

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR PERMANENT BENCH
(NAHARLAGUN)

Cri. Rev.P. No.10(AP)/2018

- 1. Shri Legem Takaliang,**
S/o Shri Apemso Takaliang,
Village Duraliang, P.O/P.S: Tezu,
District: Lohit, Arunachal Pradesh
- 2. Shri Charanso Halai,**
S/o: Lt. L Halai, Village: Kathan
P.O/Post Out Post: Wakro,
District: Lohit, Arunachal Pradesh.
- 3. Shri Asadso Ngadong,**
S/o: Samaho Ngadong,
A resident of Tezu Township (near LPG Gas Agency),
P.O/P.S: Tezu,
District: Lohit, Arunachal Pradesh.
- 4. Shri Chowkhia Tayang,**
S/o: Lt. Solyu Tayang, Village: Loiliang,
P.O/P.S: Tezu, District: Lohit, Arunachal Pradesh.
- 5. Shri Behenso Pul,**
S/o: Lt. Alaktho Pul,
Village: Changung, P.O: Hawaii, P.S.: Khupa,
District: Anjaw, Arunachal Pradesh.

.....Accused Persons

-VERSUS-

- 1. The State of Arunachal Pradesh through P.P.(A.P).**
- 2. Lady Sub Inspector, Nich Rupa(Informant)**
C/o-Officer-in-Charge, Tezu Police Station,
P.O/P.S- Tezu, District: Lohit,
Arunachal Pradesh.

.....Respondents

By Advocates:

For the petitioners: Mr. C. W. Mantaw
Mr. B. Kri

For the respondents: Public Prosecutor(AP)
Mr. K. Saxena
Mr. R. L. Thungon
Mr. Y. Riram
Mr. H. K. Jamoh

-AND-

A.B No.141(AP)/2018

- 1. Shri Charanso Halai,**
S/o Lt. L Halai, Village: Kathan,
P.O/Police Out Post: Wakro,
District: Lohit, Arunachal Pradesh.
- 2. Shri Asadso Ngadong,**
S/o: Samaho Ngadong,
A resident of Tezu Township (near LPG Gas Agency),
P.S/P.S: Tezu,
District: Lohit, Arunachal Pradesh.

.....*Accused Persons*

-VERSUS-

1. The State of Arunachal Pradesh through P.P (Arunachal Pradesh).

.....*Respondents*

By Advocates:

For the **Applicants:** C.W. Mantaw
B. Kri
For the **respondents:** Public Prosecution (Arunachal Pradesh)

-AND-

B.A. No.37(AP)/2018

Shri Prodinso Pul

S/o: Lt. Alaktho Pul Village: Changung,

P.O/P.S: Hawaii

District: Anjaw, Arunachal Pradesh

.....*Petitioner/Applicant*

-VERSUS-

1. The State of Arunachal Pradesh.

.....*Respondents*

By Advocates:

For the **petitioner:**

C.W. Mantaw

For the **respondents:**

Public Prosecutor, Arunachal Pradesh

B E F O R E

HON'BLE MR. JUSTICE NELSON SAILO

Date of hearing : 01.10.2018

Date of Judgment & Order : 05.10.2018

JUDGMENT & ORDER (CAV)

Heard Mr. C. W. Mantaw, the learned counsel for the petitioner/applicants. Also heard Mr. N. Lowang, the learned Sr. Govt. appearing for the State of Arunachal Pradesh.

