

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.1806 of 2019

Arising Out of PS. Case No.-1 Year-2014 Thana- SAKATPUR District- Darbhanga

Rajmani @ Rajmani Sharma @ Rajmani, Sai Centre Traders, aged about 42 years, Male, son of Late Ram Anugrah Sharma Permanent Resident of - Bi Pass Road, New Registry Court, Maheshwari, Police Station- Jamui, District- Jamui, Present address-Sai Centre (Traders), 1st floor, Sarmash Kothi, Old Post Office Line, Jamal Road, Police Station- Kotwali, District- Patna

... .. Petitioner/s

Versus

1. The State of Bihar
2. Sajjan Chaudhary Late Satynarayan Chaudhary, Village and Post- Lagma, Police Station-Sakatpur, District-Darbhangha.

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Surya Swetabh-Advocate

For the Opposite Party/s : Mr. Satya Nand Shukla-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

5 6-05-2019

Petitioner, who is an accused in connection with Satakpur P. S. Case No.01 of 2014, G.R. No.24080 of 2014 has asked for quashing of the order dated 09.06.2014, 26.05.2018, 11.09.2018, respectively, passed by the learned Additional Chief Judicial Magistrate-4th, Darbhanga, whereby warrant of arrest non-bailable as well as order of proclamation has been passed.

2. Shorn of unnecessary details, the facts of the case relevant for proper adjudication of the controversy is only quoted below:-

The prosecution party were duped with the respective amount (so detailed) in the background of installation



of mobile tower over their respective lands with an assurance that they will get lucrative monthly rental as well as employment and during course thereof, it has also been stated that a deed of agreement is also required to be executed in order to give additional assurance over deal at the end of accused persons so named (including the petitioner). When the activity of the accused persons became suspicious as perceived from their conduct delaying the matter on one pretext or other, the members of the prosecution party, anyhow succeeded in meeting and during course thereof, impressed upon to return back their respective deposits. Considering the need of the hour, petitioner had issued a cheque appertaining to Rs.65,000/- in favour of complainant, which got bounced and for that, legal notice was given though without any result. Similar activity also visualized relating to Cheque No.900323 appertaining to Rs.60,000/- having in favour of Parmanand Rai and for that, legal notice is also there.

3. On account thereof, Opposite Party No.2/ Sajjan Chaudhary filed Complaint Case No.1767 of 2013, which was sent to concerned police station for registration and investigation of the case as provided under Section 156(3) of the Cr.P.C., paving way for registration of instant case being



Sakatpur P. S. Case No.01 of 2014 followed with investigation. It is further evident that during course of investigation, I.O. could not locate the accused nor they appeared on account thereof, the I.O. has prayed for issuance of warrant of arrest non-bailable, which was allowed. Accordingly, warrant of arrest non-bailable was issued and having failed to execute the warrant of arrest non-bailable, submitted the same with an endorsement and further, asked for issuance of proclamation. The learned Magistrate after being satisfied therewith allowed the same, as a result of which, proclamation has also been issued. The respective orders has been put under challenge by way of filing of instant petition after expiry of so many years.

4. While assailing respective orders, it has been submitted at the end of learned counsel for the petitioner that as all the orders are inter-connected, inseparable as well as consequential to each other and so, rightly been challenged under one petition. The main thrust of argument as made on behalf of petitioner is that irrespective of the fact that there happens to be non-presence of petitioner up-till-now, while investigation is going on that does not mean that I.O. will sit tight over investigation for years together without any development as well as withholding submission of the police



report in accordance with Section 173 of the Cr.P.C., more particularly, when there happens to be no such requirement of law. That being so, keeping the investigation pending for the last five years without any legal ground is nothing, but either on account of inefficiency of the Investigating Officer or with some oblique motive.

5. Now, coming to the main issue, it has been submitted that all the orders being under challenge are not at all tenable in the eye of law, because of the fact that the same happens to be in contravention of the statutory provisions. To justify the same, it has been submitted that for the purpose of securing presence of an accused during course of investigation, even when the offence is cognizable one, is not the requirement of law. That has got a purpose as, in accordance with Article 21 of the Constitution of India, personal liberty is of paramount consideration, which should not be impinge on trivial issue. In the aforesaid background, there happens to be rule of caution prescribed under Section 41 of the Cr.P.C., whereunder there always happens to be option, more particularly when the offence so alleged, prescribes sentence upto seven years, duly elaborated, explained under Section 41A of the Cr.P.C.

