

Court No. - 89

Case :- APPLICATION U/S 482 No. - 42883 of 2023

Applicant :- Prakash Kumar Sha

Opposite Party :- State Of U.P. And Another

Counsel for Applicant :- Kunal Shah, Awadhesh Kumar Pandey, Sr. Advocate

Counsel for Opposite Party :- G.A.

Hon'ble Deepak Verma, J.

1. Heard Sri Dileep Kumar, learned Senior Advocate assisted by Sri Kunal Shah, learned counsel for the applicant, learned A.G.A for the State and perused the record.

2. This application under Section 482 Cr.P.C. has been filed to quash the orders passed on different dates on and between dated 24.01.2020 to 02.02.2023 passed by the Chief Judicial Magistrate, Varanasi, in Case No.9271 of 2023 (State of U.P. vs. Prakash Kumar Sha) whereby non-bailable warrants have been directed to be issued against the applicant as well as the orders passed on different dates on and between 21.02.2023 to 08.05.2023 whereby the learned Chief Judicial Magistrate, Varanasi in Case No.9271 of 2023 has directed issuance of process under section 82 Cr.P.C. against the applicant and the orders passed on different dates on and between 18.05.2023 to 15.10.2023 whereby the learned Chief Judicial magistrate, Varanasi in Case No.9271 of 2023 has directed issuance of warrants to attachment of property of the applicant under section 83 Cr.P.C.

3. Learned counsel for the applicant has challenged the non-bailable warrant as well as proceeding under sections 82 & 83 Cr.P.C. issued against him. Learned counsel for the applicant has argued that earlier applicant filed Application u/s 482 Cr.P.C. No.9484 of 2003 before this Court challenging the charge-sheet. Hon'ble Court by order dated 13.11.2023 had passed the following order:-

"Heard the learned counsel for the applicant and also the learned A.G.A. and perused the material on record.

It is said that the tender of the applicant for making the supply of one Steel Motor Launch was accepted by the Police Department and order was also placed to him on 22nd March, 1988. He made the supply of that Steel Motor Launch and in the month of

February 1991 it's payment was also made by the opposite party. After about five years certain shortcomings of assembling the Steel Motor Launch were communicated by the opposite party and on that basis First Information Report was lodged against the applicant. The Police have submitted final report in the case. As against the final report, notice was issued but surreptitiously further investigation was made by the Police and the charge sheet in question was submitted.

Admit. Issue notice. Let counter affidavit be filed within four weeks.

Put up on 16th December, 2003. In the meantime, the proceedings of Case No.9271 of 2003 (State vs. Prakash Kumar Sha) pending in the court of the learned Chief Judicial Magistrate, Varanasi shall remain stayed."

4. In view of Apex Court judgment in **Asian Surfacing of Road Agency (P) Ltd. vs. Central Bureau of Investigation, (2018) 16 SCC 299**, the Court proceeded against the applicant and issued non-bailable warrant on 24.01.2020. Learned counsel for the applicant next argued that applicant is resident of Kolkata and no notice or warrant was ever served upon him, therefore, applicant could not appear before the Court. Thereafter, the learned magistrate in arbitrary manner initiated proceeding under sections 82 & 83 Cr.P.C. All proceeding by the learned magistrate against the applicant under sections 82 & 83 Cr.P.C. are without following the provision provided in Cr.P.C. No summon has been served upon the applicant under section 64 Cr.P.C.

5. Learned AGA has vehemently opposed the submission of learned counsel for the applicant.

6. Having heard learned counsel for the parties and having perused the material available on record. I am of the considered opinion that if the appearance of any person/accused person is required before the learned trial court firstly summons should have been issued and if the person concerned does not appear before the Court concerned on the date fixed the Court concerned should first verify as to whether such summon has been served upon the applicant or not and if such summon has not been served on him personally at least one more summon should have been issued to him and on the next date this fact must be verified as to whether such summon has been served to the person concerned or not and if the court is convinced that despite the summons being served upon the person concerned he is avoiding the process of law, the

bailable warrant can be issued but at the stage of non-bailable warrant the Court should take proper care and precaution convincing itself that despite the service of bailable warrant on couple of dates the process of law is being avoided only in that extreme circumstance the non-bailable warrant should be issued as such process of law directly relates with the liberty of a person which is guaranteed under Article 21 of the Constitution of India. In other words, before issuing N.B.W. due care and precaution is warranted for the learned trial court and N.B.W. should not be issued in a cursory manner. Further, if the learned trial court is willing to issue proclamation under sections 82 and 83 Cr.P.C. against such accused persons, the degree of carefulness and precaution would be increased and such orders relating to the proclamation may be issued only on the application of the prosecution supported with an affidavit that despite all reasonable efforts being taken against the accused person to serve upon the summon the bailable warrant and N.B.W, he/she is avoiding the process, the Court by assigning specific and cogent reasons to the effect that now there is no other way out except to initiate proceedings under sections 82 Cr.P.C. and 83 Cr.P.C. such proclamation can be issued by that proclamation cannot be issued in a cursory manner in view of the dictum of Apex Court in re: Mohan Goswami (supra).

7. In the present case the summon has not been served upon the applicant in terms of Section 64 Cr.P.C. which provides that if the person whose presence is required in the Court is not present in the house such summon should be served upon any male member of the family.

5. In the facts and circumstances of the case, if the applicant appear before trial court within three weeks from today, all proceeding i.e. non-bailable warrant and direction for issuance of warrants of attachment of property of the applicant under section 83 Cr.P.C. dated 18.05.2023 shall be kept in abeyance till three weeks.

6. If applicant does not appear in compliance of the order passed herein, learned Magistrate shall proceed against the applicant.

7. The application u/s 482 Cr.P.C. is **allowed**.

Order Date :- 23.11.2023/SKD