

**IN THE SUPREME COURT OF INDIA****CRIMINAL APPELLATE JURISDICTION****SPECIAL LEAVE PETITION (Crl.) D. NO. 46699 OF 2018**

Sanjit Saha & Anr. ...Petitioner (s)

Versus

The State of West Bengal ...Respondent(s)

ORDER

1. The facts of this case raise issues touching upon Article 21 of the Constitution of India. The petitioner no. 2 – Anil Saha along with petitioner No. 1 – Sanjit Saha filed a common Special Leave Petition before this Court on 13.12.2018 challenging the judgment and order dated 05.07.2018 passed by the High Court at Calcutta passed in CRA No. 151 of 2014 with CRA No. 188 of 2014. The petitioners had challenged their conviction under Section 376(2)(g) of the Indian Penal code and the sentence of rigorous imprisonment for 10 years and the

direction to pay a sum of Rs.20,000/- as fine and in default to suffer imprisonment for six months.

2. The Special Leave Petitions were duly supported by an affidavit of Anil Saha – petitioner no.2 sworn on 13.12.2018. The Special Leave Petitions were accompanied with an application for exemption from surrendering.

3. The application for exemption from surrendering came up before the Learned Chamber Judge on 01.03.2019 when the following order was made, in the presence of the counsel for the petitioners:-

“Application for exemption from surrendering is rejected.

Six weeks’ time is granted for surrendering and produce the proof thereof.”

4. Thereafter, the matter came up for hearing on 24.02.2020 before the Learned Judge In-Chambers and the Learned Judge after noticing that learned counsel for the petitioners has not filed proof of surrender, granted two weeks’ further time to file the surrender proof. The order indicates that the counsel engaged was not present at the hearing. It was also ordered that if the surrender proof is not filed within two weeks from 24.02.2020 the Special Leave Petitions were to be dismissed without any further reference to the Court.

5. On 25.09.2023 before me, as a Chamber Judge, three applications filed by the petitioner No.1 – Sanjit Saha came up for hearing. A Miscellaneous Application (Diary No.19330/2023) was filed by petitioner no. 1-Sanjit Saha for restoration of the Special Leave Petitions along with an application for condonation of delay and for recalling of the court's order dated 24.02.2020. I.A. No.113070/2023 was for condonation of delay in filing and I.A. No.95673/2023 was for recalling of the Court's order.

6. On being satisfied that the petitioner No.1 had surrendered on 15.03.2019 itself, the Special Leave Petition was restored insofar as Petitioner No.1 was concerned. It was noticed that since petitioner no.1 and petitioner no.2 had filed a common Special Leave Petitions and only petitioner no.1 had taken steps for recall by pointing out that he has in fact surrendered on 15.03.2019, an order was passed to conduct an enquiry about the status of the surrender of petitioner no.2.

7. For the sake of convenience, the order dated 25.09.2023, passed in the applications of Sanjit Saha, Petitioner No. 1, are set out herein-below:

“Delay condoned.

The application for exemption from surrendering filed by the applicant came up for hearing on 01.03.2019 before the Judge In-Chambers. The applicant was given six weeks' time to surrender and file proof thereof. Thereafter, the matter came up for hearing on 24.02.2020 before the Learned Judge In-Chambers and on the ground that surrender proof had not been filed an order was passed to the following effect:-

“Perused Office Report dated 21.01.2020.

By order dated 01.03.2019, Hon'ble Judge, In-Chamber, has rejected the application of the petitioners for exemption from surrendering. By the very same order six weeks' time has been granted to the petitioners to surrender and produce the proof thereof.

In spite of time granted, learned counsel for the petitioner has not filed proof of surrender of the petitioners so far.

Two weeks' further time is granted to learned counsel for the petitioners to file proof of surrender of the petitioners failing which the special leave petition(s) shall stand dismissed without any further reference to the Court.”

No surrender proof having been filed on or before 09.03.2020, the SLP stood preemptorily dismissed. Now the applicant has filed an application on 05.05.2023 setting out that after the order of this Court dated 01.03.2019, the applicant surrendered on 15.03.2019 and surrender proof was sent to the then Advocate-on-Record. However, it appears that the said proof of surrender was not filed in Court and also there was no appearance on 24.02.2020 when the matter came up for hearing. This had resulted in the order dated 24.02.2020. It further appears that the Advocate-on-record who was originally engaged had passed away on 10.04.2021.