- 2.** Since the matters are all related, they are taken up together for final disposal.
- 3.** Criminal Revision Petition No. 10(AP)2018 is filed by 5 (five) accused persons namely Shri. Legem Takaliang, Shri. Charanso Halai, Shri. Asadso Ngadong, Shri. Chowkhia Tayang and Shri. Behenso Pul, being aggrieved by the impugned order dated 06.07.2018, passed by the learned Executive Magistrate, Office of the Deputy Commissioner at Yupia, whereby, non-bailable warrant of arrest (NBWA) was issued by him directing the arrest of the petitioners/ accused persons.
- 4.** AB No. 141(AP) 2018 is filed by two accused applicants Shri. Charanso Halai and Shri. Asadso Ngadong jointly under Section 438 of the Cr.P.C. for anticipatory bail apprehending their arrest by the Special Investigation Team (SIT), in connection with Yupia GR. Case No. 442/2018 corresponding to Tezu P.S Case No. 22/2018 under Sections 120(B)/147/148/149/452/353/302 IPC read with Sections 3 of the Prevention of Damage to Public Property Act, 1984 (PDPP Act).
- 5.** Bail Application No. 37/2018 is filed by the accused applicants namely Shri Lega Takaliang, Shri. Chowkhia Tayang and Shri. Behenso Pul under Section 439 of the Cr.P.C for their release on bail and they were arrested by the SIT, Itanagar on 05.08.2018 in connection with GR. Case No. 442/2018 corresponding to Tezu P.S Case No. 22/2018 under Sections 120(B)/147/148/149/452/353/302 IPC r/w Section 3 of the PDPP Act on the strength of the order dated 06.07.2018 passed by the Executive Magistrate, Yupia in GR Case No. 22/2018..
- 6.** Coming to the Criminal Revision Petition, facts of the case maybe noticed at the outset. On 19.02.2018, an FIR was lodged by Sub Inspector Ms. Nich Rupa, respondent No. 2 before the Officer In-charge of Tezu Police Station to the effect that on the same day at about 12:05 hours, a mob numbering around 800 to 900 comprising of youths, the aged, women and children armed with lethal weapons arrived at Tezu Police Station and broke opened the Under Trial Prisoners (UTP) Cell and took away 2 (two) UTPs

namely Shri Sanjay Sabor and Shri Jagdish Lohar, who were detained in the Lock Up in connection with Tezu Police Station Case No. 20/2018 under Sections 302/376 IPC read with Section 6 of the POCSO Act. As a result, Tezu P.S. Case No. 22/2018 was registered as already indicated above.

7. On 03.07.2018, a WT message was sent by the Officer-in-Charge of Crime Branch, P.S(SIT)PHQ at Itanagar to the Superintendent of Police, Tezu requiring the accused petitioners to appear before the Officer-in-Charge, P.S (SIT)PHQ on 06.07.2018 at 10:00 hours in connection with Tezu P.S case No. 22/2018. The notice was sent under Section 41(A) of the Cr.P.C. Although the accused petitioners were ready to comply with the aforesaid notice but on 05.07.2018, the case I.O filed an application before the Chief Judicial Magistrate, Capital Complex at Yupia praying for issuance of NBWA against the accused petitioners. On the basis of the application, the Executive Magistrate, Yupia passed the impugned Order dated 06.07.2018, issuing NBWA against the accused petitioners in connection with Tezu P.S. Case No. 22/2018. The accused petitioners apprehending their arrest therefore, did not appear before the case I.O at Itanagar on 06.07.2018.

8. Appearing for the accused petitioners, Mr. C. W. Mantaw the learned counsel for the petitioners submit that the impugned order dated 06.07.2018 is *void ab inito* and a nullity in the eye of the Law, inasmuch as, an Executive Magistrate is not authorised and empowered to issue NBWA under the Cr.P.C. NBWA can only be issued by a Judicial Magistrate having the jurisdiction and the same cannot be exercised by an Executive Magistrate. Magistrates are conferred judicial powers under the statute, and the same cannot be derived upon by any authority by way of delegation or otherwise. He submits that the impugned order dated 06.07.2018 was also passed in gross violation the Fundamental Rights of the accused petitioners guaranteed under Article 21 of the Constitution of India and therefore, the same is liable to be set aside and quashed. To substantiate his submission, the learned counsel relies upon the case of ***Jagmittar Sain Bahat Vs. Director, Health Services, Haryana & Ors.*** reported in ***2013(10)SSC 136.***

9. Mr. C. W. Mantaw, the learned counsel further submits that the two accused petitioner Shri. Charanso Halai and Shri. Asadso Ngadong filed AB No. 141(AP)2018 under Sections 438 of the Cr.P.C, in view of the impugned order passed by the learned Executive Magistrate, Office of the Deputy Commissioner at Yupia, issuing NBWA against all the accused petitioners on 06.07.2018. In this connection the learned counsel also places his reliance upon the following authorities:

