



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.08.2016

CORAM:

THE HONOURABLE DR. JUSTICE P.DEVADASS

CrI.R.C.(MD) Nos.575 and 576 of 2016

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Nithin Nair

... Revision Petitioner/A1
in both petitions

-vs-

State rep. by
The Inspector of Police,
CBI/ACB,
Chennai.
(FIR No.RC MA12012 A0016
FIR No.RC MA12012 A0015)

... Respondent in both petitions

COMMON PRAYER: Criminal Revision Petitions are filed, under Section 397 r/w 401 Cr.P.C., to set aside the dismissal order passed by the learned Chief Judicial Magistrate, Madurai in Cr.M.P.Nos.918 and 924 of 2016 in C.C.Nos.6 and 5 of 2014 respectively dated 06.08.2016.

For Petitioner in both : M/s.A.S.Shangeetha
Petitions

For Respondent in both : Mr.S.Jayakumar
Petitions Special Public Prosecutor for CBI Cases

COMMON ORDER

As the issue involved is connected in both the revisions, they are heard together and are being disposed of by this common order.

2.The ACB of CBI, Chennai is prosecuting the petitioner/A1 in C.C.Nos.6 and 5 of 2016 before the learned Chief Judicial Magistrate, Madurai for his alleged commission of certain offences.

3.The case has reached the stage of conducting of further proceedings under Sections 239 - 240 Cr.P.C. He was on bail. He has executed surety bonds. Subsequently, he vanished into their air. So also his partner in crime/A2. In order to achieve progress in the trial of the case enforcing their attendance, the trial Court issued NBWs as against A1 and A2. As against the petitioner/A1, NBW has been issued on 05.03.2016.

<https://hcservices.ecourts.gov.in/hcservices/>
1.A2 surrendered before the trial Court hoping to return home, but he was sent to a different home/prison as he was



remanded to judicial custody. Thereafter, after a great deal of legal battle, A2 came out on bail.

5. Resultantly A1 got frightened. So, he do not want to follow the suit of his partner. He sought for anticipatory bail under Section 438 Cr.P.C., apprehending arrest under NBW. But in his more, he did not succeed. Thereafter, he filed Cr.M.P.No.918 of 2016 in C.C.No.6 of 2014 and Cr.M.P.No.924 of 2016 in C.C.No.5 of 2014 banking on some decisions, some of which have been authored by me, to recall of NBWs under Section 70(2) Cr.P.C. without his physical/actual appearance before the Trial Court. By its impugned order, the trial Court distinguished his case from the case of the persons covered in the decided cases and thus dismissed his recall petitions. That is how, he is before us under Section 397 r/w 401 Cr.P.C.

6. According to the learned counsel for the revision petitioner, in view of certain reasons beyond his control and fear of NBW, he could not surrender. However, it is not that he has no intention to participate in the trial proceedings. He may be given an opportunity to defend himself in the Court and he has also engaged a counsel to defend him.

7. On the other hand, the learned Special Public Prosecutor, C.B.I. Cases, submitted that the petitioner was elusive. He is duty bound to participate in the proceedings. However, he did not. In the circumstances, the trial Court has issued N.B.Ws. The petitioner has forgotten the CBI case, but not the Court.

8. The learned Special Public Prosecutor further submitted that the trial Court practically goaded the prosecution agency to secure him and also called for status report. When the CBI went in execution of NBW, it is startling that in the address given at the time of executing the bail bond, the petitioner is not available. He has closed his company. Further, one of his surety also vacated from his address. In the circumstances, he is duty bound to furnish his present address to the Court.

9. In reply, the learned counsel for the petitioner reiterated the plea for giving an opportunity to the petitioner and submitted that solvent surety would be produced and his wife is ready to offer bail bond, so also his close friend Karnan.

10. I have anxiously considered the rival submissions, perused the impugned order and also the materials on record.

<https://hcservices.courts.gov.in> 11. In these further proceedings are conducted under Section 239-240 Cr.P.C., the criminal case will not go to the next stage of the trial. Now, it could not be proceeded with because of the



abscondence of the petitioner. In the instant case, the petitioner is already on bail. As on date it was not cancelled nor his bail bond was forfeited. But yet he is bound to appear before the trial Court for hearings and participate in the trial Court proceedings. However, he was elusive and became an absconding accused. The trial Court was left with no option except to issue NBWs and the trial Court is right in asking the prosecution to execute NBW.

