

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.11.2016

(Orders Reserved on : 19.09.2016)

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

Crl.O.P.No.25334 of 2013

1. Kalifathulah
2. Ibrahim
3. Yasmin
4. Sabeena
5. Mumtaj
6. Sadiq Basha

... Petitioners/Accused

Vs.

Ayub Khan
Respondent/Complainant

...

Prayer: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records relating to the order dated 06.09.2013 passed in Crl.M.P.No.2808 of 2011 on the file of the learned Judicial Magistrate, Uthankarai and quash the same.

For Petitioners

: Mr.K.Aswin for M/s.Dass & Viswa

For Respondent : Mr.E.Kannadasan

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ORDER

This Criminal Original Petition is filed by the petitioners/accused to call for the records relating to the order dated 06.09.2013 passed by the learned Judicial Magistrate, Uthankarai, in Crl.M.P.No.2808 of 2011.

2. The learned counsel for the petitioners would mainly contend that the learned Judicial Magistrate, Uthankarai, without application of mind and without following the relevant provisions under Section 205 of Cr.P.C., erroneously issued Non-bailable warrant against the present petitioners. In this case, the first petitioner is already arrayed as an accused in S.C.No.19 of 2011 and he is appearing before the trial Court. The respondent/complainant had preferred a complaint by implicating the petitioners deliberately with an ulterior motive, even though there is no offence made out against them and there is no specific averments attributed against the

petitioners and even if the allegations in the complaint are taken, face value the same would not make out any offence against the petitioners. Hence, the learned counsel for the petitioners prays that the order passed by the trial Court has to be set aside and the criminal original petition has to be allowed.

3. In support of his contentions, the learned counsel for the petitioners relied on the following decisions of the Hon'ble Supreme Court.

- (i) (2012) 9 Supreme Court Cases 791
(Raghuvansh Dewanchand Bhasin Vs. State of
Maharashtra and another) and**
- (ii) (2007) 12 Supreme Court Cases 1 (Inder
Mohan Goswami and another Vs. State of Uttaranchal
and others).**

4. The learned counsel for the respondent/complainant would mainly contend that the Trial Court, after recording the statement of all the witnesses adduced on the side of the complainant, taken the

case on file under Section 307 IPC and issued NBW for the appearance of the petitioners/accused. Hence, there is no illegality or infirmity in the order passed by the trial Court and hence, he prayed that the order of the trial Court has to be confirmed and the Criminal Revision Case has to be dismissed.

5. In the decision reported in **(2012) 9 Supreme Court Cases 791 (Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra and another)**, at paragraph Nos.10 and 11, the Hon'ble Supreme Court has held as follows:-

"10. It needs little emphasis that since the execution of a non-bailable warrant directly involves curtailment of liberty of a person, warrant of arrest cannot be issued mechanically but only after recording satisfaction that in the facts and circumstances of the case it is warranted. The courts have to be extra-cautious and careful while directing issue of non-bailable warrant else a wrongful detention would amount to denial of constitutional mandate envisaged in Article 21 of the Constitution of India. At the same time, there is no gainsaying that the welfare of an individual must yield to that of the community. Therefore, in order to maintain the rule of law and to keep the society in functional harmony, it is necessary to strike a balance between an individual's rights, liberties and privileges on the one hand, and the State on the other. Indeed, it is a complex exercise. As Cardozo, J. puts it "on the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any

choice.”^{*}

11. Be that as it may, it is for the court, which is clothed with the discretion to determine whether the presence of an accused can be secured by a bailable or non-bailable warrant to strike the balance between the need of law enforcement on the one hand and the protection of the citizen from highhandedness at the hands of the law-enforcement agencies on the other. The power and jurisdiction of the court to issue appropriate warrant against an accused on his failure to attend the court on the date of hearing of the matter cannot be disputed. Nevertheless, such power has to be exercised judiciously and not arbitrarily, having regard, inter alia, to the nature and seriousness of the offence involved; the past conduct of the accused; his age and the possibility of his absconding. (Also see *State of U.P. v. Poosu*².)"

6. In the decision reported in (2007) 12 Supreme Court Cases 1 (Inder Mohan Goswami and another Vs. State of Uttaranchal and others), at paragraph No.51, the Hon'ble Supreme Court has held as follows:-

"51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants."

