

THE HIGH COURT OF TRIPURA
AGARTALA

CRL. PETN. 41 of 2014

Sri Rajendra Das,
S/O. Late Lakhen Charan Das,
Of Durjoynagar,
P.S. Airport,
District – West Tripura.

..... *Petitioner*

- *Vs* –

The State of Tripura.

..... *Respondent*

CRL. PETN. 42 of 2014

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S/O. Late Lakhen Charan Das,
Of Durjoynagar,
P.S. Airport,
District – West Tripura.

..... *Petitioner*

- *Vs* –

The State of Tripura.

..... *Respondent*

BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA

For the Petitioner : Mr. D.C. Kabir, Advocate.
Mr. S. Ghosh, Advocate.

For the respondent : Mr. R.C. Debnath, Addl. P.P.

Date of hearing & : 03.07.2014.
delivery of
Judgment & order

Whether fit for : YES
reporting

JUDGMENT & ORDER (ORAL)

Both the petitions can be disposed of by a common Judgment since similar questions are involved and both the petitions have been filed by the same person.

2. Briefly stated the prosecution case is that a police officer received secret information that one criminal gang which included the present petitioner as one of its members had assembled near Shanitala, old Motor Stand area. According to the prosecution, these persons had assembled and made preparation to commit dacoity in some house in that area. Thereafter, the police conducted a raid and cordoned off the area. Only one person, Amitabha Ghosh could be arrested on the spot and rest of the alleged offenders including the present petitioner fled away from the spot. Thereafter, FIR was presented before the concerned Magistrate and proceedings continued before him. An application for bail was filed and finally on 17th January, 2014 the charge sheet was filed wherein the present petitioner Rajendra Das was shown to be an absconder. Thereafter, on 10th February, 2014, the committing Magistrate i.e. the Chief Judicial Magistrate passed a detailed order, relevant portion of which reads as follows:-

"It appears from the Charge sheet that the investigating Police officer SI Rana Chaterjee submitted charge sheet against five accused persons including the present four accused persons showing accused Rajendra Das S/O. Lt. Lakhen Charan Das of Durjoynagar, PS. Airport showing him absconder.

Accordingly, office is directed to split up this case record for accused Rajendra Das and to issue Warrant of

Proclamation and attachment against accused Rajendra Das."

3. This order is the subject matter of challenge in Criminal Petition No. 41 of 2014.

4. It appears that in the mean time, some of the co-accused applied for bail and the record was sent to the High Court and a shadow file was created by the trial Court. On 27th March, 2014, the records were sent back from the High Court and on this date, an order has been passed most of which is not relevant for the purpose of decision of this case, but in hand, it is mentioned "*Issue W/A against accused Rajendra Das*". This order is the subject matter of challenge in Criminal Petition No. 42 of 2014.

5. Mr. D.C. Kabir, learned counsel for the petitioner submits that in terms of Section 82 of the Code of Criminal Procedure, the petitioner could not have been declared to be an absconder nor any order of proclamation could be issued against him without first having issued a warrant and without the Court being satisfied that the accused is avoiding service. He also submits that the second order issuing warrants against the accused Rajendra Das is totally contrary to the previous order and therefore, is illegal and liable to be set aside. In support of his contention, Sri Kabir has relied upon the Judgment of the Gauhati High Court in **2008 CRI. L. J. 3374 (Md. Nazrul Islam v. State**

of Assam) and of the Delhi High Court in **2008 CRI. L.J. 3561 (Rohit Kumar alias Raju v. State of NCT Delhi & Anr.)**.

6. Section 82(1) of the Code of Criminal Procedure reads as follows:-

"82(1). If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation."

7. A bare perusal of this Section clearly shows that after a Court has reason to believe that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, the Court may publish a written proclamation. In this case, this Court is not required to go into the question of how and in what manner a proclamation is to be issued. The only issue is when can an accused be declared to be an absconder and necessary order for issuance of proclamation may be passed. From a bare perusal of the aforesaid Section, it is more than apparent that the *sine qua non* for issuance of the proclamation and declaration of a person to be an absconder is that a warrant against that person should already have been issued by the Court. Therefore, it is more than clear that the Court at the first instance must issue a warrant for the arrest of the said person. In case, the warrant is not executed

and the Court comes to the conclusion on the basis of the report of the serving authority that the accused is either absconding i.e. avoiding the execution of the warrants or has hidden himself so as to ensure that said warrant cannot be executed then alone proclamation can be issued. Before issuance of such proclamation, the Court must ensure that –

(i) warrants were issued by the Court

(ii) the warrants could not be executed

(iii) that the warrants could not be executed because the accused absconded or concealed himself.

It is only if these three conditions are met then the Court can issue a proclamation to declare the accused to be an absconder.

8. A learned Single Judge of the Gauhati High Court in ***Md. Nazrul Islam's (supra)*** case summed up the legal positions in the following terms:-

"20. Therefore, in order to issue a proclamation under Section 82, Cr.P.C. it is sine qua non that Court must have reason to believe that the person against whom proclamation has been issued "absconded" or is "concealing himself" so that such warrant cannot be executed and only on arriving at such a satisfaction, the Court concerned is authorized to publish such proclamation. For attachment of the property of the person absconding it is also a sine qua non that the Court issuing a proclamation must record the reasons in writing that such person is about to dispose of the whole or any part of his property or about to remove the whole or any part of his property from the local jurisdiction of the Court and such satisfaction is to be arrived at by affidavit or otherwise. The word "otherwise" here would embrace making of such other enquiry as may be found necessary on the facts and circumstances of a given case taking note of antecedent and conduct of the accused as may be revealed from the record."

