional Magistrate, he changed his view and conceded that a Magistrate, who does not have jurisdiction over the case, cannot issue a P.T. Warrant. Therefore, he submitted that such P.T. Warrant can be issued only by the Jurisdictional Magistrate. If the Police Officer has to rush to the Jurisdictional Magistrate to get P.T. Warrant, in the mean while, the time limit of 24 hours may lapse. *[Para 29]*

g. The next question is as to whether at all it is necessary invariably in all cases that such formal arrest is required to be effected in prison, when the Accused is already lodged in prison in connection with some other case. It is needless to point out that though the Police Officer has got power to arrest, it does not mean

that he has to resort to arresting the Accused, irrespective of the need and justification for arrest. As held in *Joginder Kumar v. State of U.P. and others,* 1994 SCC (Crl) 1172, "no arrest can be made, because it is lawful for the Police Officer to arrest. The existence of power to arrest is one thing. The jurisdiction for the exercise of it is quite another. Thus, he has got discretion and only in a case where such arrest is absolutely necessary, he shall resort to arrest. In all other cases, he may, without arresting the Accused, proceed with the investigation and file final reports. *[Para 30]*

h. In a case where the Police Officer deems it necessary to arrest when the Accused is already in judicial custody in connection with a different case, in our considered opinion, there are two modes available for him to adopt. The first one is that, instead of effecting formal arrest, he can very well make an Application before the jurisdictional Magistrate seeking a P.T. Warrant for the production of the Accused from prison. If the conditions required under 267 of the Code of Criminal Procedure, are satisfied, the Magistrate shall issue a P.T. Warrant for the production of the Accused in Court. When the Accused is so produced before the Court, in pursuance of the P.T. Warrant, the Police Officer will be at liberty to make a request for remanding the Accused, either to Police custody or judicial custody, as provided in Section 167(1) of the Code of Criminal Procedure. At that time, the Magistrate shall consider the request of the Police, peruse the case diary and the representation of the Accused and then, pass an appropriate order, either remanding the Accused or declining to remand the Accused. *[Para 31]*

i. It has been held, in *Elumalai v. State of Tamil Nadu,* 1983 LW (Crl.) 121 and followed in *G.K. Moopanar, M.L.A. v. State of Tamil Nadu,* 1990 LW (Crl) 113, that it is a very serious judicial act to be performed by the Magistrates, while remanding the Accused, as the personal liberty of the individual is deprived off. While considering the request for remand, the learned Magistrate is required to hold a summary enquiry. The nature of the enquiry to be held and the scope of such enquiry and under what circumstances, the order of remand can be passed by the Magistrate, have been elaborately dealt with by this Court, in *State v. K.C. Palanisamy,* Crl.O.P. (MD) No.13615 of 2011 dated 14.10.2011 At that time, the Magistrate may remand the Accused, either to Police custody or judicial custody. Thus, even without effecting a formal arrest, the Police Officer is entitled to seek Police custody or judicial custody of the Accused, as elaborated above. *[Para 32]*

j. The other mode, which the Police Officer may adopt, is to effect a formal arrest in prison, as stated in *Anupam Kulkarni's case* and thereafter, to make a request to the Jurisdictional Magistrate for issuance of P.T. Warrant for the production of the Accused. When the Accused is so produced before the Magistrate, the Police Officer will be entitled to make a request for the remand of the Accused, either in judicial custody or in Police custody. *[Para 33]*

k. After taking us through the above Judgment, the learned Senior Counsel would submit that, by passing an order of remand, the illegal detention, offending Article 22(2) of the Constitution of India, cannot be cured. A perusal of the said Judgment would go to show that in the event the arrest itself is illegal, undoubtedly, the Accused, thereafter, cannot be remanded to the custody by the Magistrate, because such illegal arrest cannot be cured by any valid remand order. In the instant case, it is not at all the case of the Respondents that the formal arrests effected on the Respondents are illegal. Therefore, the said Judgment does not come to the rescue of the Respondents, in any manner. Thus,

we hold that, though the past illegal detention cannot be cured, it will be lawful for a Magistrate to pass a valid remand order, prospectively. *[Para 41]*

1. From the above discussions, the following conclusions emerge:

- When an Accused is involved in more than one case and has been remanded to judicial custody in connection with one case, there is no legal compulsion for the Investigating Officer in the other case to effect a formal arrest of the Accused. He has got discretion either to arrest or not to arrest the Accused in the latter case. The Police Officer shall not arrest the Accused in a mechanical fashion. He can resort to arrest only if there are grounds and need to arrest.
- If the Investigating Officer in the latter case decides to arrest the Accused, he can go over to the prison where the Accused is already in judicial remand in connection with some other case and effect a formal arrest as held in *Anupam Kulkarni case*. When such a formal arrest is effected in prison, the Accused does not come into the physical custody of the Police at all, instead, he continues to be in judicial custody in connection with the other case. Therefore, there is no legal compulsion for the production of the Accused before the Magistrate within 24 hours from the said formal arrest.
- For the production of the Accused before the Court after such formal arrest, the Police Officer shall make an Application before the Jurisdictional Magistrate for issuance of P.T. Warrant without delay. If the conditions required in Section 267 of the Code of Criminal Procedure are satisfied, the Magistrate shall issue P.T. Warrant for the production of the Accused on or before a specified date before the Magistrate. When the Accused is so transmitted from prison and produced before the Jurisdictional Magistrate in pursuance of the P.T. Warrant, it will be lawful for the Police Officer to make a request to the learned Magistrate for authorising the detention of the Accused either in Police custody or in judicial custody.
- After considering the said request, the representation of the Accused and after perusing the case diary and other relevant materials, the learned Magistrate shall pass appropriate orders under Section 167(1) of the Code of Criminal Procedure.
- If the Police Officer decides not to effect formal arrest, it will be lawful for him to straightaway make an Application to the Jurisdictional Magistrate for issuance of P.T. Warrant for transmitting the Accused from prison before him for the purpose of remand. On such request, if the Magistrate finds that the requirements of Section 267 of the Code of Criminal Procedure are satisfied, he shall issue P.T. Warrant for the production of the Accused on or before a specified date.
- When the Accused is so transmitted and produced before the Magistrate in pursuance of the P.T. Warrant from prison, the Police Officer will be entitled to make a request to the Magistrate for authorising the detention of the Accused either in Police custody or in judicial custody. On such request, after following the procedure indicated above, the Magistrate shall pass appropriate orders either remanding the Accused either to judicial custody or Police custody under Section 167(1) of the Code of Criminal Procedure or dismissing the request after recording the reasons.

- Before the Accused is transmitted and produced before the Court in pursuance of a P.T. Warrant in connection with a latter case, if he has been ordered to be released in connection with the former case, the jail authority shall set him at liberty and return the P.T. Warrant to the Magistrate making necessary endorsement and if only the Accused continues to be in judicial custody, in connection with the former case, he can be transmitted in pursuance of P.T. Warrant in connection with the latter case. *[Para 42]*

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 267, 167(1), 46, 57 & 482 — Order declining remand — Legality — Formal arrest effected in prison on 3.10.2011 — Application for issuance of PT Warrant made on 4.10.2011 — PT Warrant issued by Magistrate directing production of Accused on 7.10.2011 — Magistrate on leave on 7.10.2011 and Magistrate incharge declined to exercise jurisdiction under Section 167 on ground that regular Magistrate was on leave — Magistrate incharge directed production of Accused on 10.10.2011 for suitable order — Magistrate incharge declining to remand Accused to judicial custody, *held,* not proper — Further, though Accused was directed to be produced on 10.10.2011, same would lead to only inference that she passed order of temporary remand from 7.10.2011 to 10.10.2011 — Detention of Accused between 7.10.2011 to 10.10.2011 cannot be held to be illegal — On 10.10.2011 when Accused was produced before concerned Magistrate, he declined to remand Accused holding that Accused was not produced for remand within 24 hrs. from time of formal arrest — Not proper — By effecting "formal arrest", Accused did not come into custody of Police — Therefore, no legal mandate that he should be produced within 24 hrs. before Magistrate — Order of Magistrate, *held,* not sustainable, set aside — Matter remitted for passing appropriate order under Section 167(1) after affording opportunity to prosecution and Accused.(Paras 44 to 51)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 267, 57 & 167(1) — Production of Accused pursuant to PT Warrant beyond 24 hrs. of formal arrest — Orders of remand passed by Magistrate under Section 167(1) cannot be said to be illegal — Order of Single Judge in Cr.O.P. (MD) No.1178 & 1182 of 2009, *held,* does not expound correct position of law — Overruled. (Paras 36 & 40)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Section 46 — "Arrest" — Denotes confinement of body of person either by physical act or by words or by action — Section does not indicate any other mode — Arrest necessarily involves taking of Accused into physical custody by person effecting arrest — In every arrest there is custody and not *vice versa*. (Paras 14, 15, 18-21)

CASES REFERRED

I. Subramaniam, Public Prosecutor for Petitioner.

R. Shunmugasundaram, Senior Counsel for Respondent Nos.1 & 2; N.R. Elango, Senior Counsel for T. Senthilkumar, Advocate for Respondent No.3.

