

GAHC010004802024



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

Case No. : Crl.Pet./22/2024

FAZAR ALI @ FAJAR ALI
SON OF JAHAR UDDIN, RESIDENT OF KANARABEEL, NALERTHURI, PS-
JOGIGHOPA, DIST.- BONGAIGAON ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:MAJIDA KHATUN
WIFE OF SAMAJ UDDIN
RESIDENT OF KANARABEEL (NALERTHURI)
PS- JOGIGHOPA
DIST.- BONGAIGAO

Advocate for the Petitioner : MR. R BORA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 09.01.2024

Heard Mr. R. Bora, learned counsel for the petitioner. Also heard Ms. A. Begum, learned Addl. Public Prosecutor for the State respondent No. 1.

2. By this petition under Section 482 of the Cr.P.C., the petitioner has put to

challenge the correctness or otherwise of the order dated 09.11.2023 passed by the learned Special Judge, North Salmara at Abhayapuri in Special (P) No.173(J)/2023.

3. It is to be noted here that vide impugned order dated 09.11.2023, the learned Court below had taken cognizance of the offence under Sections 376(3)/341 of the IPC, read with Section 4 of the POCSO Act and issued non-bailable warrant of arrest to the petitioner.

4. Mr. Bora, learned counsel for the petitioner submits that the petitioner had been charge-sheeted in the aforementioned case under Sections 376(3)/341 of the IPC, read with Section 4 of the POCSO Act and the learned Court below on the very first date had issued non-bailable warrant of arrest against the petitioner for being shown as absconder in the charge-sheet, and that the order impugned is illegal and not tenable in the eye of law, and therefore, it is contended to set aside the same.

5. Mr. Bora further submits that though vide order dated 09.11.2023, non-bailable warrant of arrest was issued against the petitioner, immediately after 2-3 days of the order dated 09.11.2023, the petitioner had received one summon to appear before the learned Court below on 10.01.2024 at about 10 a.m., and that the petitioner has the apprehension that if he appears before the learned Court below on that day, then in view of the order dated 09.11.2023, he may be put behind the bar, and therefore, it is contended to set aside the impugned order dated 09.11.2023.

6. On the other hand, Ms. Begum, learned Addl. Public Prosecutor has opposed the petition on the ground that the petitioner has absconded and he did not cooperate with the investigating agency and therefore, he had been shown as absconder and that at this stage, notice may be issued to the

respondent No.2, and the impugned order dated 09.11.2023, may be kept in abeyance.

7. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the impugned order dated 09.11.2023.

8. It appears that while taking cognizance of the offence under Sections 376(3)/341 of the IPC, read with Section 4 of the POCSO Act, the learned Court below had ordered for issuing non-bailable warrant of arrest against the petitioner, namely, Fazar Ali @ Fajar Ali. It is also to be noted here that the petitioner had been shown as absconder in the charge-sheet dated 30.09.2023.

9. But even though the petitioner had been shown as absconder in the charge-sheet, it is now well settled by a catena of decisions of the Hon'ble Supreme Court that the learned Court below ought to have issued summon to the petitioner at the very first instance. Reference in this context may be made to a decision of the Hon'ble Supreme Court in the case of *Inder Mohan Goswami vs. State of Uttaranchal*, reported in (2007) 12 SCC 1, where it has been held that personal liberty and in the interest of state civilized countries is the most precious of all human rights.

10. In the case of *Vikas Vs. State of Rajasthan* in *Criminal Appeal No. 1190/2013 (arising out of SLP (Crl.) No. 6081/2013)*, the Hon'ble Supreme Court has held that the Constitution of India is the grundnorm- the paramount law of the country. All other laws derive their origin and are supplementary and incidental to the principles laid down in the Constitution. Therefore, Criminal Law also derives its source and sustenance from the Constitution. The Constitution, on one hand, guarantees the Right to Life and Liberty to its citizens under Article 21 and on the other hand, imposes a duty and an

obligation on the Judges while discharging their judicial function to protect and promote the liberty of the citizens. The issuance of non-bailable warrant in the first instance, without using other tools of summons and bailable warrant to secure attendance of such a person would impair the personal liberty guaranteed to every citizen under the Constitution.

11. Similarly, Article 21 of the Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law. The issuance of non-bailable warrant involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, this demands that the Courts have to be extremely careful before issuing non-bailable warrants.

12. As stated in the foregoing paragraph, the learned Court below at the very first instance has issued non-bailable warrant of arrest against the petitioner without using the other tools, such as summons and bailable warrant to secure the attendance of the petitioner.

13. Having tested the impugned order, on the touchstone of the principles discussed herein above, this Court is of the view that the impugned order dated 09.11.2023 failed to withstand the test of legal scrutiny and therefore, this Court is inclined to set aside the same.

14. Considering the nature of relief being sought for in this petition, this Court is of the view that hearing the respondent No.2 is not at all necessary. And therefore this Court is not inclined to keep the matter pending. Accordingly, this petition stands allowed and the impugned order dated 09.11.2023, is set aside and quashed.

15. The petitioner is directed to appear before the learned Court below on the date fixed and to apply for regular bail, and in the event of filing such an

application, the learned Court below shall consider the same.

JUDGE

Comparing Assistant