

13. To conclude the answer to the question posed at the outset is rendered in the affirmative and it is held that the benefit under section 13(3A) of the Act is available only to an ex-serviceman who was a landlord of the non-residential building on or before the date of his retirement.

14. Once it is so held, the learned counsel for the petitioners in both these cases were fair enough to concede that no other point survives. Both the civil revisions are consequently dismissed. However, in view of the somewhat interesting and intricate issue involved, the parties are left to bear their own costs.

N.K.S.

Before S. S. Sandhawalia, C.J. and M. M. Punchhi, J.

KASHMIR SINGH AND ANOTHER,—Petitioners.

versus

THE STATE OF PUNJAB,—Respondent.

Criminal Misc. No. 2254-M of 1982.

August 24, 1983.

Code of Criminal Procedure (II of 1974)—Section 167—Exercise of power by a Magistrate under Section 167—Such power—Whether judicial in nature.

Held, that the jurisdiction under section 167, Criminal Procedure Code, 1973 has been vested in a Judicial Magistrate barring cases of exceptional and emergent nature provided for in sub-section (2-A) where a Judicial Magistrate is not available. The Judicial Magistrate hereunder is to exercise his power on the material placed before him by the Investigating Agency. The section mandates that the Police Officer shall forthwith transmit to the nearest Judicial Magistrate, a copy of the entries in the diary made with regard to the investigation. It would inflexibly follow therefrom that apart from the fact that the Judicial Magistrate would in no way be inhibited from looking at any other materials, he is obliged to apply his mind to the investigation which had already taken place and so recorded in the police diary before determining whether the accused person is to be detained in custody at all, and if so, whether it is to be judicial or police custody. It, therefore, follows, that the exercise of power is not to be made in a vacuum but on the basis of materials mandated by the statute and the application of a judicial mind thereto. Reference to sub-section (2) would then indicate that once the requisite materials have been placed before the Magistrate he has to consider whether further

Kashmir Singh and another v. The State of Punjab
(S. S. Sandhawalia, C.J.)

detention is necessary and if so then the quantum of such detention and its nature within the maximum limit of 15 days in the whole. The proviso to this sub-section then authorises a Magistrate to order detention otherwise than in police custody beyond the period of 15 days. However, this is on the express condition if he is satisfied that adequate grounds exist for doing so. It is well settled that where a judicial functionary is to be satisfied on the basis of adequate materials for exercising the power then such a function or discretion is essentially judicial in nature. Again a reference to sub-section (3) shows that the statute mandates the recording of reasons wherever the Magistrate directs detention in the custody of the police. This again is a pointer to the fact that the power has to be exercised rationally and on the basis of prescribed materials. In this context what is perhaps most significant is the fact of a double mandate in section 167, Criminal Procedure Code, with regard to the presence of the accused before the Magistrate. Sub-section (1) at the very outset provides that the Police Officer shall forward the accused to the Magistrate. This positive mandate is then coupled with the more pre-emptory one in sub-section (2)(b) of Section 167 to the effect that no Magistrate shall authorise detention in any custody unless the accused is produced before him. Now what indeed is the purpose and object of this pre-condition of the production of the accused person for the very exercise of the power under the Section 7 obviously the twin purpose is to first ensure the physical presence of the accused before the Magistrate and secondly, to afford him an opportunity of hearing whether he is represented by a counsel or not. It is, therefore, held on principle as also on the specific language of section 167 of the Code that a Magistrate exercising jurisdiction under section 167 thereof performs essentially a judicial function and not merely an executive one.

(Paras 11, 12 and 17)

(Case referred by Hon'ble Mr. Justice M. M. Punchhi, to the Larger Bench on 26th August, 1982 for decision of important questions of law involved in this case. The Division Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia and Hon'ble Mr. Justice M. M. Punchhi after answering the relevant questions of law, finally decided the case on 24th August, 1983).

Petition under Section 482 Cr. P. C. for quashing the order dated 11th March, 1982 passed by Additional Sessions Judge (II) Faridkot and accepting the revision petition filed by the respondent-State and directing the remand of the petitioners to police custody in case F.I.R. No. 91, dated 2nd March, 1982 under Sections 365/367, 330/342, 382/148/149, IPC, P. S. Sadar Muktsar.