It is averred that the son of the applicant, after making enquiries, has now taken steps to engage a new Advocate-on-Record and through the new Advocate-on-Record the present application for recall of the order dated 24.02.2020 and to restore SLP(CrI) D.No.46699 of 2018 has been filed. The application is supported by a copy of the detention certificate issued by the Superintendent of Balurghat Central Correctional Home, which indicates that on 15.03.2019 the applicant was in custody. The

Certificate also sets out the total period of custody including custody till 27.04.2023, which is the date of the Certificate.

Since the applicant, in obedience to the order of this Court dated 01.03.2019, has surrendered on 15.03.2019, I find merit in this application.

The applicant filed the Special Leave Petition challenging the conviction under Section 376(2)(g) of the Indian Penal code and the sentence of rigorous imprisonment for 10 years and the direction to pay a sum of Rs.20,000/- as fine and in default to suffer imprisonment for six months.

The Special Leave Petition has been filed on behalf of the petitioners – Sanjit Saha and Anil Saha assailing the judgment of the High Court dated 05.07.2018 in Criminal Appeal No.188 of 2014. Both the petitioners in the Special Leave Petition had filed Criminal Appeal No. 188 of 2014 on the file of the High Court at Calcutta.

The application for exemption from surrendering was also filed on behalf of the accused Anil Saha. The order of 01.03.2019 was passed on behalf of the said accused Anil Saha also. In fact the affidavits in support of the Special Leave Petition and the interim applications as well as the affidavit in support of condonation of delay in re-filing are filed by the co-petitioner Anil Saha.

It is not clear as to what is the status of surrender with regard to the said co-petitioner Anil Saha. Let a report be called for from the Additional Sessions Judge, 2nd Fast Track Court, Raiganj as to whether the said Anil Saha who was convicted by the said Sessions Judge in Sessions Case No.76/2012 (S.T. No. 52/2012) by judgment dated 06.01.2014 (and was sentenced originally to 12 years imprisonment by the Trial Judge which was modified to 10 years R.I. along with fine and default sentence by the High Court at Calcutta in Criminal Appeal No.188 of 2014) has surrendered to undergo his sentence. The Additional Sessions Judge, 2nd Fast Track Court, Raiganj may take the assistance of the Jail Superintendent in the District to elicit the information within two weeks.

Considering that it is a matter of personal liberty and considering the fact that the accused Sanjit Saha has in fact surrendered on 15.03.2019 and is in custody, interest of justice

requires that his Special Leave Petition be heard on merits. In fact the default was only in reporting compliance. The peremptory dismissal is only on account of delay in reporting compliance.

The applicant cannot be prejudiced for the delay in reporting compliance which is also occasioned additionally due to the passing away of the Advocate-on-Record on 10.04.2021. Hence, the delay is condoned and the application for recall is allowed. The order dated 24.02.2020 is recalled insofar as petitioner no.1 Sanjit Saha is concerned. The SLP is restored to the record as far as the petitioner no. 1-Sanjit Saha is concerned.

Insofar as the accuses Anil Saha is concerned, let the matter be listed on 09.10.2023 in Chambers for further directions.”

8. Today, when the matter was taken up, a report from the Additional Sessions Judge, Fast Track Court, 2nd Court Raiganj, Uttar Dinajpur has been placed before me. A report in the form of a letter to the Assistant Registrar of this Court has also been placed before me.

The letter reads as under:

“Office of the Additional Sessions Judge, FTC, 2nd Court Raiganj,
Uttar Dinajpur

No. 316 dated, the 07th October, 2023

From

Manik Lal Jana
Additional Sessions Judge, FTC, 2nd Court
Raiganj, Uttar Dinajpur

To

The Assistant Registrar,
The Supreme Court of India, New Delhi

Ref : Compliance report in connection with PID:
196216/2023 in Diary No. No. 46699/2018 (SEC II B)

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In the matter of Order dated 25.09.2023 in Miscellaneous Application Diary No(s) 19330/2023 (Sanjit Saha vs. State of West Bengal)

&

Sessions Case No. 76 of 2023 (Sessions Trial No.52 of 2012)

Sir,

In compliance to the order referred above, I, most humbly, submit the following report directly to the Hon'ble Supreme Court as I am so directed by the Hon'ble High Court, Calcutta.

