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IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.12315 of 2016

Arising Out of PS.Case No. -95 Year- 2009 Thana -CHANPATIA District-WESTCHAMPARAN(BETTIAH)

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Tarkeshwar Ram, son of Saral Ram, resident of Village-Bijbaniya, P.S.-Chanpatiya (Sirisiya O.P.) District-West Champaran.

.... Petitioner/s

Versus

The State of Bihar

.... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Bimlesh Kumar Pandey-Advocate
For the Opposite Party/s : Mr. C. Jawahar (A.P.P.)

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV ORDER

03 30-03-2016 Heard learned counsel for the petitioner as well as learned Additional Public Prosecutor.

2. Sole petitioner, Tarkeshwar Ram being apprehensive of his arrest in connection with Chanpatiya (Sirisiya) P. S. Case no.95 of 2009 registered under Sections 341, 342, 323, 324, 325, 307, 504 of the I.P.C. pending before Mr. N. P. Singh, Judicial Magistrate, 1st Class, West Champaran at Bettiah has filed instant petition for anticipatory bail in accordance with Section 438 Cr.P.C.

3. Harihar Ram gave his fard-beyan on 08.06.2009 before police officials of Bettiah Town P.S. while he was admitted at M.J.K. Hospital, Emergency Ward stating therein that on 07.06.2009, he was returning to his house with his she-buffalo and reached near Bangla of Madan Ram, Pramod Ram armed with

farsa, Shrawan Kumar armed with Bhala, Beni Ram armed with Bhala, Tarkeshwar Ram, Sunil Ram armed with lathi, respectively apprehended him and on an order of Shrawan Ram, Pramod Ram gave farsa blow over his head, rest assaulted him with lathi. He fell down. Thereafter, Pramod Ram pounced upon him and began to throttle whereupon he raised alarm attracting the witnesses including the villagers, who lifted him to hospital.

4. It has been submitted on behalf of petitioner that allegation has been attributed in omnibus way that too, by way of causing assault with lathi along with others. Furthermore, it has also been submitted that from the order of Cr. Misc. No.8174 of 2016 dated 24.02.2016, it is apparent that injured had sustained simple injury caused by hard and blunt substance. It has further been submitted that during course of investigation, I.O. had taken recourse under Section 41-A of the Cr.P.C. and as such, petitioner is entitled for anticipatory bail even after cognizance vide order dated 24.05.2015. It has also been submitted that other co-accused have also been allowed privilege of anticipatory bail.

5. Learned Additional Public Prosecutor opposed the prayer.

6. From the chargesheet (Annexure-5), it is apparent that petitioner was given benefit at the end of the Investigating

Officer in terms of Section 41-A of the Cr.P.C. For better appreciation ***Section 41-A of the Cr.P.C.*** is quoted below:-

> ***"41A. Notice of appearance before police officer.*** *– (1) The police officer *[shall], in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a 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 may be specified in the notice.*
>
> *(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.*
>
> *(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.*
>
> **[(4) Where such person, at any time, 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."*

7. From plain reading of Section 41-A , it is evident that the aforesaid exercise is to be taken up in case, the Investigating Officer does not desire to apprehend the accused relating to an offence so categorized under Section 41(1) of the Cr.P.C. Furthermore, it also gives a protection to the accused, not to be arrested in case he volunteers to comply and further, undertakes to comply with the notice, save and except, the reason

to be recorded by the I.O. justifying his arrest. That means to say, unless and until, reason to be recorded in writing justifying arrest of an accused, in ordinary course of nature, accused should not be arrested and, in case accused is not arrested, his presence before the Investigating Officer during course of investigation in compliance of Section 41-A of the Cr.P.C. will not curtail his right to pray for anticipatory bail.

8. So for present case is concerned, admittedly contains Section 307 I.P.C. the major penal section apart from other ancillary Sections of the I.P.C. Section 307 I.P.C. contains maximum punishment of imprisonment for life, then in that event, whether exercise of power by the Investigating Officer in terms of Section 41-A of the Cr.P.C. happens to be just, legal and proper.

9. From plain reading of Section 41 of the Cr.P.C. which authorizes the police to arrest without warrant Sub-section-1(a) thereof, identifies the categories of cases whereunder arrest is made permissible without warrant.