- (i). *Kamaljit Singh Vs. State of Punjab & Anr., (2005) 7 SSC 226***
- (ii). *Arnesh Kumar Vs. State of Bihar & Anr., (2014) 8 SSC 273.***
- (iii). *WP(Crl.)No. 38 of 2018, (Champion R. Sangma Vs. The State of Meghalaya), Judgment and Order dated 20.03.2018 passed by the Apex Court.***

10. The learned counsel submits that Section 11 of the Cr.P.C provides for establishment of the Court of Judicial Magistrate of the first class and of the second class in every District, not being a metropolitan area as specified by the State Government in consultation with the High Court.

11. Section 41(A) of the Cr.P.C empowers a Police Officer in all cases where the arrest of the person is not required under the provision of Sub-section (1) of Section 41, to issue notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence to appear before him or at such other place as maybe specified in the notice. When such notice is issued to any person, it shall be the duty of the person concerned to appear before the Police, in terms of the notice. When such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred in the notice unless, for the reasons to be recorded, the Police Officer is of the opinion that he ought to be arrested. In case such person fails to comply with the terms of the notice or is unwilling to identify himself, the Police Officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice. However, in the instant case even before the accused petitioner could comply with the notice, the case I.O

submitted an application for NBWA before the Chief Judicial Magistrate at Yupia and pursuant to the application the Executive Magistrate passed the impugned order of NBWA against the accused petitioners.

12. The learned counsel further submits that in bail application No. 37(AP)2018 the 3 (three) accused petitioners have sought for bail under Section 439 of the Cr.P.C., as they were arrested by the SIT Itanagar on 05.08.2018, in connection with the same case i.e. G.R. Case No. 442/2018. The learned counsel submits that as per Section 177 of the Cr.P.C, every offence ordinarily has to be inquired into and tried by Court within whose local jurisdiction it was committed. Further the learned counsel submits, as per Section 167 (2A) of the Cr.P.C, in absence of a Judicial Magistrate, a remand of the accused person can be made by the Executive Magistrate for his detention for a term not exceeding 7(seven) days in the aggregate, and on the expiry of the period of detention, the accused person is to be released on bail except where further detention of the accused person has been made by a Magistrate competent to make such order. In the instant case, the Executive Magistrate who issued the impugned order NBWA was not competent to issue the same and therefore, the arrest and detention of the accused persons is illegal and *void ab initio*. He thus, submits that the impugned order dated 06.07.2018, passed by the Executive Magistrate at Yupia should be set aside and quashed and that the accused petitioners be released forthwith, he also submits that on such release the accused petitioners are ready to comply with any such terms and conditions as this Court may find to be appropriate.

13. In the background of the facts set out and submissions made as above, it will be gainful to abstract Section 11 of the Cr.P.C.:

"11. Courts of Judicial Magistrates.- (1) In every district (not being a metropolitan area), there shall be established as many Courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, after consultation with the High Court, by notification, specify:

¹[Provided that the State Government may, after consultation with the High Court, establish, for any local area, one or more Special Courts of Judicial Magistrates of the first class or of the second class to try any particular case or particular class of

cases, and where any such Special Court is established, no other Court of Magistrate in the local area shall have jurisdiction to try any case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established.]

(2) The presiding officers of such Courts shall be appointed by the High Court.

(3) The High Court may, whenever it appears to it to be expedient or necessary, confer the powers of a Judicial Magistrate of the first class or of the second class on any member of the Judicial Service of the State, functioning as a Judge in a Civil Court."