Finding — Cr.O.P. allowed with directions.

Prayer : Petition is filed under Section 482 of the Code of Criminal Procedure to call for the records and set aside the order dated 10.10.2011 passed by the learned Judicial Magistrate No.V, Trichy Crime No.27 of 2011, on the file of the Petitioner.

JUDGMENT

S. Nagamuthu, J.

1. In every "arrest" there is "custody", but not *vice versa*. Whether in every "formal arrest" there is "custody", as embodied in Article 22(2) of the Constitution of India and Section 57 of the Code of Criminal Procedure, is the interesting issue involved in this Criminal Original Petition.

2. The Respondents herein are the Accused in Crime No.27 of 2011, on the file of the Anti Land Grabbing Special Cell, City Crime Branch, Trichy, for offences punishable under Sections 147, 148, 365, 307, 427, 294(b) & 506(ii), IPC r/w Section 3 of PPDL Act. Apart from the same, they have been arrayed as Accused in two other cases, in Crime Nos.24 of 2011 & 26 of 2011, on the file of the very same Police. In the cases, in Crime Nos.24 of 2011 & 26 of 2011, the Respondents were arrested and on the orders of remand passed by the learned Judicial Magistrate No.IV, Trichy, they were detained in the prisons in Cuddalore, Palayamkottai and Salem, respectively.

3. While so, in connection with Crime No.27 of 2011, the Petitioner/Investigating Officer effected "formal arrest" of the first Respondent, on 3.10.2011, at 9.00 a.m. in the prison. Similarly, he effected formal arrest of the Respondents 2 & 3, on 03.10.2011, at 3.15 p.m. & 4.55

p.m., respectively. Thereafter, the Petitioner rushed to Trichy and on 4.10.2011 made a request to the learned Judicial Magistrate No.V to issue warrant [hereinafter referred to as "P.T warrant" - Prisoner Transit warrant], as per Section 267 of the Code of Criminal Procedure. On considering the same, the learned Magistrate issued warrants directing the respective jail Authorities to produce the Respondents, on 7.10.2011, obviously, because 5.10.2011 & 6.10.2011 were holidays. Accordingly, the Respondents were produced before the learned Magistrate, by the Jail Authorities, in pursuance of the P.T. Warrants issued on 7.10.2011. But the learned Magistrate No.V was on casual leave on that day and the learned Judicial Magistrate No.IV, [hereinafter referred to as "in-charge Magistrate"], was in full charge of the said Court. The learned in-charge Magistrate, heard the representation of the Accused, as well as the Public Prosecutor and passed the following order:

> "Order: 7.10.2011 at 2.30 p.m.
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> Formal arrest made on 3.10.2011. Requisition for P.T. Warrant given on 4.10.2011 in view of holidays concerned Magistrate directed to produced the Accused on 7.10.2011 on P.T. Warrant. Hence Accused produced on P.T. Warrant. Grounds of arrest explained. Right of Legal Aid Explained. Considering the circumstance of the Court holiday on 5.10.2011 & 6.10.2011 as well as Casual Leave of regular Magistrate on 7.10.2011 this Court not inclined to remand the Accused on Judicial custody in view of available records. Produce the Accused before concerned Magistrate on 10.10.2011 for further suitable Order in this regard. Hence, Accused to be produced before regular Magistrate on 10.10.2011."

The said order was not challenged by any party to the proceedings. Thereafter, as directed by the said Magistrate, the Respondents were produced before the learned Judicial Magistrate No.V, on 10.10.2011. At that time, again the Petitioner submitted a request to the learned Magistrate to pass an order of remand to all the three Respondents, as provided under Section 167, Cr.P.C.

4. Pausing for a moment, it is necessary to mention that in the mean while, the Accused were granted bail in the cases relating to Crime Nos.24 of 2011 & 26 of 2011. Despite their release on bail in those two cases, the respective Jail Authorities did not set them at liberty, on 8.10.2011. Alleging that such detention of the Respondents in prison without any authorisation from the Court amounts to illegal detention, the wife of the Second Respondent herein filed H.C.P. (MD) No.913 of 2011 before this Court, on 10.10.2011, to set all the Respondents herein at liberty and the same is pending.

5. Reverting back to the proceedings before the Magistrate on 10.10.2011, when the Respondents were produced before the Magistrate, the learned Magistrate considered the request of the Petitioner for remanding the Accused to judicial custody. The same was opposed by the State itself (Petitioner herein) on the ground that in view of the pendency of the H.C.P (MD) No.913 of 2011, the Magistrate should not pass any order on the

remand request made by the Petitioner. The learned Magistrate, admittedly, heard the Counsel for the Respondents as well.

6. Mr. N.R. Elango, the learned Senior Counsel, who appeared for the Accused before the Magistrate, had submitted that the learned Magistrate lacked jurisdiction to remand the Accused, since the Accused were in the illegal detention of the Police in violation of Article 22(2) of the Constitution of India. It appears from the order of the learned Magistrate that the learned Senior Counsel Mr. N.R. Elango placed reliance on the order of this Court made in Crl.O.P. (MD) No.1182 of 2009, wherein a learned Single Judge of this Court had taken the view that in the event the Accused is not produced before the Magistrate within 24 hours of the arrest, the said detention, beyond 24 hours from the time of arrest, is illegal, and thereafter, if the Accused is produced before the Magistrate with a request for remand, the Magistrate cannot remand as per law, and if any such remand is made, the same would be illegal. The learned Judicial Magistrate No.V, after having considered the submissions made on either side and following the dictum stated in Crl.O.P. (MD) No.1182 of 2009, passed an order on the same day thereby, negativing the request of the Petitioner for remanding the Accused to custody. The State is aggrieved by the said order. Thus, the State has come up with Crl.O.P. (MD) No.13683 of 2011 before this Court challenging the said order.

7. When this Crl.O.P. (MD) No.13683 of 2011 came up for hearing before one of us (Justice S. Nagamuthu), the State Public Prosecutor Mr. I. Subramanian, appeared and submitted that the directions issued in Crl.O.P. (MD) No.1182 of 2009 are directly in conflict with the law laid down by the Hon'ble Supreme Court in a number of judgments, more particularly, in ***Sadhwi Pragyna Singh Thakur v. State of Maharashtra,*** 2011 (10) SCC 445 During the course of arguments, it was also brought to the notice of Justice S. Nagamuthu that when a similar issue came up for consideration, in Crl.O.P. (MD) No.4420 of 2010, another learned Single Judge of this Court (Hon'ble Justice M.M. Sundresh), by order, dated 30.4.2010, doubted the correctness of the view taken in Crl.O.P. (MD) No.1178 of 2009 & Crl.O.P. (MD) No.1182 of 2009 and had referred the matter to a Division Bench for considering the correctness of the dictum stated in Crl.O.P. (MD) No.1178 of 2009. Since, the legal question involved in the instant case, in Crl.O.P. (MD) No.13683 of 2011, is also similar to that of the legal question involved in Crl.O.P. (MD) No.4420 of 2010, by order dated 11.10.2011, one of us, (Justice S. Nagamuthu), referred the said Criminal Original Petition also for decision by a Division Bench, along with Crl.O.P. (MD) No.4420 of 2010. Accordingly, as directed by the Hon'ble the Chief Justice, both the matters, *viz.* Crl.O.P. (MD) Nos.4420 of 2010 and 13683 of 2011, have been placed before this Division Bench for considering the said legal question. Thus, both the matters are before this Court for consideration.