6. It has also been submitted that during course of



acceding with the prayer of the I.O. to issue warrant of arrest non-bailable, proclamation, attachment, the law did not permit mechanical way of consideration, rather it always has to be under proper judicial scrutiny to find out the justification and in likewise manner, the order should be well reasoned. Apart from this, it has also been submitted that such order could not be passed in order to facilitate apprehension of the accused to be produced before the Investigating Officer/ Police Officer. That being so, the initial order happens to be contrary to the spirit of law. Consequent thereupon, the subsequent two orders. In order to justify the prayer, learned counsel for the petitioner has referred *Inder Mohan Goswami and another vs. State of Uttaranchal and others reported in (2007)12 SCC 1, State through C.B.I. vs. Dawood Ibrahim Kaskar and others reported in A.I.R. 1997 SC 2494, Raghuvansh Dewanchand Bhasin vs. State of Maharashtra and another reported in (2012) 9 SCC 791, Umesh Kumar and others vs. State of Jharkhand through Vigilance and another, Cr.M.P. No. 744 of 2013, Cr.M.P. No. 750 of 2013, Cr. M.P. No. 752 of 2013 order dated 21.03.2013.*

7. The learned Additional Public Prosecutor refuting the submission having made on behalf of petitioner, has



submitted that instead of surrendering before the learned lower Court or before the police as option always lies to the petitioner, invented a novel method to challenge the respective orders, which could not be, because of the fact that appearance of the accused during course of investigation followed with trial is the mandate of law unless the accused carries a stigma, attracting application of **Section 299 Cr.P.C.** It has further been submitted that there happens to be no barrier so prescribed either under Constitution of India or under Code to the extent that during course of investigation, there would not be presence of an accused. It has also been submitted that the judgments so referred by the learned counsel for the petitioner also did not speak with regard to presence of any kind of prohibition. Accordingly, the order impugned is fit to be confirmed, whereupon, instant petition be dismissed.

8. Three kinds of eventualities have been perceived during course of adjudication of the prayer having made on behalf of the petitioner. The first and foremost is to see under the garb of fundamental rights so prescribed under Chapter-III of the Constitution of India. For better appreciation, the relevant Articles are being quoted below:-

“21. Protection of life and personal liberty No person shall be deprived of his life or personal



liberty except according to procedure established by law.

22. Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

(3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been,



or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose

(7) Parliament may by law prescribe

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and



(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4) Right against Exploitation.”

9. After going through the aforesaid articles, it is apparent that either both conjointly or independently, did not cast any kind of infringement in having the fundamental rights of a citizen eclipsed in the facts and circumstances of the case, but the condition so prescribed is should be in accordance with law. Such activity could be perceived in two independent modes. The first one, under preventive detention and the second one, being an accused of a cognizable offence.

10. So far theme of preventive detention is concerned, that has got different sphere and has to be dealt with in accordance with identification of implication of relevant act permitting the preventive detention, which being out of consideration for the present purpose, hence left out to be further discussed.

11. So far second aspect is concerned, again it has to be dealt with in the facts and circumstances of the case. That means to say, first of all the nature of the offence has to be seen and further, the mode of prosecution subsequently thereof. It is needless to say that two modes of prosecution is permissible :-
A) the police case, B) the complaint case. In likewise manner,



two kinds of offences have been identified:-A) *cognizable*, B) *non-cognizable*. However, for proper consideration, definition of cognizable offence is to be seen:-

"2.(c)-"cognizable offence" means an offence for which, and" cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

12. So far complaint case is concerned, the appearance of the accused happens to be only after taking of cognizance of an offence against an accused in accordance with Section 190 Cr.P.C. followed with issuance of process in accordance with Section 204 Cr.P.C. and for that, the complainant is required to deposit the process fee as prescribed under the Civil Court Criminal Rules. In case, there happens to be non-appearance of the accused in pursuance of the processes having been issued in accordance with Section 204 of the Cr.P.C., then in that circumstance, the Court is quite competent to follow the procedure as prescribed under Chapter-VI of the Cr.P.C. stretching right from Section 61 to Section 90 directing an individual including the police machinery to apprehend a person and produce before it. In sum and substance, it always happens to be post-cognizance stage.



13. So far activities regarding police case is concerned, it begins with institution of F.I.R. in accordance with Section 154 Cr.P.C. followed with investigation u/s 156(1), 157 Cr.P.C. and after completing investigation, submission of police report U/s 173 Cr.P.C. having influence either of Section 169 Cr.P.C. or 170 Cr.P.C. Then comes to the stage of Section 190 Cr.P.C., that means to say, stage of cognizance.

14. As is evident, there happens to be vast procedural differences while dealing with complaint case as well as police case. Accused has got no identity so far complaint case is concerned before order of cognizance. While concerning police case, the accused has. As the controversy relates with the police case that too, status of accused in consonance with the duty of the I.O. during course of conduction of the investigation coupled with power of a Magistrate in consonance therewith, hence the adjudication is confined to that extent.

15. So, in order to properly dealt with riddles, first of all, it has to be seen *A) whether police has got right to apprehend an accused during course of investigation, B) whether appearance of accused is necessary during course of investigation, C) what kind of legal recourse is available before the police for procurement of appearance of the accused during*



course of investigation.

