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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on: 12th April, 2017

+ **CRL.M.C. 1243/2017**

KAILASH AGARWAL Petitioner

Represented by: Mr. Tanveer A. Mir, Mr.
Pranay Sohini, Advs.

versus

STATE OF NCT OF DELHI & ANR Respondents

Represented by: Mr. Hirein Sharma, APP with
SI Aditya PS Rajouri Garden.
Mr. Sudhir Nandrajog, Sr. Adv.
with Mr. Baban Kr. Sharma,
Mr. Neeraj Grover, Advs. for
complainant.

+ **CRL.M.C. 1246/2017**

SUBHASH AGARWAL Petitioner

Represented by: Mr. Tanveer A. Mir, Mr.
Pranay Sohini, Advs.

versus

STATE OF NCT OF DELHI & ANR Respondents

Represented by: Mr. Hirein Sharma, APP with
SI Aditya PS Rajouri Garden.
Mr. Sudhir Nandrajog, Sr. Adv.
with Mr. Baban Kr. Sharma,
Mr. Neeraj Grover, Advs. for
complainant.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. By the common impugned order dated 21st February, 2017 the two petitioners were declared proclaimed offenders in case FIR No.600/2016 registered under Sections 379/420/468/471/120B IPC at PS Rajouri Garden wherein Sections 467 and 406 IPC were subsequently added. Above-noted FIR was registered on the complaint of one Madhu Sudan Agarwal S/o Mool Chand Agarwal, Director of Haldiram Snacks Pvt. Ltd. pursuant to an order dated 8th June, 2016 under Section 156 (3) Cr.P.C. passed by the learned Metropolitan Magistrate Shri Ajay Kumar Malik, Tis Hazari Courts. The allegations in the FIR are not relevant to the decision of the present case.
2. Despite the FIR having been registered on 9th June, 2016 no notice was served on petitioner Kailash Agarwal till 20th December, 2016 when the first notice under Section 41(1)/41A Cr.P.C. was served on him to join investigation on 20th December, 2016 whereafter he filed an application for grant of anticipatory bail before the learned Additional Sessions Judge, Tis Hazari which was dismissed vide order dated 26th December, 2016. Subsequent thereto Kailash Agarwal filed an application seeking anticipatory bail before this Court wherein this Court vide order dated 10th January, 2017 granted interim protection subject to his joining the investigation. However, pursuant to the status report filed and after hearing the parties, the anticipatory bail application of Kailash Agarwal was dismissed by this Court vide order dated 3rd February, 2017. Thus, the petitioner Kailash Agarwal had a protection of no arrest from this Court from 10th January, 2017 till 3rd February, 2017.
3. Aggrieved by the order dated 3rd February, 2017 passed by this Court rejecting the anticipatory bail application, Kailash Agarwal filed a Special

Leave Petition before the Hon'ble Supreme Court which came up for hearing on 15th February, 2017 and was disposed of on the same day by the following order:

“This special leave petition is disposed of with a direction that the petitioner will not be arrested for a period of two weeks from today. In the meanwhile, the petitioner will be at liberty to surrender and move an application for regular bail before the concerned court, with at least one day advance notice to the public prosecutor. The Trial Court will consider and decide the application for bail as far as possible on the same day, having regard to the contentions which may be raised, in accordance with law.”

4. As noted above that after registration of FIR the investigating officer issued a notice under Section 41(1)/41A Cr.P.C. to Kailash Agarwal only to join the investigation on 20th December, 2016 which he could not join and time was sought for appearance by the learned counsel for Kailash Agarwal by filing an application along with his medical certificate. The investigating officer issued another notice under Section 41(1)/41A Cr.P.C. to Kailash Agarwal and simultaneously filed an application before the learned Metropolitan Magistrate, Tis Hazari for issuance of non-bailable warrants and vide order dated 27th December, 2016 the learned Metropolitan Magistrate issued non-bailable warrants against Kailash Agarwal and posted the matter for 9th January, 2017. On 9th January, 2017 the investigating officer filed another application before the learned Metropolitan Magistrate seeking issuance of process under Section 82 Cr.P.C. which was allowed and the matter was listed on 18th and 19th February, 2017.
5. On 21st February, 2017 the investigating officer filed an application before the learned Metropolitan Magistrate informing the process under

Section 82 Cr.P.C., orders passed by this Court and the Hon'ble Supreme Court, prayed for recording of the statement of the process server and to declare the petitioner Kailash Agarwal and Subhash Agarwal as proclaimed offender. The facts noted in the application of the investigating officer dated 21st February, 2017 are reproduced as under:

“Hon'ble Court has issued proclamation notice u/S 82 Cr.P.C. against accused Kailash Agarwal and Subhash Agarwal for 18.02.2017. That on 10.01.2017 accused Kailash was granted interim relief by Hon'ble High Court in Anticipatory bail application. He has joined the investigation on 23.01.2017 but then not appeared, that on 03.02.2017 the Hon'ble High Court dismissed the anticipatory bail application of accused Kailash Agarwal. Thereafter accused Kailash Agarwal approach to Hon'ble Supreme Court of India. Hon'ble Supreme Court has directed to not to arrest the accused up to 14 days from the date of order i.e. 15.02.2017 and further directed accused to surrender and apply for regular bail application before trial Court.”

