

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.629 of 2018

Arising Out of PS.Case No. -3404 Year- 2007 Thana -PATNA COMPLAINT CASE District-
PATNA

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Sanjay Kumar, son of Sh. Gauri Shankar Pandey, resident of 305, Narayan Shree
Apartment, Anandpuri, P.S.- S.K. Puri, Patna- 800001, Bihar.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Agricultural Insurance Company of India Limited, through its Regional Manager,
Regional Office at 3rd Floor, Grand Plaza, Frazer Road, Patna, Bihar.

.... Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. Ashutosh Nath, Advocate
	:	Mr. Binod Kumar, Advocate
	:	Mr. Anuja Srivastava, Advocate
For the State	:	Mr. Binod Kumar No.-III, APP
For Opposite Party No.2	:	Mr. Rajen Sahay, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 08-03-2018

Heard learned counsel for the petitioner, learned counsel for
the State and learned counsel for the complainant opposite party no.2.

2. This application under Section 482 of the Code of
Criminal Procedure (for short 'the Cr.P.C.') has been filed by the
petitioner for quashing of the order dated 06.06.2016 passed by the
learned Sub Judge-XIV-cum-Additional Chief Judicial Magistrate,
Patna by which he has issued a composite order under Sections 82 and
83 of the Cr.P.C. against the petitioner in Complaint Case No.3404(C)
of 2007 filed by the Agriculture Insurance Company India Ltd. (for
short 'the complainant').



3. Mr. Ashutosh Nath, learned counsel for the petitioner argued that after taking cognizance of the offences punishable under Sections 409, 467, 468, 471 and 120B of the Indian Penal Code the learned Magistrate in exercise of powers conferred under Section 204 of the Cr.P.C. summoned the petitioner vide order dated 06.03.2009 to face trial. The summoning order was never served upon the petitioner and in absence of service report vide order dated 28.10.2010 bailable warrant of arrest was issued and in absence of service report of bailable warrant of arrest vide order dated 22.01.2011 non-bailable warrant of arrest was issued against him. He submitted that the petitioner was not aware about the pendency of the complaint case against him till a composite order under Sections 82 and 83 of the Cr.P.C. was passed against him on 06.06.2016. He submitted that the orders issuing bailable warrant of arrest, non-bailable warrant of arrest, declaring the petitioner a proclaimed offender and directing for attachment of his property are all bad in law in view of the fact that there was no report that the petitioner was deliberately avoiding his appearance before the court. Placing reliance on the decision of the Supreme Court in **Inder Mohan Goswami and Another vs. State of Uttaranchal and Others**, [(2007) 12 SCC 1], he submitted that all coercive steps taken against the petitioner after issuance of summons are patently bad in law and not fit to be sustained.



4. Per contra, learned counsel for the complainant opposite party no.2 submitted that the petitioner is trying to take undue advantage of the technicalities of law. He submitted that the petitioner was very much aware about the pendency of the criminal case against him, but was evading appearance before the court and, thus, the court was left with no other option but to take coercive steps against him in order to secure his attendance before the court.

5. Mr. Jharkhandi Updhyay, learned Additional Public Prosecutor appearing for the State has supported the contentions of the learned counsel appearing for the opposite party no.2. He submitted that there is tendency among the accused persons to delay the trial by avoiding to receive notice.

6. I have heard learned counsel for the parties and perused the record.

7. The entire order-sheet of Complaint Case No.3404(C) of 2007 has been brought on record as Annexure-1 to this petition. In order to appreciate the submissions made on behalf of the parties it would be proper to briefly state the manner in which the case proceeded. On 06.03.2009 while directing the office clerk to issue summons, the case was adjourned to 18.04.2009. Since 18.04.2009 the proceedings of the Court of Magistrate are narrated hereinbelow in tabular form:



<u>Date</u>	<u>Nature of order</u>
18.04.2009	Adjourned to 08.06.2009 for filing Talbana.
08.06.2009	Adjourned to 05.08.2009 for filing Talbana.
04.07.2009	The complainant filed Talbana. Office to comply with earlier order regarding issuance of summons to the accused.
05.08.2009	Adjourned to 12.10.2009 for appearance of the accused.
12.10.2009	Office to issue summons to the accused persons in compliance with the order dated 06.03.2009. Adjourned to 30.11.2009.
30.11.2009	Office to comply with the previous order. Adjourned to 25.03.2010.
25.03.2010	Adjourned to 19.05.2010 for appearance of the accused.
19.05.2010	Adjourned to 25.06.2010.
31.05.2010	Endorsement made in the margin note that summons issued.
25.06.2010	Accused absent. Service report of summons not received. The case adjourned to 27.07.2010.
27.07.2010	Service report of summons not received. The case adjourned to 27.08.2010.
27.08.2010	Accused absent. Service report of summons not received. Issue bailable warrant of arrest. The case adjourned to