1. The Convict Anil Saha surrendered before this Court on 15.03.2019 and send to Raiganj District Correctional Home to suffer sentence. (Order no. 81 dated 15.03.2019 of this Court – Annexure-1)
2. Convict Anil Saha is kept in the Raiganj District Correctional Home till 17.03.2023 and transferred to Balurghat Central Correction Home on 17.03.2023 for suffering sentence. He expired in the Balurghat Correctional Home on 26.05.2023. (Report of Supdt., Balurghat Central Correctional Home forwarded by Supdt. District Correctional Home, Raiganj. -Annexure-2)

This is for kind perusal of the Hon'ble Supreme Court of India.

With regard.

Yours faithfully,

(Manik Lal Jana)
Additional Sessions Judge,
FTC, 2nd Court, Raiganj,
Uttar Dinajpur”

9. Along with a letter the order sheet of 15.03.2019 of the Additional Sessions Judge, Fast Track Court – II, Raiganj is also annexed which reads as under:

“Sessions Case No. 76/2012

81/15-03-2019:Record is put up by put up petition filed today on behalf of the convicts along with surrender petition.

Perused. Heard. Considered. The put up petition is allowed.

Two convicts namely Sanjit Saha and Anil Saha surrendered before the Court. Let both the convicts be taken into Judicial custody.

On perusal of the record it appears that one judgment was passed by the Hon’ble High Court, Calcutta dated 05-07-2018 in c/w C. R.A. No. 151 of 2014 and C.R.A. 188 of 2014 and the Hon’ble High Court convicted both the above named convicts with a direction upon both the convicts to surrender before this Court and also directed this Court to send both the convicts after surrender to the District Correctional Home, Raiganj.

On receipt of the copy of Judgment this Court issued W/A against both the convicts but they were not arrested by police. Subsequently, both the convicts surrendered today before this Court. Accordingly, both the convicts are taken into custody.

Let both the convicts namely Sanjit Saha and Anil Saha be sent to Raiganj District Correctional Home at once.

The Superintendent of Raiganj District Correctional Home is directed to take necessary steps as per direction of the Hon’ble High Court.

Let a copy of this order along with the copy of judgment dated 05-07-2018 passed by the Hon’ble High Court be sent to the Raiganj District Correctional Home for information and taking necessary action.

Issue Jail Warrant accordingly.

B.C.I-I to comply.

Recall W/A at once.”

10. A custody certificate from the Office of the Superintendent, Balurghat Central Correctional Home has also been placed before me. The custody certificate also shows that the petitioner no.2 had surrendered on 15.03.2019 and was admitted to Balurghat Central Correctional Home on 17.03.2019.

11. Most importantly, the custody certificate carries the remark that petitioner no.2-Anil Saha has expired on 26.05.2023 and as per the postmortem report, the cause of death was due to the effect of diseased condition of organs – a natural cause. The custody certificate also shows that the petitioner no.2 had undergone a period of about four years two months and eleven days sentence at the time of his death.

12. From the facts in para 1 to 11 above, the following aspects clearly emerge:

i. *Firstly*, in obedience to the order of this Court dated 01.03.2019 and well within the time granted by this Court, petitioner no.2 - Anil Saha (like petitioner No.1 – Sanjit Saha) surrendered on 15.03.2019.

ii. *Secondly*, petitioner No. 1 - Sanjit Saha has taken steps to move an application for recall pointing out that soon after surrender he

had informed his counsel, who for various reasons including the fact that the counsel's death happened on 10.04.2021 could not report the fact of surrender to this Court.

iii. *Thirdly*, this has resulted in the peremptory dismissal of the Special Leave Petitions since no surrender proof was filed within two weeks from the order dated 24.02.2020. The situation was in spite of surrendering to custody on 15.03.2019, for want of communication, the Special Leave Petitions of both petitioners also stood peremptorily dismissed as per the order of 24.02.2020.

iv. *Lastly*, it was only while ordering the restoration of the Special Leave Petition of petitioner no.1 and on the ordering of an enquiry, it has surfaced that the petitioner no.2 has in fact surrendered on 15.03.2019.