6. Despite the fact that it was clearly brought to the notice of the learned Metropolitan Magistrate that pursuant to the interim protection Kailash Agarwal joined the investigation on 23rd January, 2017 and thereafter by the order of the Hon'ble Supreme Court he was directed not to be arrested for a period of 14 days from 15th February, 2017 where after Kailash Agarwal was directed to surrender and apply for regular bail before the Trial Court, the learned Metropolitan Magistrate proceeded to pass the impugned order declaring Kailash Agarwal as proclaimed offender.

7. Thus the order passed by the learned Metropolitan Magistrate declaring Kailash Agarwal as a proclaimed offender is wantonly illegal and in gross contempt of the order of the Hon'ble Supreme Court.

8. As noted above after registration of the FIR pursuant to the directions under Section 156(3) Cr.P.C. on 8th June, 2016 the above-noted FIR was registered on 9th June, 2016. No notice to join investigation was either issued or served on petitioner Subhash Agarwal and as per the status report filed S.I. Aditya Malik the investigating officer visited the address of the petitioner at 1-2-4-12/12 Domalaguda, Gagan Mahal Colony, Hyderabad on 16th September, 2016 when the accused persons were not found. Investigating Officer conducted the investigation from concerned banks at Hyderabad and received relevant documents. On 10th December, 2016 investigating officer again visited the house of accused persons and did not find the accused persons except Smt. Maniya Agarwal, daughter-in-law of Subhash Agarwal who was orally informed. Even as per the investigating officer no written notice was served asking Subhash Agarwal to join the investigation though the investigating officer found it fit to serve notice under Section 41A Cr.P.C. for appearance to join investigation on Kailash Agarwal. Thus without serving any notice under Section 41A Cr.P.C. on Subhash Agarwal, on 27th December, 2016 an application was filed before the learned Metropolitan Magistrate for issuance of non-bailable warrants against Subhash Agarwal as well. It is the case of the investigating officer that on 5th January, 2017 petitioner Subhash Agarwal was not found at home and his son Aakash was informed about the issuance of non-bailable warrants against his father Subhash Agarwal and uncle Kailash Agarwal and his statement was recorded that he will inform his father to surrender before the Court. The anticipatory bail application of Subhash Agarwal filed on 7th January, 2017 was listed on 10th January, 2017 before this Court, however since Subhash Agarwal had not approached the learned Additional Sessions

Judge in the first instance he was granted liberty to approach the learned Sessions Judge in the first instance.

9. As noted above, the FIR was initially registered for offences which provided for sentence of imprisonment for seven years or less and Section 467 IPC was only subsequently added, that too after an application was filed by the complainant in this regard before the learned Metropolitan Magistrate. Conscious of the allegations in the FIR, though the investigating officer found it fit to serve notice under Section 41A Cr.P.C. on Kailash Agarwal even after invoking Section 467 IPC in the case diaries, no notice under Section 41A Cr.P.C. was served on the petitioner Subhash Agarwal to join the investigation. A notice for appearance served on Kailash Agarwal cannot be attributed to be a service of notice to Subhash Agarwal to join investigation.

10. Referring to Section 41-A of the Cr.P.C. which was inserted by Section 6 of the Code of Criminal Procedure Amendment Act, 2008 in the decision reported as (2014) 8 SCC 273 Arnesh Kumar Vs. State of Bihar & Anr., the Hon'ble Supreme Court laying down the guidelines held:

“9. Another provision i.e. Section 41-A CrPC aimed to avoid unnecessary arrest or threat of arrest looming large on the accused requires to be vitalised. Section 41-A as inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), which is relevant in the context reads as follows:

“41-A. 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.”

The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) CrPC, 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 CrPC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

10. We are of the opinion that if the provisions of Section 41 CrPC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 CrPC for effecting arrest be discouraged and discontinued.

11. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court."

11. As noted above the impugned order declaring Kailash Agarwal as a proclaimed offender is grossly illegal and in contempt of the order dated 15th February, 2017 passed by the Hon'ble Supreme Court. Further the impugned order declaring petitioner Subhash Agarwal as a proclaimed offender is not as per the mandate of the Hon'ble Supreme Court in Arnesk Kumar (supra). In view of the discussion aforesaid, the impugned order 21st February, 2017 passed by the learned Metropolitan Magistrate declaring Kailash Agarwal and Subhash Agarwal as proclaimed offenders is set aside.
12. Copy of the order be placed before the Inspecting Committee of this Court for the year 2017 of the learned Metropolitan Magistrate.
13. Petitions are disposed of.

(MUKTA GUPTA)
JUDGE

APRIL 12, 2017
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