12. In this backdrop of the matter, after failing before the Court in getting anticipatory bail, he has come before this Court challenging the order of the trial Court passed in the petition to recall the N.B.Ws.

13. According to the learned counsel for the petitioner, pinning his hope on this Court, he seeks relief under Section 397 r/w 401 Cr.P.C.

14. There is distinction between bail jurisdiction under Section 438 Cr.P.C. and the revisional jurisdiction under Section 397 r/w 401 Cr.P.C. Under Section 438 Cr.P.C. a person apprehending arrest either before or after registration of F.I.R. and even during the trial of the case apprehending his arrest also under NBW, before going to jail he seeks bail. He seeks bail in advance, it is advance bail, it is also bail before jail and in that context it is distinguished from bail petitions under Sections 436, 437 and 439 Cr.P.C.

15. Grant of advance bail is guided by certain principles, namely, nature and gravity of the offence, his antecedents, his availability etc. However under Section 397 r/w 401 Cr.P.C., the consideration will be entirely different. In its revisional jurisdiction under Section 397 Cr.P.C. the Court is bound to scrutinise the legality and propriety of the order passed by the inferior Court/Subordinate Court. It is mainly adjudication based on question of law. However, if the appreciation of the materials/evidence by the inferior Court is not in proper perspective, then it will be an erroneous decision. The finding will be perverse. Thus, the issue which arose before this Court under Section 438 Cr.P.C. is entirely different from the issue before us under Section 397 r/w 401 Cr.P.C. (See **AMIT KAPOOR V. RAMESH CHANDER [2012 (9) SCC 460]**.)

16. In the circumstances, question before us is while enforcing his attendance whether he could seek recalling NBW even without appearing/surrendering before the Court or he has to surrender and seek recalling of the NBW. The decisions cited by the learned counsel for the petitioner are rendered on the factual matrix involved in each case. Considering the attitude of



the petitioner, I am of the firm view that the petitioner is not entitled to the view taken by this Court in the earlier decided, namely, NBW can be recalled without physical presence of the accused, in other words, he need not surrender.

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17.If he surrender before the trial Court, the very aim of the trial Court in issuing NBW will be over. The fear in the mind of the accused that if he go there, he may be remanded to jail may appears to be a wild guess, but the possibility of happening of such an event also cannot be ruled out. Now, there is no proper address for the petitioner, almost he has become a vagabond.

18.In view of the foregoing, it is ordered as under:

(i) These revisions are allowed.

(ii) The impugned common order passed by the learned Chief Judicial Magistrate, Madurai in Cr.M.P.No.918 of 2016 in C.C.No.6 of 2014 and Cr.M.P.No.924 of 2016 in C.C.No.5 of 2014 is set aside.

(iii) The petitioner shall surrender before the trial Court on or before 09.09.2016. On his such surrender, the trial Court will recall the NBWs and also will write to the respondent to return the NBWs to the Court.

(iv) The petitioner shall execute a personal bond for Rs.1,00,000/- with two sureties, namely, his wife and one Karnan and they also shall execute a bond for a likesum to the satisfaction of the Trial Court.

(v) Petitioner shall regularly attend all the hearings before the trial Court.

(vi) At the time of execution of bail bonds he shall file an affidavit containing his current address.

Sd/

Assistant Registrar(Crl.Side)

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Sub Assistant Registrar

To:

1.The Chief Judicial Magistrate, Madurai.

2.The Special Public Prosecutor for CBI Cases, Madurai.

3.The Inspector of Police,CBI/ACB,Chennai.

+2ccs to M/S.A.S.Shangeetha, Advocate in SR.No.47870 & 47869

Crl. R.C. (MD) Nos.575 and 576 of 2016

29.08.2016

sj

PA/GSV-PM/SAR I/31.08.2016/4P/6C