- 05.10.2010.
- 05.10.2010 Accused absent. Service report of summons not received. Office to comply with the earlier order regarding issuance of bailable warrant of arrest. The case adjourned to 21.12.2010.
- 23.10.2010 In the margin note it is stated that **bailable warrant of arrest issued.**
- 21.12.2010 Accused absent. Service report not received. The case adjourned to 22.01.2011.
- 22.01.2011 Accused absent. Service report not received. Office to issue **non-bailable warrant of arrest against the accused persons.** The case adjourned to 18.03.2011.
- 18.03.2011 Accused absent. Service report not received. The case adjourned to 18.06.2011.
- 02.04.2011 In the margin note it is recorded that **non-bailable warrant of arrest issued.**
- 18.06.2011 Accused absent. Service report not received. The case adjourned to 18.08.2011.
- 18.08.2011 Accused absent. Service report not received. The case adjourned to 22.11.2011.
- 22.11.2011 Accused absent. Service report not received. The case adjourned to



24.03.2012.

24.03.2012 Accused absent. Service report not received. The case adjourned to 14.08.2012.

14.08.2012 Accused absent. Service report not received. The case adjourned to 12.12.2012.

12.12.2012 Accused absent. Service report not received. The case adjourned to 16.05.2013.

16.05.2013 Accused absent. Office **to publish a written proclamation under Section 82 of the Cr.P.C.** requiring the accused persons to appear before the court. The case adjourned to 03.09.2013.

03.09.2013 Accused absent. Office to comply with the earlier order fixing 01.10.2013 as the next date.

01.10.2013 Accused absent. Office to comply with the earlier order fixing 14.02.2014 as the next date.

27.01.2014 In the margin note it is recorded that **proclamation order under Section 82 of the Cr.P.C. issued.**

14.02.2014 Accused absent. Service report not received. The case adjourned to 05.05.2014.

05.05.2014 Accused absent. Service report not received. The case adjourned to



04.08.2014.

04.08.2014 Accused absent. Service report not received. The case adjourned to 19.01.2015.

19.01.2015 Accused absent. Service report not received. The case adjourned to 09.04.2015.

09.04.2015 Accused absent. Service report not received. The case adjourned to 31.07.2015.

31.07.2015 Accused absent. Service report not received. Office to comply with the earlier order. The case adjourned to 30.10.2015.

30.10.2015 Accused absent. Service report not received. The case adjourned to 21.12.2015.

21.12.2015 Accused absent. The case adjourned to 05.04.2016.

05.04.2016 Accused absent. The case adjourned to 06.06.2016.

06.06.2016 Accused absent. Office **to publish fresh order of proclamation under Section 82 of the Cr.P.C. and order of attachment of property under Section 83 of the Cr.P.C.**

8. Having taken note of the proceedings in the Court of Magistrate, I must record the well settled legal principle and the



provisions of law prescribed for securing appearance of the accused persons in a criminal case have not been followed. The orders passed by the learned Magistrate leave much to be desired. The cardinal principle that exercise of judicial authority is not show of strength, but a duty to be performed with humility and firmness appears to have been lost while passing orders in the present case.

9. The accused persons were summoned in exercise of powers conferred under Section 204 of the Cr.P.C. vide order dated 06.03.2009. Since then the case was adjourned mechanically to 18.04.2009, 08.06.2009, 04.07.2009, 05.08.2009, 12.10.2009, 30.11.2009, 25.03.2010, 19.05.2010, but the learned Magistrate failed to ensure that summonses were actually issued by the office. It would appear from perusal of the notings made in the margin that for the first time summonses were issued upon the accused persons on 31.05.2010. It is also not known the manner in which summonses were issued upon the accused persons. However, from the orders dated 25.06.2010, 27.07.2010 and 27.08.2010 it would be manifest that in absence of any service report of the summonses so issued the court mechanically issued warrants of arrest against the accused persons on 27.08.2010. Then the case adjourned to 05.10.2010, 21.12.2010 and 22.01.2011 and without ensuring the service of summonses and bailable warrants of arrest issued earlier vide order