8. As we have already seen, the basis for reference of these two Criminal Original Petitions to the Division Bench is the doubt raised by Hon'ble Mr.

Justice M.M. Sundresh, regarding the correctness of the view expressed in the order made in Crl.O.P. (MD) Nos.1178 of 2009 & 4420 of 2010. In those two cases, the respective Accused were already in judicial custody in connection with some other case. Formal arrests were effected in connection with the subsequent cases by the Police. Thereafter, the Investigating Officer approached the Jurisdictional Magistrate for issuance of P.T. Warrants for production of the Accused. Accordingly, P.T. Warrants were issued and the Accused were produced before the Jurisdictional Magistrate. This process took a few days. Thus, the Accused could not be produced before the learned Magistrate concerned within 24 hours from the time of formal arrest. But, the learned Magistrate remanded the Accused to judicial custody. When the Accused approached this Court for bail, the learned Judge, by referring to a judgment of the Hon'ble Apex Court, in ***Manoj v. State of Madhya Pradesh,*** 1999 (3) SCC 715, held that the learned Magistrate had no jurisdiction to remand the Accused, since, the Accused were produced beyond 24 hours from the time of arrest excluding the time taken for the journey of the Accused from the jail to the Court. According to the learned Judge, the remand was illegal. In the referral order, the Hon'ble Mr. Justice M.M. Sundresh has stated that *Manoj's case* was rendered in a totally different context, and therefore, the same cannot be made applicable to the facts of the present case. The learned Judge had further observed that he was unable to agree with the view taken in Crl.O.P. (MD) No.1178 of 2009. According to Hon'ble Mr. Justice M.M. Sundresh, assuming that the detention of the Accused for sometime in Police custody is illegal, even then, the Magistrate would be competent to remand the Accused, either to judicial custody or to Police custody, when the Accused is produced before him with a request for remand. Thus, from the narration of the above facts of the cases and the observations made by the learned Judges, which are conflicting with each other, the following questions have come up for consideration before this Court:

> (a) When the Accused is in judicial custody in connection with one case, if formal arrest is effected in prison in connection with a different case, whether the Accused will be "in the custody of the Police", as embodied in Section 57 of the Code of Criminal Procedure and Article 22(2) of the Constitution of India ?
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> (b) From the time of formal arrest, if the Accused is not produced before the Magistrate for remand within 24 hours, whether the detention of the Accused, beyond the said 24 hours shall be illegal ?
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> (c) Assuming that the Accused could not be produced within 24 hours from the time of effecting formal arrest in jail, whether it would be lawful for the Magistrate to pass an order authorising the detention of the Accused, either in Police custody or in judicial custody, thereafter ?

(d) Whether such remand order passed by the Magistrate will cure/legalise the alleged illegal detention of the Accused in Police custody beyond 24 hours from the time of formal arrest ?

9. On the above questions of law, we have heard the learned State Public Prosecutor, Mr. I. Subramanian, Mr. R. Shanmugasundaram, the learned Senior Counsel for Respondents 1 & 2 and Mr. N.R. Elango, the learned Senior Counsel on behalf of the Third Respondent.

10. Personal liberty is one of the cherished objects of the Indian Constitution and the deprivation of the same can only be in accordance with the procedure established by law and in conformity with the provisions thereof, as stipulated in Article 21 of the Constitution of India. Article 22(2) of the Constitution mandates that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate. Similar provision is found in Section 57 of the Code of Criminal Procedure, which also mandates that no Police Officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. These two provisions came up for consideration on several occasions before the Hon'ble Supreme Court, as well as this Court and the Courts have in no uncertain terms held that without the authorisation of a Magistrate, no arrestee shall be detained in the custody of the Police beyond 24 hours from the time of arrest excluding the time taken for the journey from the place of arrest to the Court. In this regard, there could be no controversy that when an Accused is detained in the custody of the Police after arrest beyond 24 hours excluding the time taken for the journey from the place of arrest to the Court, such detention beyond the said period is surely illegal.

11. As is mandated under Article 22(2) of the Constitution of India and under Section 57 of the Code of Criminal Procedure, for getting the authorisation from the Court for detention, either in judicial custody or Police custody, the Accused has to be physically produced before the Magistrate under Section 167, Cr.P.C. Section 167(1) of Cr.P.C. is the law which regulates and empowers a Magistrate to authorise the detention of the Accused either in Police custody or in judicial custody, as the case may be. It is too well settled that while passing an order of remand, either judicial custody or Police custody, as mandated in Section 167(1) of Cr.P.C., since the said detention deprives the personal liberty guaranteed under Article 21 of the Constitution of India, such order of remand shall not be passed in a mechanical fashion. The learned Magistrate is required to apply his mind

into the entries in the Case Diary, representation of the Accused and other facts and circumstances, and only on satisfaction that such remand is justified, the learned Magistrate shall pass such order of remand. [vide ***Elumalai v. State of Tamil Nadu,*** 1983 LW (Crl) 121].

12. At this juncture, we may point out that in a case where an Accused is arrested and detained in physical custody of the Police, as mandated in Article 22(2) of the Constitution of India and Section 57 of the Code of Criminal Procedure, undoubtedly the Accused cannot be detained in Police custody for more than 24 hours. But in the case on hand, the contention of the learned Public Prosecutor is that though the Respondents were formally arrested, the same cannot be equated to an arrest as adumbrated under Section 46 of the Code of Criminal Procedure. The learned Public Prosecutor would submit that when only a formal arrest is effected in prison, the arrestee does not get into the custody of the Police, and therefore, there is no question of detention in Police custody beyond 24 hours. The learned Public Prosecutor would submit that if only the Accused has been arrested and detained in custody, then such custody shall not be for beyond 24 hours from the time of arrest. But, in the case of a formal arrest, according to the learned Public Prosecutor, since there is only a formal arrest, the Accused does not get into the physical custody of the Police, and therefore, there is no Police custody either for 24 hours or beyond that.

13. But, it is the contention of the learned Senior Counsel, Mr. N.R. Elango that the Phrase "Arrest and Custody" as enumerated in Article 22(2) of the Constitution and Section 57 of the Code of Criminal Procedure, cannot be split into two distinct terms. He would submit that they would go together. In other words, according to him, the moment an Accused is arrested, he comes under the physical custody of the Police. Therefore, there cannot be any arrest without custody. Arrest and custody are the integral part of the same process. In such view of the matter, according to the learned Senior Counsel, if formal arrest is effected in prison by the Police, the Accused is taken into custody forthwith by the Police, and therefore, as mandated under Article 22(2) of the Constitution and Section 57 of the Code of Criminal Procedure, the Accused should be produced before a Magistrate within 24 hours from the time of such formal arrest and any detention beyond 24 hours from the time of formal arrest excluding the time taken for the journey from the place of arrest to the Court shall be illegal.

14. Since the rival contentions of the learned Counsel centers around Section 46(1) of the Code of Criminal Procedure, let us have a cursory look into the same which is thus:

> "*46. Arrest how made.— (1)* In making an arrest the Police Officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

> Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the Police Officer is a female, the Police Officer shall not touch the person of the woman for making her arrest."

A reading of the above provision would make it undoubtedly clear that the term "arrest" denotes confinement of the body of the person either by a physical act or by words or action. Section 46 does not indicate any other mode of arrest. Therefore, as per Section 46(1), the arrest necessarily involves the taking of the Accused into physical custody by the person who effects the arrest.