H. S. Gill, Advocate, for the Petitioner.

Bhagwant Singh Sidhu, A.G. with S. K. Sayal, AAG, Punjab,
for the Respondents.

JUDGMENT

S. S. Sandhwalia, C.J.

1. For reasons delineated hereinafter, the primary and indeed the solitary question that now survives for determination in this reference to the Larger Bench may well be formulated in the following terms:—

Whether a Magistrate exercising the jurisdiction under Section 167 of the Code of Criminal Procedure, 1973, performs essentially a judicial function or merely an executive one?

2. The facts relevant to the aforesaid issue may be recounted with relative brevity:

Dilbagh Singh petitioner No. 2 is the son of Kashmir Singh petitioner No. 1. One Jaswant Singh was employed as a servant of Kashmir Singh petitioner No. 1. Whilst digging some foundations with two others, he had found a pot full of old silver coins which they divided amongst themselves. About 12 days prior to the registration of the case, Kashmir Singh and Dilbagh Singh petitioners brought Jaswant Singh and Karnail Singh at the scene of the occurrence and allegedly tortured them to produce the aforesaid old silver coins and further threatened to kill them on their failure to do so. Kashmir Singh petitioner is stated to have fired over the heads of Karnail Singh and Jaswant Singh to terrorise them and thereafter brought them back to his house where the mother and sisters of Karnail Singh were also allegedly brought and tortured. Signatures of Karnail Singh and his mother were allegedly taken on blank pronotes and some gold ornaments and valuable articles were further taken away by the petitioners from the house of Karnail Singh and Jaswant Singh.

3. Pursuant to the registration of the case the petitioners were arrested on March 3, 1982 and were produced before the Chief Judicial Magistrate, Faridkot (because the investigation was being carried on by the C.I.A. Staff, Faridkot), on March 4, 1982, when further police remand was sought.

4. However, the Chief Judicial Magistrate remanded them to police custody upto March 5, 1982 with the direction that they be produced before the Illaqa Magistrate at Muktsar on that date.

Kashmir Singh and another v. The State of Punjab
(S. S. Sandhawalia, C.J.)

Accordingly, the two petitioners were produced before Shri B. C. Rajput, Judicial Magistrate, Muktsar, under Section 167 of the Code of Criminal Procedure, 1973 (hereinafter called the Code) and a request was made on behalf of the investigating agency for further police custody of the petitioners for seven days. The learned Magistrate, exercising jurisdiction under Section 167 of the Code, declined the request taking the view that the police had sufficient time to interrogate the accused and to recover the alleged property. He, therefore, remanded them to judicial custody till March 19, 1982.

5. Thereafter the petitioners applied for bail to the Court of Session which came up before Shri Harnam Singh, Additional Sessions Judge, Faridkot. On the other hand, the State preferred a revision petition against the order under Section 167 of the Code of Shri B. C. Rajput, dated March 5, 1982 declining further police remand. The learned Additional Sessions Judge gave notice to the counsel for the petitioners in the bail case and by his impugned order, dated March 11, 1982, he set aside the aforesaid order of Shri B. C. Rajput and directed the remand of the petitioners to police custody upto March 14, 1982 and the production of the petitioners before the Illaqa Magistrate on March 15, 1982. It is common ground that the petitioners were not produced before the learned Additional Sessions Judge at the time when the said order was passed.

6. This Criminal Miscellaneous had originally come up before my learned brother Punchhi, J. sitting singly and a number of significant issues were raised including the one—whether it was essential for the accused to be produced before the revisional court in order to authorise his detention in police custody other than the one ordered by the Magistrate under Section 167 of the Code? Adverting to both the difficulty and the significance of the questions involved, my learned brother referred four questions for decision by the larger Bench and that is how the matter is before us.

7. As noticed at the out-set, the threshold question herein is whether the exercise of the power under Section 167 of the Code is essentially a judicial or merely an executive function. On this issue, the stand of the learned counsel for the petitioners that it is purely an executive function, is rested primarily on a passing reference to Section 167 of the Code in *The State of Bihar v. Ram Naresh Pandey and another* (1). The firm and the forceful stand taken by the

(1) A.I.R. 1957 S.C. 389.

learned Advocate General, Punjab, on the other hand is that a Magistrate under Section 167 of the Code exercises a pristinely judicial function of considerable significance.