dated 22.01.2011, an order was passed to issue non-bailable warrants of arrest against the accused persons. From the notings made in the margin it would be evident that bailable warrants of arrest were actually issued on 27.08.2010 and non-bailable warrants of arrest were issued on 02.04.2011. It would further appear that since 22.01.2011, the case was adjourned to 18.03.2011, 18.06.2011, 18.08.2011, 22.11.2011, 24.03.2012, 14.08.2012, 12.12.2012 and 16.05.2017 and no report regarding service of summonses or warrants of arrest (bailable or non-bailable) was made available to the court and in absence of such report vide order dated 16.05.2013, an order for publishing proclamation against the accused persons under Section 82 of the Cr.P.C. was passed. Since 16.05.2013 the case adjourned to 03.09.2013, 01.10.2013, 14.02.2014, 05.05.2014, 04.08.2014, 19.01.2015, 09.04.2015, 31.07.2015, 30.10.2015, 21.12.2015, 05.04.2016 and 06.06.2016. It would be manifest from the margin note that proclamation order was issued on 27.01.2014 and in absence of service report of summonses and warrants of arrest (bailable or non-bailable) and in absence of any statement in writing by the court issuing the proclamation to the officer that the proclamation was duly published on a specified day in the manner specified in Clause (i) of Sub Section (2) of Section 82 of the Cr.P.C., vide order dated 06.06.2016 the court directed for issuance of process under Section



83 of the Cr.P.C.

10. It would be pertinent to note here that basic purpose of Criminal Procedure Code is to ensure fair trial where none of the rights of the accused are compromised nor are they unjustifiably favoured. In order to ensure presence of the parties who are relevant to the trial before the Judge concerned, it is important to follow the procedure prescribed for their appearance. Chapter-VI of the Cr.P.C. sets out the procedure to ensure appearance of the accused persons. The forms in which summons should be served is given in Section 61 of the Cr.P.C. The summons for appearance may be issued to an accused or a witness. It requires that every summons issued by a court shall be in writing, in duplicate, signed by the presiding officer of such court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the court. The Indian Penal Code through Section 174 enforces coercive measure on such person to attend the trial by enforcing a six month punishment if such person fails to attend the trial on receipt of service of summons. However, if these requirements are not fulfilled no person can be punished for non-compliance of Section 174.

11. Section 62 of the Cr.P.C. prescribes that every summons shall be served by a police officer or subject to such rules as the State Government may make in this behalf, by an officer of the



Court issuing it or other public servant.

12. Sub Section (2) of Section 62 prescribes that the summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons. Sub Section (3) provides that every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

13. Section 64 of the Cr.P.C. prescribes solution when the person on whom the summons is to be served is not found by exercise of due diligence. It prescribes that where a person summoned cannot, by exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some other adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate. The explanation to Section 64 Cr.P.C. prescribes that a servant is not a member of the family within the meaning of this Section. Thus, Section 64 clearly limits the service to adult members of the family, neither female members nor servant can be included under the ambit of persons to whom the summons can be served.

14. Where personal service cannot be effected under Section 62 of the CrP.C. and extended service under Section 64 of the Cr.P.C.,



the law permits substituted service under Section 65 of the Cr.P.C. It prescribes that if service cannot, by exercise of due diligence, be effected as provided in Section 62, Section 63 and Section 64 of the Cr.P.C., the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the court, after making such enquiries as it thinks fit, may either declare that the summons has been duly served or order for fresh service in such manner as it considers proper.

15. Thus, it is the duty of the court to enquire about the service of the summonses upon the accused. If the summonses are not served, it is the bounden duty of the court to see to it that they are served. If it is found that summonses are received by the accused persons and still they fail to appear before the court it would be a gross case of disobedience of the order of the court and in that case, it would be the duty of the Court of Magistrate to issue warrant, if necessary non-bailable to ensure the presence of the accused in the court. The Cr.P.C. discusses warrant of arrest from Section 70 onwards. The essential requirements for a warrant of arrest are that it must be in writing, must be signed by the presiding officer, must be sealed, must clearly identify the persons to be arrested, must specify the offence charged, must name the persons directed to arrest, must



indicate the authority of the Magistrate and must mention the age of the persons sought to be arrested. It would be evident from Sub Section (2) of Section 70 of the Cr.P.C. that warrant does not lapse; it remains valid as long as the Magistrate does not explicitly revoke it.

16. Section 71 of the Cr.P.C. deals with bailable warrants where the person sought to be arrested can be released on execution of bond with sufficient sureties. Sections 72 to 74 prescribe the procedure and deal with direction of warrants to the concerned officers. Section 76 of the Cr.P.C. stipulates that the person arrested must be brought before the court without unnecessary delay. Section 77 of the Cr.P.C. provides that warrants may be executed at any place in India.