15. But, if an Accused already is in judicial custody in connection with some other case, when the Investigating Officer wants to arrest him in connection with a different case, some confusion may surface regarding the mode of arrest. As has been held by the Hon'ble Supreme Court in ***CBI v. Anupam J. Kulkarani,*** 1992 (3) SCC 141, he can effect formal arrest of the Accused in prison. As provided in Section 46(1) of the Code of Criminal Procedure by effecting arrest in prison, the Police Officer cannot take him into custody at all, because the detention of such Accused in judicial custody has already been authorized by the Magistrate in connection with some other case. Therefore, without the authority of the Magistrate, it is not possible in law for the Police Officer to remove the Accused after effecting arrest in prison either to the Jurisdictional Magistrate or to the nearest Magistrate for the purpose of remand. It is only to meet such exigency, the Hon'ble Supreme Court developed a concept known as formal arrest in ***C.B.I. v. Anupam J. Kulkarni*** cited supra. As in the instant case, in that case also, the Accused was already in prison in connection with a former case. In connection with the subsequent case, the Accused was arrested in prison. Thereafter, he was produced before the learned Magistrate. By that time, the initial period of 15 days of remand in the former case had expired. When Police custody was sought for in the latter case, it was opposed by the Accused that during the subsequent period, after the initial period of 15 days of remand, the Police custody cannot be granted. While declaring the law that the detention of the Accused in Police custody can be made by the Magistrate either having jurisdiction or not, only during the initial period of 15 days from the date of first remand, the Hon'ble Supreme Court went on to analyse the legal position as to the effect of formal arrest made in connection with a latter case after the expiry of the initial period of 15 days in connection with the former case. The Hon'ble Supreme Court in Paragraph No.13 of the said Judgment, has held as follows:

> "There cannot be any detention in the Police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested Accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in

> connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the Proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the Proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the Accused has to be released on bail as provided under the Proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the Police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody."

It is only after the said judgment, the concept of formal arrest in prison while the Accused is already in prison in connection with some other case came into being and thereafter invariably in most of the cases, we are informed, the Police officials do effect formal arrest in prison and thereafter get the Accused remanded to either judicial custody or Police custody under Section 167 of the Code of Criminal Procedure.

16. When such formal arrest is effected in prison, practically, if not in all cases at least in some cases, it may not be possible for producing the Accused before either the nearest Magistrate or the Jurisdictional Magistrate within 24 hours for the purpose of further remand, the reason being that the Accused cannot be moved from the jail to the Court either by the jail authority or by the Police without the authorisation of the Court. In such a situation, the only mode available for the Police Officer to produce the Accused before the Magistrate for the purpose of remand is to apply to the jurisdictional Magistrate for P.T. Warrant under Section 267, Cr.P.C. At this juncture, it is needless to point out that P.T. Warrant can be issued only by the jurisdictional Magistrate and not by any other Magistrate. When such a request for production of the Accused from prison in the Court is needed, the Magistrate shall issue P.T. Warrant and in pursuance of the said P.T. Warrant, the Accused shall be thereafter produced before the Magistrate. This process will mostly take more than 24 hours. For example, let us assume that an Accused is lodged in Central Prison, Chennai, in connection with a case. Later on, in connection with a case relating to Kanyakumari District, the Investigating Officer effects formal arrest of the Accused in Central Prison, Chennai, as per the procedure indicated above and thereafter it will take at least one full day for the Police Officer to rush back to Kanyakumari to make an Application for issuance of P.T. Warrant. Assuming that the learned Magistrate issues P.T. Warrant on the same day, it will take yet another day for the Police Officer to take P.T. Warrant to the Prison Authorities at Chennai. It is only thereafter, the Accused will be again taken from Chennai to Kanyakumari for the purpose of remand. This process would certainly consume at least 3 to 4 days. If we have to say that the detention during the interregnum period in prison is illegal, necessarily, we

have to hold that the Accused was in the custody of the Police. In our considered opinion, such interpretation cannot be made, as the same would make the law meaningless.

17. At this juncture, the contention of the learned Public Prosecutor that by effecting formal arrest, the Accused does not come into the custody of the Police at all, and therefore, the production of the Accused after any number of days in pursuance of a P.T. Warrant before the Court will meet the legal requirements and there is no question of any illegal detention in the custody of the Police during the interregnum period needs consideration.

18. Now, this debate leads us to examine the question as to whether the terms "arrest" and "custody" are synonymous. For this, it would be useful to refer to the judgment of the Full Bench of this Court in ***Roshan Beevi v. Joint Secretary, Government of Tamil Nadu,*** 1983 MLW (Cri) 289, wherein this Court had to examine the meaning of the word "arrest". After reference to various law Dictionaries and various judgments on this aspect, the Full Bench took the view that custody and arrest are not synonymous terms. The Full Bench further held that though custody may amount to arrest in certain circumstances, but not under all circumstances. The said judgment came to be considered before the Hon'ble Supreme Court in ***Directorate of Enforcement v. Deepak Mahajan and Another,*** 1994 (3) SCC 440. While confirming the stand taken by the Full Bench in ***Roshan Beevi's*** case, the Hon'ble Supreme Court in paragraph 48 of the judgment, has held as follows:

> "*48.* Thus the Code gives power of arrest not only to a Police Officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an Accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that Accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide *Roshan Beevi.*"

19. A perusal of the above Supreme Court judgment would make it clear that in every arrest there is custody and not *vice-versa*. The question as to when a person gets into the custody of the Court for the purpose of exercising the power by the Magistrate under Section 167(1) of the Code of Criminal Procedure came up for consideration before the Hon'ble Supreme Court in ***Niranjan Singh v. Prabhakar Rajaram Kharote,*** 1980 (2) SCC 559. Speaking for the Bench, Hon'ble Justice V.R. Krishna Iyer has declared the law as follows:

> "He can be in custody not merely when the Police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions."

20. The above cases, *viz.* ***Roshan Beevi's case*** and ***Niranjan Singh's case,*** were considered again by the Hon'ble Supreme Court very recently in ***State of Haryana v. Dinesh Kumar,*** 2008 (3) SCC 222. After referring to ***Niranjan Singh's case*** in Paragraph No.25 of the Judgment, the Hon'ble Supreme Court has held as follows:

> "*25.* We also agree with Mr. Anoop Chaudhary's submission that unless a person Accused of an offence is in custody, he cannot move the Court for bail under Section 439 of the Code, which provides for release on bail of any person Accused of an offence and *in custody*. (emphasis supplied) The precondition, therefore, for applying the provisions of Section 439 of the Code is that a person who is an Accused must be in custody and his movements must have been restricted before he can move for bail. This aspect of the matter was considered in *Niranjan Singh case* where it was held that a person can be stated to be in judicial custody when he surrenders before the Court and submits to its directions."

21. Then, after referring to ***Roshan Beevi's*** case, the Hon'ble Supreme Court in Paragraph No.27 of the Judgment, held as follows:

> "*27.* The interpretation of "arrest" and "custody" rendered by the Full Bench in *Roshan Beevi case* may be relevant in the context of Sections 107 & 108 of the Customs Act where summons in respect of an enquiry may amount to "custody" but not to "arrest", but such custody could subsequently materialise into arrest. The position is different as far as proceedings in the Court are concerned in relation to enquiry into offences under the Penal Code and other Criminal enactments. In the latter set of cases, in order to obtain the benefit of bail an Accused has to surrender to the custody of the Court or the Police authorities before he can be granted the benefit thereunder. In Vol. 11 of the 4th Edn. of *Halsbury's Laws of England* the term "arrest" has been defined in Para 99 in the following terms:
>
> > "*99. Meaning of arrest.*—Arrest consists in the seizure or touching of a person's body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion."

22. From the above judgments, one can easily understand that for a Magistrate to exercise his power under Section 167(1) of the Code of Criminal Procedure, the pre-requisite condition is that the Accused must be in the custody of the Court and such custody may be had either by arrest by a competent officer and production before the Magistrate or on the surrender of the Accused on his own volition before the learned Magistrate or on his appearance in pursuance of any process. Under these circumstances, the Accused will be in the custody of the Court, and therefore, the Magistrate

will be competent to pass further orders of detention, either in judicial custody or in Police custody, initially for 15 days.