14. From a perusal of what has been abstracted above, it may be seen that in every district, not being a metropolitan area, the Court of Judicial Magistrate first class or second class are to be established as the State Government may consider necessary in consultation with the High Court by way of a notification. In the State of Arunachal Pradesh, the State Government in the Home Department issued a notification under Memo No. HMB(A)-35/2008/462-70, dated 30.06.2008, declaring the Session Court at Yupia and the Court of Judicial Magistrate first Class at Itanagar as Designated Courts with immediate effect for trial of cases investigated by the SIT of Police Department under Section 11(1) of the Cr.P.C. However, as pointed out by the petitioners, there is no longer a Court of Judicial Magistrate first class at Itanagar. Besides the Sessions Court at Yupia, presently, there is a Court of Chief Judicial Magistrate as well as the Court of Judicial Magistrate first class at Yupia. This being the position the Executive Magistrate in the Office of the Deputy Commissioner at Yupia could not have issue the impugned NBWA on 06.07.2018 in connection with GR Case No. 442/2018.

15. To consider the issue raised by the accused petitioners as regards the power of remand by a Judicial Magistrate first class, it will also be gainful to abstract Section 167(2A) of the Cr.P.C:

"(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers

of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order.”

16. From the above abstract, it may be seen that in absence of a Judicial Magistrate, the nearest Executive Magistrate available on whom the powers of Judicial Magistrate has been conferred for reasons to be recorded in writing, can authorise the detention of an accused person in custody as he may think fit for a term not exceeding 7(seven) days in aggregate. On expiry of the term, the accused person is to be released on bail, except when an order for further detention of the accused person has been made by a Magistrate competent to make such order. It is therefore, clear that only an Executive Magistrate empowered with the powers of a Judicial Magistrate and within its jurisdiction under the circumstances provided in Section 167(2A) can pass an order of remand of the accused and that too, for a limited duration only.

17. In the case of ***Jagmittar Sain Bahat (Supra)***, the Apex Court held that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court and if the Court passes a decree having no jurisdiction of the matter, it will only amount to a nullity as the matter goes to the root of the case. In a recent decision rendered by the Apex Court on 27.09.2018 i.e. ***Civil Appeal No. 2772 of 2011, E.A. Aboobacker & Ors. Vs. State of Kerela & Ors.***, the issue that was considered was as to whether the Special Tahsildar (LA), K.R.L who was appointed as Collector only in respect of acquisition of land relating to Cochin Refineries Ltd. within Ernakulam District can be considered to be a Collector

in respect of other acquisitions. The Apex Court, negating the liberal view taken by the High Court held that the Collector concerned was empowered only in respect of acquisition of land relating to Cochin Refineries Ltd. and that there was no question of taking a liberal view or a conservative view. The only view which has to be taken is the legal view. The same principle in my considered opinion will apply to the present case as well i.e. on the jurisdiction of a Judicial Magistrates in matters of remand and also to the powers which can be exercised by an Executive Magistrate under the exception provided in Section 167 (2A) of the Cr.P.C. Thus, the issue raised on this aspect is accordingly answered.

18. Considering the position in law as discussed above and the facts of the case in its entirety, the impugned NBWA issued by the learned Executive Magistrate, Yupia vide order dated 06.07.2018, cannot be sustained and the same is set aside. Consequently, the following direction is hereby made:

- (i). In bail application No. 37(AP)2018, the applicants namely Shri Legam Takaliang, Shri Chowkhia Tayang and Shri Behenso Pul be released on bail on their furnishing a bail bond of Rs. 25,000/- each, with two local sureties of the like amount and to the satisfaction of the learned Judicial Magistrate, Yupia.
- (ii). In AB No. 141(AP)2018, the applicants Shri Charanso Halai and Shri Asadso Ngadong, in the event of their arrest shall be released on bail bond of Rs. 25,000/- each, with two local sureties of the like amount to the satisfaction of the arresting authority.
- (iii). Bail granted to the 5 (five) accused persons above will be further subjected to the following conditions:
 - a) They shall make themselves available for interrogation by the investigating authority as and when they are required and extend all co-operation with the investigation.
 - b) They shall not, directly or indirectly, make any inducement, threat or promise to any person

acquainted with the facts of the case so as to dissuade such person from disclosing such facts to the Court or to any police officer;

- c) They shall not leave the State of Arunachal Pradesh without previous permission of the Officer-in-Charge, Crime Branch PS (SIT) PHQ, Itanagar.

19. With the above observations and directions, all the cases stand **disposed of.**

JUDGE

Victoria