8. Ere one inevitably adverts to precedent, it seems apt to first examine the issue refreshingly on principle, and the language of the statute. On the larger question of the approach to the construction of the Code generally, it is perhaps necessary to bear in mind that the dominant purpose thereof is the prescription of procedure for the exercise of the judicial function of the trial of accused persons under the Indian Penal Code or other special criminal statutes. Primarily, it spells out the procedure for the investigation, enquiry and the trial into offences and there seems to be no manner of doubt that some of these functions if not pristinely judicial, they are at least co-related to the exercise of the judicial function in the criminal jurisdiction. This is not to say that no function whatsoever under the Code can be merely executive but the presumption is that the exercise of power expressly by judicial magistrates under the Code, would normally be judicial and only the clearest indicia to the contrary would be necessary to hold that it is executive in nature.

9. It is then apt to remind oneself that in accord with Article 50 in the Directive Principles, the Code in essence, now tends to give effect to the separation of the judiciary from the executive. Within this limited field, the judicial and the executive magistrates are visualised as distinct entities. Reference in this connection may be made instructively to Section 3 of the Code and particularly subsection (4) thereof. It would appear that where Parliament so intended, powers have been expressly conferred on executive magistrates and indeed by the amending Act 63 of 1980, the jurisdiction under Sections 108, 109 and 110 of the Code, has even been expressly taken away from the Judicial Magistrates of the First Class and conferred on the Executive Magistrates. It is indeed in this context that the fact that Section 167 of the Code expressly confers this power only on judicial magistrates to the exclusion of the executive magistrates, needs highlighting.

10. Adverting now pointedly to Section 167 of the Code, it seems apt to read its relevant parts for facility of reference:—

“167. Procedure when investigation cannot be completed in twenty-four hours:—

- (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed

Kashmir Singh and another v. The State of Punjab
(S. S. Sandhawalia, C.J.)

within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

- (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as *such Magistrate thinks fit, for a term not exceeding fifteen days in the whole*; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that—

- (a) the Magistrate may authorise the detention of the accused person otherwise than in the custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,—

- (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
- (ii) sixty days, where the investigation relates to any other offence,

and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused persons shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) *no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;*

* * * *

(2A) * * * *

* * * *

(3) *A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing."*

11. As stands already noticed, the jurisdiction under section 167, Criminal Procedure Code, has been vested in a Judicial Magistrate barring cases of exceptional and emergent nature provided for in sub-section (2A) where a Judicial Magistrate is not available. What next catches the eye is a fact that the Judicial Magistrate hereunder is to exercise his power on the materials placed before him by the Investigating Agency. The Section mandates that the Police Officer shall forthwith transmit to the nearest Judicial Magistrate, a copy of the entries in the diary made with regard to the investigation. It would inflexibly follow therefrom that apart from the fact that the Judicial Magistrate would in no way be inhibited from looking at any other materials, he is obliged to apply his mind to the investigation which had already taken place and so recorded in the police diary before determining whether the accused person is to be detained in custody at all, and if so, whether it is to be judicial or police custody. It, therefore, follows that the exercise of power is not to be made in a vacuum but on the basis of materials mandated by the statute and the application of a judicial mind thereto. Reference to sub-section (2) would then indicate that once the requisite materials have been placed before the Magistrate he has to consider whether further detention is necessary and if so then the quantum of such detention and its nature within the maximum limit of 15 days in the whole. The proviso to this sub-section then authorises a Magistrate to order detention otherwise than in police custody beyond the period of 15 days. However, this is on the express condition—if he is satisfied that adequate grounds exist for doing so. Now it seems to be well-settled that where a judicial functionary is to be satisfied on the basis of adequate materials for exercising the power then such a function or discretion is essentially judicial in nature. Again a reference to sub-section (3) shows that the statute mandates the recording of reasons wherever the Magistrate directs

Kashmir Singh and another v. The State of Punjab
(S. S. Sandhawalia, C.J.)

detention in the custody of the police. This again is a pointer to the fact that the power has to be exercised rationally and as noticed earlier on the basis of prescribed materials.