23. Section 46 of the Code of Criminal Procedure, as we have already seen, prescribes the mode of arrest. According to the said provision, the arrest can be effected only by keeping the arrestee in the custody of the Police. It is only on interpreting Section 46 and various other provisions, in the judgments cited supra, the Hon'ble Supreme Court has laid down the law thereby stating that in every arrest, there is custody but not vice-versa.

24. It is only on the above premise, the learned Senior Counsel, Mr. N.R. Elango would contend that as soon as the formal arrest is effected in prison, as stated in ***CBI v. Anupam Kulkarni's,*** 1992 (3) SCC 141 case, the Accused is taken into custody by the Police and therefore, the period of detention in Police custody commences from the moment the formal arrest is effected. It is in this view, the learned Senior Counsel would contend that within 24 hours from the time of such formal arrest, the Accused should be produced before the Magistrate. There could be no controversy that if an arrest is made and the Accused gets into physical custody of the Police, surely, the said detention in Police custody shall not exceed 24 hours and any such detention beyond 24 hours without the authorisation of the Magistrate shall be unconstitutional, as mandated in Article 22(2) of the Constitution. But in a case where the Accused is not actually arrested, as provided in Section 46 of Cr.P.C., and only a formal arrest is effected, as rightly pointed out by the learned Public Prosecutor, we are of the opinion that the Accused is not taken into the physical custody of the Police. In other words, when formal arrest is effected, as stated in ***CBI v. Anupam Kulkarni's case***, there is no custody, whereas, when there is actual arrest effected, there is custody. Thus, the law laid down in ***Deepak Mahajan's case*** stating that in every arrest there is custody and not vice-versa, cannot be imported to a formal arrest. That law laid down by the Supreme Court is only with reference to the actual arrest and not with reference to the formal arrest.

25. In this regard, we may refer to the Judgment of the Hon'ble Supreme Court, in ***State of W.B. v. Dinesh Dalmia,*** 2007 (5) SCC 773. That was a case where the Accused Dinesh Dalmia was arrested in New Delhi by C.B.I. in connection with a case and produced before the Chief Metropolitan Magistrate and thereafter on transit remand order, he was produced before the jurisdictional Magistrate, *viz.,* Additional Chief Metropolitan Magistrate, Egmore, Chennai, on 14.2.2006. Accordingly, the learned Additional Chief Metropolitan Magistrate, Chennai, remanded him to judicial custody.

26. In the meanwhile, it came to light that the Accused-Dinesh Dalmia was involved in yet another Criminal case in Calcutta. Therefore, the Investigating Officer in the latter case filed a petition before the Chief Metropolitan Magistrate, Calcutta, who was the Jurisdictional Magistrate in

respect of the latter case, and requested for a P.T. Warrant. The Chief Metropolitan Magistrate, Calcutta, allowed the said prayer and directed the Accused to be produced before him, on 22.2.2006. A copy of the said order was sent to the Chief Metropolitan Magistrate, Egmore, Chennai, on 14.2.2006, and the order, dated 13.2.2006, passed by the Chief Metropolitan Magistrate, Calcutta, was brought to the notice of the Additional Chief Metropolitan Magistrate, Egmore, Chennai. The Additional Chief Metropolitan Magistrate, Egmore, Chennai, observed that the matter of Calcutta Police would be considered after the period of C.B.I. custody was over. On 17.2.2006, the Investigating Officer intimated the Chief Metropolitan Magistrate, Calcutta, that the Accused was in C.B.I. custody till 24.2.2006, in connection with the former case. Therefore, the learned Chief Metropolitan Magistrate, Calcutta, directed the production of the Accused before him, on or by 8.3.2006. In the mean while, the Accused came to know that he was wanted for arrest, and therefore, he made a "notional surrender" before the Chief Metropolitan Magistrate, Egmore, who remanded him to judicial custody. Later on, when he was physically produced before the Court, on 13.3.2006, a request was made by the Police before the Chief Metropolitan Magistrate, Calcutta, for Police custody. The learned Magistrate, accordingly, authorised his detention in Police custody till 28.3.2006.

27. Aggrieved over the same, a challenge was made before the Sessions Court and ultimately the matter came up before the Hon'ble Supreme Court. The contention before the Supreme Court was that the Accused surrendered on 27.2.2006 before the Additional Chief Metropolitan Magistrate, Egmore, in connection with the Case Nos.300 & 476 of 2002 and he was produced before the Chief Metropolitan Magistrate, Calcutta, on 28.3.2006. Thus, on 28.3.2006, the initial period of remand for 15 days had already expired and therefore, the custody of the Police cannot be granted in view of the law laid down in ***Anupam Kulkarni's case***. The Hon'ble Supreme Court had considered whether such "notional surrender" before a different Court will disentitle the Police to seek Police custody after expiry of 15 days from such date of notional surrender. After elaborately dealing with Sections 57, 167(1) and other provisions of Cr.P.C. and Article 22(2) of the Constitution, the Hon'ble Supreme Court held in paragraph-16 of the judgment as follows:

> "Therefore, the reading of sub-sections (1) & (2) with Proviso clearly transpires that the incumbent should be in fact under the detention of Police for investigation. In the present case, the Accused was not arrested by the Police nor was he in the Police custody before 13.3.2006. He voluntarily surrendered before a Magistrate and no physical custody of the Accused was given to the Police for investigation. The whole purpose is that the Accused should not be detained for more than 24 hours and subject to 15 days' Police remand and it can further be extended up to 90/60 days as the case may be. But the custody of Police for investigation purpose cannot be treated as judicial custody/detention in another case. The Police custody here means the Police custody in a particular case for investigation and not judicial custody in another case. *This notional surrender*

cannot be treated as Police custody so as to count 90 days from that notional surrender. A notorious Criminal may have number of cases pending in various Police Stations in a city or outside the city, a notional surrender in pending case for another FIR outside the city or of another Police Station in same city, if the notional surrender is counted then the Police will not get the opportunity to get custodial investigation. The period of detention before a Magistrate can be treated as device to avoid physical custody of the Police and claim the benefit of proviso to sub-section (2) and can be released on bail. *This kind of device cannot be permitted under Section 167, Cr.P.C. The condition is that the Accused must be in the custody of the Police and so-called deemed surrender in another Criminal case cannot be taken as starting point for counting 15 days' Police remand or 90 days or 60 days as the case may be. Therefore, this kind of surrender by the Accused cannot be deemed to be in the Police custody in Case No. 476 of 2002 in Calcutta."* [emphasis supplied].

In Paragraph No.17 of the said judgment, the Hon'ble Supreme Court has held as follows:

"*17.* Therefore, it is very clearly mentioned that the Accused must be in custody of the Police for the investigation. But if the investigation into the offence for which he is arrested initially revealed other ramifications associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable. Meaning thereby that if during the course of the investigation any further ramification comes to the notice of the Police then the period will not be extendable. But it clearly lays down that the Accused must be in custody of Police."

28. A close reading of ***Dinesh Dalmia's case,*** as referred to above, would keep things beyond any shadow of doubt that unless the Accused is "in the physical custody" of the Police on arrest, the question of production of the Accused within 24 hours from the time of such formal arrest cannot be insisted upon. To put it otherwise, if a formal arrest is effected, as held in ***Anupam Kulkarni's case,*** when the Accused is already in custody, in connection with a different case, the Accused continues to be in judicial custody in connection with the former case and he never comes to the physical custody of the Police, in connection with the case relating to which formal arrest is effected.

29. Therefore, there is no legal mandate that the Accused should be thereafter produced before the Jurisdictional Magistrate or nearest Magistrate, within 24 hours of such formal arrest. The contention of the learned Senior Counsel, Mr. N.R. Elango is that after effecting the formal arrest, the Accused should be taken to a Magistrate who has or has no jurisdiction for the purpose of remand, within 24 hours of such arrest. When a question was posed to him as to how it is practically possible for the Police to move the Accused from jail to the Court after effecting formal arrest, he had submitted that such a course is possible only by getting a P.T. Warrant from the "nearest Magistrate", so as to save the time limit of 24 hours. When

it was pointed out to the learned Counsel that as per Section 267 of the Code of Criminal Procedure, P.T. Warrant can be issued only by a Jurisdictional Magistrate, he changed his view and conceded that a Magistrate, who does not have jurisdiction over the case, cannot issue a P.T. Warrant. Therefore, he submitted that such P.T. Warrant can be issued only by the Jurisdictional Magistrate. If the Police Officer has to rush to the Jurisdictional Magistrate to get P.T. Warrant, in the mean while, the time limit of 24 hours may lapse.