13. As pointed out earlier, Petitioner No.1 Sanjit Saha has filed an application for recall. His Special Leave Petition has already been restored vide order In-Chambers dated 25.09.2023. In all likelihood, Petitioner No.2 Anil Saha, also, must have also communicated the same, since the counsel was the same. Counsel was not present before

the Judge In-Chambers on 24.02.2020. It has also come on record that unfortunately the counsel had also passed away on 10.04.2021.

14. Petitioner no.2 – Anil Saha has passed away on 26.05.2023 and he has not been able to avail the Constitutional remedy of appeal by special leave, which he was legitimately entitled to, since he had surrendered on 15.03.2019 and as such was entitled to a hearing on his Special Leave Petition.

15. Order XXII Rule 5 of the Supreme Court Rules, 2013 reads as under:-

“5. Where the petitioner has been sentenced to a term of imprisonment, the petition of appeal shall state whether the petitioner has surrendered and if he has surrendered then the petitioner shall, by way of proof of such surrender, file the certified copy of the order of the Court in which he has surrendered or a certificate of the competent officer of the Jail in which he is undergoing the sentence. A mere attestation of the signatures on the Vakalatnama from the jail authorities shall not be considered as sufficient proof of surrender. Where the petitioner has not surrendered to the sentence, the petition of appeal shall not be accepted by the Registry unless it is accompanied by an application for seeking exemption from surrendering. Where the petition of appeal is accompanied by an application for exemption from surrendering, that application alone shall be posted for hearing/orders before the Court in the first instance.”

As is clear from the above that ordinary rule is that a convict has to surrender to the sentence before filing the Special Leave Petition unless an application for exemption from surrendering is filed.

16. Under Order V Rule 2(35), the Judge In-chambers has the power to exempt from surrendering or to refuse exemption. In the event of refusal of exemption and in the event of not surrendering, the matter is placed before the Chamber Judge for non-prosecution. Order V Rule 2(35) reads as under:

Order V
BUSINESS IN CHAMBERS

2.The powers of the Court in relation to the following matters may be exercised by a Single Judge sitting in Chambers,

“35. Application for exemption from surrendering, provided that not more than one opportunity be granted for surrendering. In case of refusal and/or if accused do(es) not surrender, the matter be placed before the Hon’ble Judge in Chambers for non-prosecution.”

17. The legal position is when a Judge In-Chamber grants time to surrender, at the next hearing, the Judge has to be informed as to whether the convict has surrendered or not. If exemption from surrendering is refused and the accused does not surrender, the matter should be placed for non-prosecution. The Judge In-Chambers should

be posted with the clear information as to whether the accused has surrendered or not surrendered after refusal of exemption. The problem has arisen in this case due to a communication gap. I feel urgent steps need to be taken so that these eventualities do not occur again.

18. Guidelines are necessary as to the further course of action, in cases where after refusal of exemption from surrendering, the information is not forthcoming to the Court. Information may not be forthcoming for myriad reasons - counsel's non-appearance, counsel's death or for any other reason.

19. In the present case, both the petitioners had surrendered within the time granted by this Court but however there was no communication forthcoming on or before 24.02.2020, when the matter was listed in Chambers. Thereafter, it has come on record that the counsel engaged also passed away on 10.04.2021.

20. This Court has in several cases held that when counsel does not appear in a criminal case, the Court is obliged to appoint an *amicus*. [See *Mohd. Sukur Ali* v. *State of Assam*, (2011) 4 SCC 729]. It has also been held that in the absence of counsel, the case should not be

decided and that a criminal case cannot be dismissed for default. [See **Madan Lal Kapoor v. Rajiv Thapar and Others**, (2007) 7 SCC 623 and **Bani Singh and Others v. State of U.P.**, (1996) 4 SCC 720]. This Court has held that free legal assistance for the poor and indigent at State cost is a fundamental right of a person accused of an offence even if the accused does not seek. [See **Suk Das v. Union Territory of Arunachal Pradesh**, (1986) 2 SCC 401]. In **Madhav Hayawadanrao Hoskot v. State of Maharashtra** [(1978) 3 SCC 544] right to counsel to a prisoner has been recognised and traced to Article 21.