10. Sub-section 1(b) prescribes some sort of relaxation with regard to the cases even though cognizable in nature prescribing sentence less than seven years or upto seven years with or without fine with certain exceptions so enumerated therein. In the background of parallel scrutiny of both the

Sections, it is evident that applicability of Section 41-A is found permissible relating to the offences containing maximum punishment of seven years with or without fine.

11. Learned counsel for the petitioner relied upon ***Gauri Shankar Roy, Mamta Devi vs. State of Bihar reported in 2015(3) P.L.J.R. 618***, which contains elaborate discussion over the Section 41, 41-A Cr.P.C. and under Para-22 thereof, it is evident that issue has properly been answered. For better appreciation, same is quoted below:-

> *"22. From perusal of the scheme of Section 41 Cr.P.C. as it stands now after being substituted by Code of Criminal Procedure (Amendment) Act 2008 (5 of 2009), it transpires that the power of arrest available to a police officer in connection with commission of a cognizable offence may be categorized under three heads – (a) under the first head, the Police officer has been conferred a power to arrest any person who has committed a cognizable offence in his presence. This power is without any qualification, exception and prerequisites. The only sine qua non is commission of a cognizable offence in presence of a police officer; (b) the second category of*

the case have been mentioned under Section 41(1)(b). In this class, those cases are included which are punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine and the police officer has received a reasonable complaint, or a credible information regarding any one having committed such offence or a reasonable suspicion exists that any one has committed such a cognizable offence. The power to arrest for the offence under this category is, however, not absolute and unqualified. In order to exercise the power of arrest in these category of cases, the police officer must have a reason to believe on the basis of complaint, information or suspicion that any person has committed the said offence and the police officer should be satisfied that such arrest is necessary in terms of any or all of the grounds as mentioned under Section 41(1)(b)(ii)(a,b,c,d,e) of the Code."

12. In the aforesaid judgment, ***Arnesh Kumar vs. the State of Bihar reported in 2014 (3) B.B.C.J. 282 (SC)*** has also been considered under Para-32 which reads as follows:-

"32. With regard to the ambit of provision under Section 41-A of the Cr.P.C., the Apex Court, in the case of Arnesh Kumar Vs. The

State of Bihar, reported in 2014(3) BBCJ IV 282 has held in paragraph no. 10 in the following words:-

"10. Aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) Cr.P.C., the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.P.C. has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid."

13. In ***Kumari Hema Mishra v. State of U.P. and others reported in 2014 Cr. Law Journal 1107***, again the matter has been thrashed and held as follows:-

"20. Amended provisions make it compulsory for the police to record the reasons for making arrest as well as for not making an arrest in respect of a cognizable offence for which the maximum sentence is upto seven years.

Reference in this connection may also be made to Section 41A inserted vide Act 5 of 2009 w.e.f. 01.11.2010, which reads as follows:

"41A. Notice of appearance before police officer – (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a 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 may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, 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."

"21. Above mentioned provisions make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under Clause (b) of sub-section (1) of the amended Section 41. But, all the same, unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41-A, could be a ground for his arrest. Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty guaranteed under Article 21 of the Constitution of India."

14. Consequent thereupon, the action of the police in giving liberty to the petitioner in terms of Section 41-A of the Cr.P.C. is not at all found permissible in the eye of law taking into account the offence, more particularly, Section 307 I.P.C. prescribing punishment upto life.

15. Be that as it may, on account of lapses on the part of the I.O., petitioner should not be allowed to suffer. Therefore,

considering the nature of allegation in consonance with the fact that other co-accused are also availing liberty of anticipatory bail vide Cr. Misc. No.8174 of 2016, Cr. Misc. No.36862 of 2015, petitioner, **Tarkeshwar Ram** is also directed to be released on bail on furnishing bail bond of Rs.10,000/- (ten thousand) with two sureties of the like amount each to the satisfaction of Mr. N. P. Singh, Judicial Magistrate, 1st Class, West Champaran at Bettiah/ successor in office in connection with Chanpatiya (Sirisiya) P. S. Case no.95 of 2009, in event of his arrest/ surrender within four weeks from the date of production/ receipt of the order in terms of condition so enumerated under Section 438(2) of the Cr.P.C.

(Aditya Kumar Trivedi, J)

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