30. The next question is as to whether at all it is necessary invariably in all cases that such formal arrest is required to be effected in prison, when the Accused is already lodged in prison in connection with some other case. It is needless to point out that though the Police Officer has got power to arrest, it does not mean that he has to resort to arresting the Accused, irrespective of the need and justification for arrest. As held in ***Joginder Kumar v. State of U.P. and others,*** 1994 SCC (Crl) 1172, "no arrest can be made, because it is lawful for the Police Officer to arrest. The existence of power to arrest is one thing. The jurisdiction for the exercise of it is quite another. Thus, he has got discretion and only in a case where such arrest is absolutely necessary, he shall resort to arrest. In all other cases, he may, without arresting the Accused, proceed with the investigation and file final reports.

31. In a case where the Police Officer deems it necessary to arrest when the Accused is already in judicial custody in connection with a different case, in our considered opinion, there are two modes available for him to adopt. The first one is that, instead of effecting formal arrest, he can very well make an Application before the Jurisdictional Magistrate seeking a P.T. Warrant for the production of the Accused from prison. If the conditions required under 267 of the Code of Criminal Procedure, are satisfied, the Magistrate shall issue a P.T. Warrant for the production of the Accused in Court. When the Accused is so produced before the Court, in pursuance of the P.T.Warrant, the Police Officer will be at liberty to make a request for remanding the Accused, either to Police custody or judicial custody, as provided in Section 167(1) of the Code of Criminal Procedure. At that time, the Magistrate shall consider the request of the Police, peruse the case diary and the representation of the Accused and then, pass an appropriate order, either remanding the Accused or declining to remand the Accused.

32. It has been held, in ***Elumalai v. State of Tamil Nadu,*** 1983 LW (Crl.) 121 and followed in ***G.K. Moopanar, M.L.A., v. State of Tamil Nadu,*** 1990 LW (Crl) 113, that it is a very serious judicial act to be performed by the Magistrates, while remanding the Accused, as the personal liberty of the individual is deprived off. While considering the request for remand, the learned Magistrate is required to hold a summary enquiry. The nature of the enquiry to be held and the scope of such enquiry and under what circumstances, the order of remand can be passed by the Magistrate, have been elaborately dealt with by this Court, in ***State v. K.C. Palanisamy,*** Crl.O.P. (MD) No.13615 of 2011 dated 14.10.2011. At that time, the

Magistrate may remand the Accused, either to Police custody or judicial custody. Thus, even without effecting a formal arrest, the Police Officer is entitled to seek Police custody or judicial custody of the Accused, as elaborated above.

33. The other mode, which the Police Officer may adopt, is to effect a formal arrest in prison, as stated in ***Anupam Kulkarni's*** case and thereafter, to make a request to the Jurisdictional Magistrate for issuance of P.T. Warrant for the production of the Accused. When the Accused is so produced before the Magistrate, the Police Officer will be entitled to make a request for the remand of the Accused, either in judicial custody or in Police custody.

34. Now, let us move on to the next contention. In case the Accused is produced before the Magistrate by keeping him in illegal custody for some time beyond 24 hours time from the time of arrest, it is the contention of the learned Senior Counsel for the Respondents that the Magistrate would be incompetent to pass a valid remand order. According to the learned Counsel for the Respondents, the illegal detention by the Police cannot be cured by a subsequent valid order of remand. The learned Senior Counsel tried to substantiate his contention based on the judgment of the Hon'ble Supreme Court, in ***Manoj v. State of Madhya Pradesh,*** 1999 SCC (Cri) 478. In that case, the Accused concerned was arrested by the Police of Kota in Rajasthan (hereinafter referred to as "***Rajasthan case***") and he was later remanded to judicial custody. While he was in judicial custody, he was required to be arrested in connection with a case in Rampura Police Station, Madhya Pradesh State (hereinafter referred to as "***M.P. case***"). The Investigating Officer in ***M.P. case,*** went to Rajasthan and effected a formal arrest, on 7.8.1998. But he was never produced before the Magistrate for remanding him in connection with the ***M.P. case.*** The Accused continued to be in prison, in pursuance of the remand orders passed time and again, in connection with ***Rajasthan case.*** After the Accused was ordered to be released in Rajasthan case, he was still detained in prison, in connection with the ***M.P. case.*** Since, there was no valid remand order in connection with the ***M.P. case,*** he challenged his detention as illegal. When this question came up before the Hon'ble Supreme Court, in paragraph-13 of the judgment, the Hon'ble Supreme Court has held as follows:

> "When the State of Madhya Pradesh whose Police made the arrest of the Appellant in connection with the *M.P.* case on 7.8.1998, admitted that after the arrest he was not produced before the nearest Magistrate within 24 hours, its inevitable corollary is that detention made as a sequel to the arrest would become unlawful beyond the said period of 24 hours."

35. Relying heavily on the above cited case, the learned Senior Counsel would submit that any detention beyond 24 hours from the time of formal arrest, without the authorisation of the Court, amounts to illegal detention. In our considered opinion, such a contention cannot be countenanced at all. It is

needless to point out that the judgment of the Hon'ble Supreme Court laying down a law cannot be interpreted as though we have been called upon to interpret a statutory provision. The judgment of the Hon'ble Supreme Court laying down the law has to be fully understood in the factual scenario and in the light of the relevant statutory provisions. The above observations in ***Manoj's case*** were made in a totally different context. To put it precisely, since the Accused was never produced before the Magistrate after effecting formal arrest, the Hon'ble Supreme Court directed him to be released forthwith, since his continued custody in prison, without the authorization of the Jurisdictional Magistrate, was illegal.

36. The above Judgment of the Hon'ble Supreme Court came to be taken note of by the learned Single Judge of this Court, in Crl.O.P. (MD) Nos.1178 of 2009 and 1182 of 2009. In those cases, the respective Accused were produced before the respective Jurisdictional Magistrates, in pursuance of P.T.Warrants, after 24 hours after formal arrest and they were remanded to custody by the respective Magistrates, under Section 167(1) of the Code of Criminal Procedure. The learned Single Judge held that such remand orders were illegal. The learned Single Judge, after referring to the ***Manoj's case,*** has held that since the Accused were produced in pursuance of P.T. Warrants beyond 24 hours of formal arrest, the said orders of remand were illegal. With great respect, we state that the said conclusion arrived at by the learned Single Judge in those two Criminal Original Petitions does not expound the correct position of law.

37. In this connection, we may now refer to the Judgment of the Hon'ble Supreme Court, in ***Sadhwi Pragyna Singh Thakur v. State of Maharashtra,*** Manu/SC/1101/2011. The facts of the said case would be that the Accused therein was arrested on 10.10.2008 and he was produced before the Jurisdictional Magistrate, on 24.10.2008. According to the Police, he was arrested only on 23.10.2008. Thus, according to the Police, he was produced within 24 hours from the time of arrest, whereas, according to the Accused, he was detained in illegal custody, and thereafter, produced before the Magistrate, on 24.10.2008. On appreciating the materials available, the Hon'ble Supreme Court, ultimately held that the Accused would have been arrested only on 23.10.2008, and therefore, his production before the Magistrate, on 24.10.2008, was perfectly within 24 hours as mandated, in Article 22(2) of the Constitution of India and Section 57 of Cr.P.C. In other words, according to the Supreme Court, on facts, there was no illegal detention. However, the Hon'ble Supreme Court further went on to examine the question as to whether the Magistrate would be competent to pass a valid order of remand, prospectively, even assuming that the Accused was earlier kept in illegal custody by the Police for some time. In Paragraph No.24 of the Judgment, the Hon'ble Supreme Court has held as under:

> "Even if it is assumed for the sake of argument that there was any violation by the Police by not producing the Appellant within 24 hours of arrest, the

Appellant could seek her liberty only so long as she was in the custody of the Police and after she is produced before the Magistrate, and remanded to custody by the learned Magistrate, the Appellant cannot seek to be set at liberty on the ground that there had been non-compliance of Article 22(2) or Section 167 of the Code of Criminal Procedure by the Police."