7. In this case, already, the respondent/complainant had filed a police complaint and the case was registered by the Uthankarai police, Singarapettai and at the time of filing the final report, the

case was taken on file by the learned Magistrate, Uthankarai and the case was committed to the Court of Sessions, Krishnagiri, and the same was taken on file as S.C.No.19 of 2011. It is admitted that in the final report filed by the police, the first petitioner alone has been implicated in the offence. Aggrieved by the same, the respondent/complainant had preferred a petition before this Court in Crl.O.P.No.12807 of 2011 and M.P.No.1 of 2011 and this Court, by order dated 26.11.2012, passed the following order which reads as follows:-

"3. In this petition, though the petitioner sought for further investigation by the police, considering the fact that the petitioner has already filed a private complaint against six accused persons and as it was also submitted by the learned Additional Public Prosecutor according to the statement of some of the witnesses recorded by the investigation officer, and as per the statement of those witnesses recorded under Section 164 Cr.P.C., it is revealed only one accused took part in the occurrence, this Court is of the view that it is not proper to order for further investigation, but at the same time, this Court feels that the petitioner/complainant must be given opportunity to establish his case against all the accused. Even though the police had come to the conclusion that the petitioner was attacked by only one person i.e., 'Kalipathullah', according to the petitioner, six persons took part in the occurrence, it is necessary for the learned Judicial Magistrate, Uthangarai, to consider the complaint given by the petitioner in C.C.No.208 of 2011. The learned Judicial magistrate shall proceed as per the provisions under

Section 202 Cr.P.C. and as it appears that the offence alleged is triable exclusively by the Court of sessions, the learned Magistrate shall call upon the complainant to produce all the witnesses and examine them on oath and thereafter the learned Magistrate may commit the case to the Court of Sessions, and on such committal, the case shall be tried along with the case in S.C.No.19 of 2011, on the file of the Additional Special Judge, Krishnagiri.

4. The learned Additional Special Judge may not proceed with the trial in S.C.No.19 of 2011, till the case on the basis of private complaint is committed to Sessions."

8. In view of the above private complaint filed by the respondent/complainant, the learned Magistrate, Unthankarai recorded the evidence of all the witnesses adduced on the side of the complainant and finally, taken the case on file under Section 307 of IPC and passed the following order:-

"Records perused. Earlier this Court has committed the case with respect of accused Kalifathullah alone. Against the said order, the complainant preferred CrI.O.P.No.12807 of 2011 and the Honourable High Court has given direction to commit the case to Sessions Court if the offence is made out as against the other accused. On perusal of the records, prima facie case made out. Case taken on file for the offence under Section 307 of IPC against the accused. Issue NBW as against A-1 to A-6. Call on 20.09.2013."

9. On reading of the entire evidence adduced on the side of the

complainant, it reveals that the learned Magistrate, after application of mind, passed an order under Section 203 of Cr.P.C. and issued process under Section 204 of IPC. Hence, this Court is of the view that there is no illegality or infirmity in the order of the trial Court in taking cognizance of the offence under Section 307 of IPC.

10. Section 204 of Cr.P.C. reads as follows:-

"204. Issue of process. - (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) A summons-case, he shall issue his summons for the attendance of the accused, or

(b) A warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate

may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

11. Section 87 of Cr.P.C. reads as follows:-

"87. Issue of warrant in lieu of, or in addition to, summons.- A court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest-

(a) If either before the issue of summons, or after the issue of the same but before time fixed for his appearance, the court sees reason to believe that he has absconded or will not obey the summons; or

(b) If, at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

12. In this case, admittedly, the police registered a case against the petitioners and after investigation, the police has filed a charge sheet against the first petitioner alone and not filed charge sheet against the other petitioners. In view of the above circumstances, this Court is of the considered view that the issuance of Non-Bailable Warrant, at the first instance, on the date of taking cognizance of offence on 06.09.2013 itself is not at all maintainable. Considering the facts and circumstances of the case, the trial Court has to issue

summons to the accused for their appearance and if they failed to appear or evading the summons, the learned Magistrate is always at liberty to proceed according to law.

13. In view of this, this Court is of the considered view that the criminal original petition has to be allowed with regard to the issuance of Non-Bailable Warrant to the accused in the private complaint. In other respects, the criminal original petition has to be dismissed.

14. In the result, the criminal original petition is allowed only with regard to the issuance of Non-Bailable Warrant at the first instance on 06.09.2013. In other respects, the order of the learned Magistrate is confirmed. Since the petitioners/accused have knowledge about the case, they are directed to appear before the learned Magistrate concerned within two weeks from the date of receipt of a copy of this order, failing which, the Magistrate is always at liberty to proceed as per the Criminal Procedure Code for their appearance according to law.

29.11.2016

Internet :Yes
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To

The Judicial Magistrate,
Uthankarai.

G.CHOCKALINGAM, J.

Jrl

Order in
Crl.O.P.No.25334 of 2013

29.11.2016