21. Since the matter directly engages with Article 21, there is a positive obligation vested on the part of the jail authorities to communicate to the Court information about their surrender and period of detention irrespective of whether the convict has engaged a counsel or not.

22. In ***M.H. Hoskot (supra)***, it has been also recognised that procedural safeguards are the indispensable essence of liberty. Prisoners being confined to the four walls of jail are very often

incommunicado with the outside world. This has been reiterated by this Court in several judgments.

23. In this case, as is clear from the facts while the factum of surrender happened, it is only in the communication of the surrender that there was a lapse.

24. A positive obligation vests in the jail authorities to communicate the factum of surrender of the convict to the Court. This is a means of providing access to justice, which again is a facet of Article 21. The Chamber Judge/Court may depending on the information received, thereafter pass such orders as are deemed fit.

25. The Model Prison Manual, 2016, para 8.62 states as under:-

“Communication of Appellate Orders

8.62 On receipt of an order disposing of an appeal, the purport thereof shall be communicated to the prisoner concerned in the presence of the Superintendent who shall enter on the order a certificate to the effect that it has been so communicated. Whenever a prisoner has been transferred before the receipt of orders on his/her appeal, such orders shall be forwarded, without delay, to the Superintendent of the prison in which the prisoner is confined.”

26. It appears from the record that the petitioners, even though in custody, were not apprised by the jail authorities of the peremptory

dismissal of the Special Leave Petition(s). If even the peremptory dismissal of the Special Leave Petitions had been communicated to the petitioners herein by the jail authorities, they perhaps would have taken remedial steps without loss of time. The petition of petitioner No.1– Sanjit Saha has been restored. The petition insofar as petitioner No.2 – Anil Saha has abated. Liberty under Section 394 CrPC and/or principle analogous thereto for the relatives is reserved.

27. Recurrence of the unfortunate scenario, that has happened in the present case, ought to be prevented. One option could be for the Registry in cases where surrender proof is not filed by the counsel and there is no information as to whether the convict has surrendered or not surrendered, (in spite of time being given to surrender), to call for a report from the Trial Judge. Additionally, the Judge In-Chambers can appoint an *amicus curiae* in cases where counsel is absent to coordinate with the Registry and the trial Court to find out about the actual state of affairs with regard to the factum of surrender.

28. A cue can be taken from *Sunil Batra (II)* vs. *Delhi Administration*, (1980) 3 SCC 488 wherein Krishna Iyer, J. in para 78 (3) recorded the following:-

“78 (3) Lawyers nominated by the District Magistrate, Sessions Judge, High Court and the Supreme Court will be given all facilities for interviews, visits and confidential communication with prisoners subject to discipline and security considerations. This has roots in the visitatorial and supervisory judicial role. The lawyers so designated shall be bound to make periodical visits and record and report to the concerned court results which have relevance to legal grievances.”

29. Even if there is a default in reporting compliance by the party or counsel for whatever reason, the right to have a constitutional remedy under Article 136 of the Constitution of India or remedies by way of statutory appeals ought not to be defeated. The trial Judge may, like in the present case, with appropriate directions to the concerned police and the Jail Authorities report the actual state of affairs. The trial judge may avail the services of the District Legal Services Authority (DLSA) and the Duty counsels of the jails. Calling for information would also ensure that if the convict has not surrendered and is evading surrender, steps are taken to bring the convict to justice.

30. The long-term option would be in the digital era to evolve a mechanism whereby, the Jail authorities are vested with an obligation to upload on a customised web portal, the surrender and custody particulars of the convicts with the corresponding numbers of the Criminal Appeals/Special Leave Petitions. This will ensure that on a click of a button, all up to date information are available for the Court.

31. Let the papers along with this order be placed before Hon'ble the Chief Justice of India.

.....J.
(K.V. Viswanathan)

New Delhi;
October 9, 2023.