17. On perusal of the order-sheet, it is manifest that in absence of service report of summonses, bailable warrants of arrest were issued against the petitioner and in absence of service report of bailable warrants of arrest, the court issued non-bailable warrant of arrest and processes under Sections 82 and 83 of the Cr.P.C. The learned Magistrate, while passing the order, completely failed to apply her judicial mind and passed the order mechanically.

18. It would be manifest that the Cr.P.C has provided ample powers to execute warrant of arrest, but in case the steps taken in accordance with law fails to yield desired result and the accused



fails to appear, the Cr.P.C. has provided two more remedies (i) issuing a proclamation (Section 82) (ii) attachment and sale of property (Section 83).

19. Section 82 of the Cr.P.C. lays down that if the court is satisfied that even after issuance of warrant the person concerned has absconded or is concealing himself then the court will give a time period of thirty days from the date of proclamation within which the person has to appear before the court. There is nothing on record to show that the court expressed its satisfaction that the accused persons absconded or they are concealing themselves before issuing the proclamation. It is also not known as to whether the proclamation was even issued or the same remained merely in the order-sheet of the Magistrate.

20. Section 83 of the Cr.P.C. penalizes a person who seeks to avoid his arrest under a warrant against whom a proclamation is issued under Section 82 of Cr.P.C. The object of attaching property of an absconder is to compel his appearance. However, be it noted that before an order of proclamation is issued, the court must ensure that it has reason for issuing such an order. The order of proclamation without sufficient reason would be illegal and therefor any consequent action arising out of such order like attachment of property would be deemed to be illegal as well.



21. In the present case, as seen above, after issuance of summonses there is no report that they were served upon the accused persons and in absence of service report of the summonses, the court issued warrants of arrest against the accused persons. Further, in absence of service report of bailable warrants of arrest, the court issued non-bailable warrants of arrest against the accused persons. Furthermore, there being no report regarding service of summonses, bailable warrants of arrest and non-bailable warrants of arrest and without expressing satisfaction that the accused persons are absconding or concealing themselves, the learned Magistrate passed order for publishing a written proclamation requiring the petitioner to appear before the court and even without satisfying himself as to whether written proclamation was even published again issued a composite order under Sections 82 and 83 of the Cr.P.C.

22. The orders passed by the learned Magistrate are clearly in violation of the mandatory provisions prescribed under the Cr.P.C. No court exercising the powers under the Criminal Procedure Code can afford to traverse beyond the provisions of the law.

23. In **Inder Mohan Goswami** (supra) as to when a non-bailable warrant of arrest can be issued has been succinctly set out by the Supreme Court by emphasizing that arrest or imprisonment means deprivation of rights to individual and, thus, the courts have to be



extremely careful before issuing non-bailable warrant of arrest. In the said case, the Supreme Court observed:-

“53. Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:

- it is reasonable to believe that the person will not voluntarily appear in court; or
- the police authorities are unable to find the person to serve him with a summon; or
- it is considered that the person could harm someone if not placed into custody immediately.

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance,



the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issueailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-ailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-ailable warrants.

56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-ailable warrants should be avoided.

57. The Court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-ailable warrant.”



24. Having considered the matter from all its aspects, I am satisfied that the learned Magistrate has proceeded with the complaint case in the most mechanical manner giving a complete go-bye to the procedure prescribed in law and the ratio laid down by the Supreme Court in **Inder Mohan Goswami** (supra).

25. The learned Magistrate has adopted a procedure which is dangerous one and can leave to drastic consequences. It is entirely undesirable that the Magistrate should ignore the prescribed rules and the ratio laid down by the Supreme Court. From the order sheet it is manifest that the service report of summonses was not being received. However, the Magistrate issued warrant of arrest (bailable and non-bailable) without taking any action against those who were responsible for not effecting processes. Be it noted that the Magistrate is not powerless if processes are not served or orders passed by a Magistrate are not carried out by the persons authorized to execute it. There is nothing on the record to show that the Magistrate took any steps to enforce the service of summonses or warrants of arrest (bailable and non-bailable) or took any action against those who were entrusted with the duty to serve processes issued by the court. Instead of showing control over the proceedings of the court, she adopted an easy route by taking drastic steps against the accused persons and issued order of proclamation and attachment of property even without



recording any reason for the same.

26. In view of the discussions made above, I am of the considered opinion that the order issuing warrant of arrest against the petitioner on 28.10.2010 and all subsequent orders passed in the case including the issuance of non-bailable warrant of arrest, order of proclamation and order of attachment and sale of property are all bad in law and, thus, they are set aside

27. The petition stands allowed.

(Ashwani Kumar Singh, J)

Md.S./-

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