12. In this context what is perhaps most significant is the fact of a double mandate in Section 167, Criminal Procedure Code, with regard to the presence of the accused before the Magistrate. Sub-section (1) at the very outset provides that the Police Officer shall forward the accused to the Magistrate. This positive mandate is then coupled with the more pre-emptory one in sub-section (2)(b) of Section 167 to the effect that no Magistrate shall authorise detention in any custody unless the accused is produced before him. Now what indeed is the purpose and object of this pre-condition of the production of the accused person for the very exercise of the power under the Section? Obviously the twin purpose is to first ensure the physical presence of the accused before the Magistrate and secondly, to afford him an opportunity or hearing whether he is represented by a counsel or not. Though this appears to be plain on principle, it stands buttressed by a century long line of precedent to the effect that an accused person even at the stage of remand under Section 167 is not merely entitled to be heard but equally to be represented by counsel for presenting his case. The Division Bench in *re. Llewelyn Evans*, (2) in no uncertain terms reiterated this rule wherein Madgavkar J., observed as follows:—

“An application by the police for remand falls under Section 167, Criminal Procedure Code, and can be held to be a proceeding instituted under this Code in that Court. Therefore, at least from the moment after the twenty-four hours of arrest that he appears before the Court, this right, in my opinion, begins. His legal advisers can appear, oppose the remand, offer bail, or make any other legal application on his behalf. He is an accused and appears as such before that Court, and he does not become so only when the charge-sheet is sent up. I am of opinion, therefore, that even under Section 340, Criminal Procedure Code, the law contemplates that such access should be allowed before and irrespective of the charge-sheet.”

The aforesaid view was expressly followed way back in *Sunder Singh v. Emperor*, (3) (no precedent to the contrary was cited before us)

(2) A.I.R. 1926 Bombay 551.

(3) A.I.R. 1930 Lahore 945.

and is more than amply re-inforced by modern jurisprudential trends.

13. Equally it would not be in doubt that the Investigating Agency would be entitled to present and press its claim for police custody as well. It would, therefore, follow that for the exercise of this jurisdiction, the Magistrate is obliged to apply his mind to the materials produced before him; hear the accused either in person or through his counsel as also the prosecution and then determine the significant question whether the accused should be detained at all and if so, the nature of such custody within the parameters prescribed in Section 167 of the Code. This, in essence, is a judicial function and there is no dearth of authority that in doing so, the Magistrate exercises his judicial mind.

14. The deck is now clear for a consideration of *State of Bihar v. Ram Naresh Pandey and another*, (supra), which is the sheet anchor of the learned counsel for the petitioners for canvassing that the proceedings under section 167 of the Code are purely executive in nature. However, a close analysis of the said judgment would disclose that their lordships were primarily and indeed wholly concerned with the scope and interpretation of section 494 of the Old Code pertaining to the withdrawal of the Public Prosecutor from the prosecution. The *ratio* of the judgment is, therefore, on the point of the width and import of the said section. Only as an aid to the larger reasoning for its construction, their lordships had adverted to the scheme of the administration of criminal justice generally under the Code. Merely as instances thereof, they marginally referred to sections 61, 94, 155(2), 164, 167 and 202. With regard to the discretion of a Magistrate under all the said provisions collectively, it was observed in passing as under:—

“His discretion in such matters has necessarily to be exercised with reference to such material as is by then available and is not a *prima facie* judicial determination on any specific issue. The Magistrate’s functioning in these matters are not only supplementary at the higher level, to those of the executive but are intended to prevent abuse.”

15. I am unable to construe the aforesaid observation as a considered or conclusive pronouncement on the very nature of the proceedings under section 167. As has already been noticed, the said question was not even remotely before their lordships nor, was it

Kashmir Singh and another v. The State of Punjab
(S. S. Sandhawalia, C.J.)

particularly considered with regard to section 167. A collective reference to six sections was made generally and it was rightly pointed out that these matters involved the exercise of discretionary functions and not the final judicial determination of any specific issue nor even a *prima facie* one. Therefore, to advocate that *Ram Narsh Pandey's case* (supra) is any warrant for the proposition that the very nature of proceedings under all the aforesaid sections of the Code referred thereto is purely executive, seems wholly untenable. However, taking the stance of the learned counsel for the petitioner at the highest (entirely for the sake of argument), it seems apt to recall the classic warning of Lord Halsbury in *Quinn v. Leatham*, (3A) :—

“The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.”