Then, in paragraph-25 of the judgment, the Hon'ble Supreme Court referred to the earlier judgment of the Hon'ble Supreme Court, in ***Saptawna v. The State of Assam,*** AIR 1971 SC 813, wherein, in Paragraph No.3, the Hon'ble Supreme Court (in Saptawna case), has held as follows:

"It seems to us that even if the Petitioner had been under illegal detention between January 10 to January 24, 1968 – though we do not decide this point – the detention became lawful on January 24, 1968 when he was arrested by the Civil Police and produced before the Magistrate on January 25, 1968. He is now an under trial prisoner and the fact that he was arrested in only one case does not make any difference. The Affidavit clearly states that he was also treated to have been arrested in the other cases pending against him."

The Hon'ble Supreme Court further went on to refer to its earlier judgment, in ***V.L. Rohlua v. Deputy Commissioner, Aijal, District Mizo,*** 1970 (2) SCC 908, and finally held, in Paragraph Nos.26 & 27 of the Judgment, as under:

"*26.* The decisions relied upon by the learned Counsel for the Appellant do not support the plea that in every case where there is violation of Article 22 of the Constitution, an Accused has to be set at liberty and released on bail. Whereas, an Accused may be entitled to be set at liberty if it is shown that the Accused at that point of time is in illegal detention by the Police, such a right is not available after the Magistrate remands the Accused to custody. Right under Article 22 is available only against illegal detention by Police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22 does not operate against the judicial order.

27. The decision in *Manoj v. State of M.P.,* 1999 (3) SCC 715, relied upon by the learned Counsel for the Appellant was a case where the Accused was not produced before the Magistrate in the second case and, therefore, was directed to be released. It was not a case where the person was produced before the learned Magistrate and remanded to custody and then directed to be released because there was infraction by the Police."

Thus, any doubt in understanding ***Manoj's case*** has been now obviated by the Hon'ble Supreme Court by elaborately distinguishing the principles enunciated in the ***Manoj's case***. But the learned Senior Counsel would refer to Paragraph No.29 of the judgment, wherein the Hon'ble Supreme Court has observed as follows:

"*29.* At the time when the Appellant moved for bail she was in judicial custody pursuant to orders of remand passed by the learned CJM/Special Judge. The Appellant did not challenge the orders of remand dated October 24, 2008, November 3, 2008, November 17, 2008 and subsequent orders. In the absence of challenge to these orders of remand passed by the competent Court, the

> Appellant cannot be set at liberty on the alleged plea that there was violation of Article 22 by the Police."

38. Relying on the above observations, the learned Senior Counsel would submit that, because the remand order passed by the competent Court was not challenged, the Hon'ble Supreme Court did not set at liberty the Accused on the alleged plea that there was violation of Article 22 by the Police. In our considered opinion, in Paragraph No.29 of the Judgment, as referred to above, the Hon'ble Supreme Court has not laid down any law. It is only a passing observation. Even in Paragraph No.29 of the Judgment, it is not the view of the Hon'ble Supreme Court that the Magistrate cannot pass any order of remand, prospectively, though the Accused had been kept in illegal detention for some time, by the Police. Thus, as laid down by the Hon'ble Supreme Court, in ***Sadhwi Pragyna Singh Thakur v. State of Maharashtra*** (cited supra), even if the Accused had been under the illegal detention of the Police for sometime, when he is produced before the Magistrate, for remand, it will be lawful for the Magistrate to pass an order of remand, either to Police custody or to judicial custody, provided if he considers that such further detention is necessary.

39. In this respect, the learned Public Prosecutor relies on a Judgment of a Division Bench of this Court, in ***T. Mohan v. State,*** 1993 MLJ (Crl) 628. That was a case where a Magistrate, having no jurisdiction, passed an order of remand illegally, for the period between 25.1.1993 & 25.02.1993. Thereafter, he was remanded to custody, from 14.2.1993 by the learned Judicial Magistrate, having the necessary jurisdiction to do so. A Hapeas Corpus Petition was filed challenging the said remand order on the ground that since the detention of the Accused, between 25.1.1993 & 25.2.1993, was illegal, the subsequent remand order passed, on 14.2.1993, was not legal. But, the Division Bench, after referring to various Judgments, including the Judgment of the Hon'ble Supreme Court, in ***A.K. Gopalan v. Government of India,*** 1966 (2) SCR 427, negatived the said contention. In ***A.K. Gopalan's*** case, the Hon'ble Supreme Court has held as follows:

> "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 the Application and the date of hearing"

After referring to the above law laid down in ***A.K. Gopalan's case,*** the Division Bench has held that, though admittedly, the detention of the Accused, in pursuance of the illegal remand order, between 25.1.1993 and 25.2.1993 was illegal, that will not, in any manner, render the order of remand made on 14.2.1993, as illegal or *non est* in the eye of law. In effect, the Division Bench took a similar view, which we are now inclined to take that, though the Accused was kept in illegal detention for sometime, that will not divest the power of the Magistrate to pass a legal remand order, prospectively.

40. The learned Senior Counsel would place reliance on the Judgment of the Hon'ble Supreme Court, in ***In the Matter of Madhu Limaye and others,*** 1969 (1) SCC 292. The learned Senior Counsel, more precisely, relied on the observations made by the Hon'ble Supreme Court, in Paragraph No.12, which is as follows:

> "*12.* Once it is shown that the arrests 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."

41. After taking us through the above Judgment, the learned Senior Counsel would submit that, by passing an order of remand, the illegal detention, offending Article 22(2) of the Constitution of India, cannot be cured. A perusal of the said Judgment would go to show that in the event the arrest itself is illegal, undoubtedly, the Accused, thereafter, cannot be remanded to the custody by the Magistrate, because such illegal arrest cannot be cured by any valid remand order. In the instant case, it is not at all the case of the Respondents that the formal arrests effected on the Respondents are illegal. Therefore, the said Judgment does not come to the rescue of the Respondents, in any manner. Thus, we hold that, though the past illegal detention cannot be cured, it will be lawful for a Magistrate to pass a valid remand order, prospectively.

42. From the above discussions, the following conclusions emerge:

- (1) When an Accused is involved in more than one case and has been remanded to judicial custody in connection with one case, there is no legal compulsion for the Investigating Officer in the other case to effect a formal arrest of the Accused. He has got discretion either to arrest or not to arrest the Accused in the latter case. The Police Officer shall not arrest the Accused in a mechanical fashion. He can resort to arrest only if there are grounds and need to arrest.

- (2) If the Investigating Officer in the latter case decides to arrest the Accused, he can go over to the prison where the Accused is already in judicial remand in connection with some other case and effect a formal arrest as held in ***Anupam Kulkarni case.*** When such a formal arrest is effected in prison, the Accused does not come into the

physical custody of the Police at all, instead, he continues to be in judicial custody in connection with the other case. Therefore, there is no legal compulsion for the production of the Accused before the Magistrate within 24 hours from the said formal arrest.

- (3) For the production of the Accused before the Court after such formal arrest, the Police Officer shall make an Application before the Jurisdictional Magistrate for issuance of P.T. Warrant without delay. If the conditions required in Section 267 of the Code of Criminal Procedure are satisfied, the Magistrate shall issue P.T. Warrant for the production of the Accused on or before a specified date before the Magistrate. When the Accused is so transmitted from prison and produced before the Jurisdictional Magistrate in pursuance of the P.T. Warrant, it will be lawful for the Police Officer to make a request to the learned Magistrate for authorising the detention of the Accused either in Police custody or in judicial custody.