9. The Delhi High Court also succinctly clarified the legal position in Paras 17, 18 and 18A, which read as follows:-

"17. The sine qua non for an action under Section 82 is the prior issuance of warrant of arrest by the Court. There must be a report before the Magistrate that the person against whom the warrant was issued by him had absconded or had been concealing himself so that such warrant can (sic) be issued. An attachment warrant can be issued only after the issuance of proclamation.

18. The expression "reason to believe" occurring in Section 82, Cr.P.C. suggests that the Court must be subjectively satisfied that the person has absconded or has concealed himself on the materials before him. The term "absconded" is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense is to hide oneself. Further, under Section 82, Cr.P.C. the Court issuing proclamation must record its satisfaction that accused had "absconded" or "concealed himself".

18A. The three clauses (a), (b) and (c) of sub-section (2)(i) of Section 82, Cr.P.C. are conjunctive and not disjunctive. The factum of valid publication depends on the satisfaction of each of these clauses. Clause (ii) of sub-section (2) is optional; it is not an alternative to clause (1). The latter clause is mandatory."

10. I am in respectful agreement with the law laid down in the aforesaid cases. Therefore, I have no hesitation in holding that the first order whereby, the learned Magistrate declared the petitioner to be an absconder and issued proclamation against him is totally illegal and without jurisdiction and the procedure prescribed by law was not followed. The said order in so far as the declaration of the petitioner to be an absconder and issuance of the proclamation against him is set aside. Though an order for issuance of proclamation was issued, the fact is that actually no such proclamation was published. In the second order dated 27th

March, 2014, the Magistrate issued warrant of arrest against the petitioner. However, in between the Magistrate had split up the case and committed the case against four of the accused to the Court of Sessions. In the Court of Sessions when the case was received on the first day the names of all the accused including the present petitioner are mentioned as accused. There is nothing in the order of the learned Sessions Judge that the one of the accused i.e. the present petitioner is an absconder or that the trial has been split up as far as he is concerned. The learned Sessions Judge transferred the case to an Additional Sessions Judge. In none of the orders of the learned Additional Sessions Judge there is mention of the name of the petitioner and rightly so because the case against the petitioner was not committed. However, at least, in one of the order sheets it should have been mentioned that initially the case has been filed against some other accused also and one of the accused has been declared to be an absconder and committal proceeding are still going on against him.

11. Mr. Kabir urges that the second order issuing warrants of arrest against the petitioner is totally without jurisdiction since once the committal Magistrate had declared the petitioner to be an absconder he could not have issued warrant of arrest thereafter. He therefore prays that the warrant of arrest may be kept in abeyance and the petitioner may be permitted to surrender before the trial Court and join the investigation. From the records of the

case, I find that no attempt whatsoever was made by the trial Court to ensure the presence of the accused-petitioner at any stage. The learned trial Court only relied upon the statement of the police that the petitioner was an absconder. There is no reference even to any record of the police which could have shown that the accused was avoiding arrest. Even if that had been proved that also could not be a good ground to issue a proclamation at the first instance. It is only if a warrant issued by the Court is not executed that an accused can be declared to be an absconder.

12. Since the order declaring the petitioner to be an absconder is illegal and void, the question that arises what is the next course of action. It is urged by Sri Kabir that the petitioner has lost a valuable right of approaching this Court for grant of anticipatory bail. I am clearly of the view that the right to approach the Court for anticipatory bail is not such a right, which can be said to have been totally set at naught by the orders in question.

13. Be that as it may, the fact remains that the petitioner is now aware of the proceedings and can join trial. Therefore, in the larger interest of justice and balancing the rights of both sides, the following directions are to be issued:-

(i) that the order dated 10th February, 2014 insofar as it declares the petitioner to be an absconder and

issuance of proclamation and attachment is concerned the same is set aside.

- (ii) the order dated 27.03.2014 issuing warrants of arrest is not set aside, but an opportunity is granted to the petitioner to approach the trial Court for grant of bail.***
- (iii) the petitioner may on any date hereinafter surrender before the learned Additional Sessions Judge concerned and apply for grant of bail. His application for grant of bail shall be considered strictly in accordance with law on its own merits totally uninfluenced by the observations of the learned committal Magistrate that the petitioner is an absconder.***

14. Certain other directions also need to be issued –

- (i) that all Magistrates, in future, shall ensure that the letter and spirit of the law is followed and no accused is declared to be an absconder or proclaimed offender unless the procedure as set out hereinabove is followed;***
- (ii) the Court to which a case is committed must on the first date clearly record whether all the persons, who are accused in the charge sheet have been committed for trial before it or are there some against whom the***

trial has been split and kept in abeyance, and the reason thereof.

15. Keeping in view of these developments, the order of splitting the trial is also set aside and the trial against the present petitioner and the other accused shall now be tried on jointly.

16. A copy of this order be handed over to Mr. S. Ghosh, learned counsel by tomorrow.

17. The Registrar General is directed to ensure that copy of this order is circulated to all the members of the Tripura Judicial Service for compliance.

CHIEF JUSTICE

sima