Expressly approving the aforesaid observations, their lordships in *State of Orissa v. Sudhansu Sekhar Misra and others*, (4) buttressed it further by observing:—

“It is not a profitable task to extract a sentence here and there from a judgment and to build upon it.”

I am inclined to hold that the learned counsel for the petitioner is clutching at a straw by reading too much from a solitary passing observation and, in so doing, is attempting to do exactly what their lordships had in terms disapproved above.

((16) On the other hand, there appears to be a long line of precedent holding that the exercise by a Magistrate of discretion with regard to the custody or otherwise of an accused person is a judicial function requiring the application of a judicial mind. In *The State of Punjab v. Ajai Singh and another*, (5), their lordships, whilst apparently referring to a somewhat analogous provision of Article 22(2) (see sections 60 and 61 of the Code) have observed:—

“The provision that the arrested person should within 24 hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a

(3A) 1901 A.C. 495.

(4) A.I.R. 1968 S.C. 647.

(5) A.I.R. 1953 S.C. 10.

warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him."

The question then directly arose in *Sundar Singh v. Emperor*, (6), and was categorically concluded as under :—

"Section 167 requires a police officer to submit his diaries to the Magistrate within 24 hours of the arrest of an accused person and it is left to the latter to decide whether the accused should be detained in custody (whether of the police or any other custody) any longer. In deciding this question the Magistrate will presumably be guided by the evidence already available and the prospect of getting further relevant evidence as regards the alleged offence. *The weighing of such evidence with respect to an alleged offence seems to me to be essentially a judicial function and it seems to be precisely for this reason that the matter is left to a Magistrate and not a police officer.* If the matter were purely executive it could easily have been left to the decision of the investigating officer or his superiors in the Police Department."

To the same tenor are the observations of the Division Benches in *Swami Hariharanand Saraswati and others, v. The Jailor I/C Dist. Jail, Banaras*, (7) and *Bir Bhadra Pratap Singh v. D. M. Azemgarh and others*, (8).

(17) To conclude, it must be held on principle, on the specific language of section 167 of the Code, and on precedent, that a Magistrate exercising jurisdiction under section 167 thereof performs essentially a judicial function and not merely an executive one.

(18) Once it is held as above, the matter lies in a narrow compass. As noticed earlier, one of the four questions referred for consideration by my learned brother Punchhi, J., had been formulated in the following terms:—

"If such proceeding or order is held to be subject of revision by the Court of Session or the High Court, is it essential

(6) A.I.R. 1930 Lahore 945.

(7) A.I.R. 1954 Allahabad 601.

(8) A.I.R. 1959 All. 384.

Phool Singh and others v. Ram Sarup and others
(R. N. Mittal, J.)

for the accused to be produced before it in order to authorise his detention in custody other than the one ordered by the Magistrate?"

Before us it was common ground that the two petitioners were not produced before the revisional Court of the Additional Sessions Judge, Faridkot, when the impugned order (Annexure P. 4) was passed. On this issue, the learned Advocate-General has taken a categorical stand that the physical production of the accused persons before the learned Additional Sessions Judge was necessary to give him jurisdiction for remanding them to further police custody. Since on this point the learned counsel for the parties are now at one and we do not have the benefit of a rival argument thereon, we refrain from making any pronouncement whatsoever thereon. However, in view of the firm concession of the learned Advocate-General on behalf of the State that the Additional Sessions Judge was denuded of jurisdiction and his order is unsustainable, we would allow this revision and set aside the said order.

M. M. Punchhi, J.—I agree.

N.K.S.

Before Rajendra Nath Mittal, J.

PHOOL SINGH AND OTHERS,—Appellants.

versus

RAM SARUP AND OTHERS,—Respondents.

Regular Second Appeal No. 1096 of 1975.

September 2, 1983.

Limitation Act (36 of 1963)—Section 6(1)—Ancestral land alienated by father—Male child conceived but not born on the date of alienation—Such child—Whether entitled to challenge alienation and claim benefit of section 6(1) of the Limitation Act, 1963—Another son born after alienation—Such son—Whether entitled to challenge the alienation.

Held, that a son who was in embryo at the time of an alienation by his father can challenge the alienation after his birth but is not