- (4) After considering the said request, the representation of the Accused and after perusing the case diary and other relevant materials, the learned Magistrate shall pass appropriate orders under Section 167(1) of the Code of Criminal Procedure.

- (5) If the Police Officer decides not to effect formal arrest, it will be lawful for him to straightaway make an Application to the Jurisdictional Magistrate for issuance of P.T. Warrant for transmitting the Accused from prison before him for the purpose of remand. On such request, if the Magistrate finds that the requirements of Section 267 of the Code of Criminal Procedure are satisfied, he shall issue P.T. Warrant for the production of the Accused on or before a specified date.

- (6) When the Accused is so transmitted and produced before the Magistrate in pursuance of the P.T. Warrant from prison, the Police Officer will be entitled to make a request to the Magistrate for authorising the detention of the Accused either in Police custody or in judicial custody. On such request, after following the procedure indicated above, the Magistrate shall pass appropriate orders either remanding the Accused either to judicial custody or Police custody under Section 167(1) of the Code of Criminal Procedure or dismissing the request after recording the reasons.

- (7) Before the Accused is transmitted and produced before the Court in pursuance of a P.T. Warrant in connection with a latter case, if he has been ordered to be released in connection with the former case, the Jail Authority shall set him at liberty and return the P.T. Warrant to the Magistrate making necessary endorsement and if only the Accused continues to be in judicial custody, in connection with the

former case, he can be transmitted in pursuance of P.T. Warrant in connection with the latter case.

43. With the above legal principles, let us now consider the facts of the present case.

44. To recapitulate the facts, formal arrests of the Respondents were effected on 3.10.2011 and the request for issuance of PT warrant was made, on 4.10.2011, before the learned Judicial Magistrate No.V, Thiruchirappalli. The learned Judicial Magistrate issued PT warrants to the Jail Authorities, directing the production of the Accused before her, on 7.10.2011. On 7.10.2011, the learned Judicial Magistrate No.V, was on leave and learned Judicial Magistrate No.IV, was in charge of the Judicial Magistrate No.V, Court.

45. In the earlier paragraph, we have extracted the order, dated 7.10.2011, passed by the learned Judicial Magistrate. In the said order, the learned Judicial Magistrate has concluded as follows:

> "Considering the circumstance of the Court holiday on 5.10.11 & 6.10.11 as well as Casual Leave of regular Magistrate on 7.10.11 this Court not inclined to remand the Accused on Judicial custody in view of available records. Produce the Accused before concerned Magistrate on 10.10.11 for further suitable Order in this regard. Hence Accused to be produced before regular Magistrate on 10.10.2011."

46. From the order of the learned Magistrate, we fail to understand as to how it is relevant that 5.10.2011 & 6.10.2011 were holidays. We also fail to understand as to how the Magistrate could decline to exercise her jurisdiction, under Section 167 of the Code of Criminal Procedure, on the ground that the regular Magistrate probably meaning thereby the learned Judicial Magistrate No.V was on leave, on 7.10.2011. It was because the learned Magistrate No.V was on leave, the learned Judicial Magistrate, No.IV, was put in charge of the Court of the learned Judicial Magistrate No.V. Therefore, it was not correct on her part to express that she was not inclined to remand the Accused to judicial custody. Having said so, the learned Judicial Magistrate further proceeded to direct the production of the Accused, on 10.10.2011, for "suitable order" in this regard. We further fail to understand as to what the learned Judicial Magistrate has meant by saying "suitable order". Though the learned in charge Judicial Magistrate has not stated in clear terms that from 7.10.2011 till 10.10.2011, she had passed an order of temporary remand, a complete reading of the order passed by the learned Magistrate only leads to the inference that she had passed an order of remand. Though the act of the Magistrate cannot be appreciated, for that matter, we cannot hold that the detention of the Accused, between 7.10.2011 and 10.10.2011, was illegal. We hold that the order of the learned Judicial Magistrate, dated 7.10.2011 is an authorization to detain the Accused in prison, temporarily, till 10.10.2011.

47. Now, turning to the order passed by the learned Judicial Magistrate No.V, on 10.10.2011, admittedly, in pursuance of the earlier direction issued on 7.10.2011, the Accused were detained in prison, and thereafter, produced before the learned Judicial Magistrate No.V, on 10.10.2011. But, the learned Judicial Magistrate No.V, relying on the view expressed by a learned Single Judge of this Court, dated 24.3.2009, made in Crl.O.P. (MD) No.1182 of 2009, [which we have overruled], has declined to remand the Accused holding that the Accused was not produced before her for remand, within 24 hours from the time of formal arrest. Since, we have held that, by effecting formal arrest, the Accused did not come into the custody of the Police, there is no legal mandate that they should be produced within 24 hours before the learned Judicial Magistrate, from the time of formal arrest. Thus, we hold that the order passed by the learned Judicial Magistrate No.V is not sustainable and the same is liable to be set aside. The learned Judicial Magistrate ought to have considered whether it is necessary to remand the Accused and to have passed appropriate orders, under Section 167(1) of the Code of Criminal Procedure.

48. While interfering with the said order, we would like to remind the learned Judicial Magistrates of their constitutional obligation, while exercising their right to remand an individual, since it involves the curtailment of right to life, as guaranteed in Article 21 of the Constitution of India. In this regard, we may also refer to the law laid down by the Hon'ble Supreme Court, in ***A.R. Antulay v R.S. Nayak,*** 1988 (2) SCC 602 : AIR 1988 SC 1531 : 1988 2 JT 325 : 1988 SCC (Crl) 372, wherein it has been stated as follows:

> "..... It has been said long ago that "*actus curias neminem gravabit*" an act of the Court shall prejudice no man. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law".

Lord Cairns in ***Alexander Rodger v. The comptoir D'escompte De paris,*** 1869-71 LR (3) PC 455 at 475 observed thus:

> "Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any one of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the Primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

49. In the case on hand, after effecting arrest, the Police Officer promptly gave a request, on 4.10.2011 itself for issuance of PT warrant. When the learned Judicial Magistrate had rightly issued PT warrant, we fail to understand as to why she had directed the production of the Accused, on 7.10.2011, *i.e.,* after two days, instead of directing the production of the

Accused, at the earliest. As we have already held above, again on 7.10.2011, the learned Judicial Magistrate has passed another erroneous order. Again, as directed by the learned Judicial Magistrate, the Accused were produced, on 10.10.2011 and then again, another erroneous order was passed by the learned Judicial Magistrate. Thus, though the Police acted promptly in this case, the matter has come to this level for decision because of the acts of the Magistrates. We trust and hope that in future such things, causing prejudice to any one on the act of the Court, does not happen. We are informed that the order of the learned Single Judge of this Court dated 24.3.2009, made in Crl.O.P. (MD) No.1178 of 2009, has been circulated by the Registry to all the learned Judicial Magistrates through out the State for being followed, scrupulously. Since, we have overruled the view taken in the said Judgment, we direct the Registry to place this order before the Hon'ble The Chief Justice for considering the need to withdraw the said circular, in ROC. No.665A/09/F/MB, dated 9.4.2009.

50. Before parting with this Judgment, we like to record our appreciation for the excellent assistance rendered by Mr. I. Subramaniam, the learned State Public Prosecutor, Mr. R. Shunmuga Sundaram, the learned Senior Counsel and Mr. N.R. Elango, the learned Senior Counsel.

51. In the result,-

- the impugned order dated 10.10.2011 passed by the learned Judicial Magistrate No.V, Trichy, is set aside and Criminal Original Petition (MD) No.13683 of 2011 is allowed.
- The matter is remitted back to the said Magistrate for passing appropriate orders, under Section 167(1) of the Code of Criminal Procedure, after affording opportunity to the prosecution as well as to the Accused.
- The Respondents are directed to surrender before the learned Judicial Magistrate, on 9.11.2011, at 10.30 a.m. and if they fail to appear, the learned Magistrate shall secure their custody by issuing non-bailable warrants.
- We further direct that the Magistrate shall not adjourn the proceeding, at any cost and shall pass appropriate orders on the same day of the surrender/production of the Accused.