16. Criminal prosecution irrespective of nature, if culminates in conviction, then in that event, there will be infringement of fundamental right of an accused and is permissible under Article 21 of the Constitution and presence of accused is necessary, who is going to be reprimanded under the caption of natural justice. That happens to be the reason behind presence of Section 273 Cr.P.C. wherein all the proceeding are to be followed in presence of an accused, which governs all kind of trial be it Sessions Trial, Magisterial Trial, based upon police report, or on complaint. The pristine issue, connecting thereof, is presence of accused during course of investigation is necessary? Virtually, it depends upon fact of the individual case, nature of the offence, but in majority of the cognizable offence, presence is necessary since inception of a criminal case, for the purpose of interrogation in order to trace out links, collection of evidence, chain of circumstances and to facilitate the same, relevant provisions are already available in Cr.P.C.

17. Now, coming to the points so formulated hereinabove, first of all point no. 'A' is being taken, which specifically deals with pre-cognizance stage and for that, **Section 157 Cr.P.C.** is the relevant Section, which commands



exclusively in following manner:-

“157. Procedure for investigation preliminary inquiry.

(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender;

Provided that-

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering



on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub- section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub- section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.”

18. Now, the other relevant Sections are to be seen, which equally commands the field. The first stage is found duly detailed under Chapter-V of the Cr.P.C., which begins from Para-41. Furthermore, in terms of Section 48 of the Cr.P.C., the police official, for the purpose of arresting an accused, pursue such person into any place in India. When the person is apprehended, he is to be taken to the nearest Magistrate as provided under Section 56 of the Cr.P.C. and the Section 57 Cr.P.C. deals with the maximum time comprising 24 hours excluding the time of journey, apprehended accused is to be produced before the Magistrate and such production is to be followed by an order under Section 167 of the Cr.P.C. attracting



judicial remand and for that, maximum period is prescribed according to nature of the offence. That means to say, the aforesaid channelized eventuality relates with consequential activity co-related with arrest of an accused under **Section 41 of the Cr.P.C.** and for that, the same is quoted below:-

“41. When police may arrest without warrant.

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house- breaking; or

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or



(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub- section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Any officer in charge of a police station may, in



like manner; arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110.”

19. At the present juncture, reference of Section 41A of the Cr.P.C. also looks imperative. After close scrutiny of the same, it is evident that an option has been given to the I.O. to exercise such methodology in order to have not only interrogation of an accused, but his subsequent appearance by way of having bend at his behest, whose appearance is secured on notice, as in the opinion of I.O., arrest of accused was not at all warranted. For proper appreciation, the same 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.]*

**[Clause 41A Inserted by Code of Criminal Procedure Amendment act, 2008 and sub-clause (1) further modified by Code of Criminal Procedure Amendment act, 2010]*

***[sub-clause (4) substituted by Code of Criminal Procedure Amendment act, 2010]*

20. From plain reading of the same, it is abundantly clear that it depends upon the wisdom of police to see whether arrest is the requirement or not, and if not, then in that circumstance, there will be applicability of the section. So,



arrest is found permissible during course of investigation.

21. Chapter-VI deals with the methodology to be followed by the Court for procurement of appearance of an accused. It has been bifurcated under so many sub-heads:- A) *summons falling in between Section 61 to Section 69 Cr.P.C.*, B) *warrant of arrest falling in between Section 70 to 81*, C) *proclamation and attachment from Section 82 to 86*, D) *other rules regarding the processes.*

22. From plain reading of those provisions, it is evident that none of it earmark whether its took recourse be sought of pre-cognizance or post cognizance stage. It simply happens to be weapon having in the armoury of the Court, which the Court on its own motion or prayed, may exercise, only to enable appearance of an accused having a basic feature, presence during trial as well as to facilitate proper investigation. At this juncture, it looks appropriate to mention that under Chapter-V, there happens to be complete absence of provisions akin to Section 82 and 86 Cr.P.C. Availability of relevant provisions falling under Chapter-VI relating to post cognizance stage is found appropriately enlightened after going through ***Section 204 Cr.P.C.***, which 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.”

23. So, after having analytical scrutiny of the relevant Sections, it is manifest that after registration of a case



under Section 154 Cr.P.C., if the offence is cognizable, investigation is to be carried out without permission of the Magistrate, and if necessary, accused is also subject to arrest as provided under Section 157 Cr.P.C., also supplemented by Section 41 Cr.P.C.

24. The subsequent event, which attracts proper attention is being cognizable offence, the police has got power to apprehend the accused without warrant. But in case, accused evades his arrest, then the police will sit idle or any other recourse is available before it for procurement of presence of accused and for that, Chapter-VI is there, which comes in rescue. If the activities so permitted under Section 82, 83 Cr.P.C. is properly scrutinized, it is evident that irrespective of nature of offence, first of all, warrant of arrest non-bailable has to be obtained in accordance with **Section 73 Cr.P.C.** and for want of appearance of accused if remains unexecuted then, in that circumstance, with an endorsement over it anything reason, the same should be placed before the issuing Court followed by the subsequent steps. That means to say, apart from having exclusive domain during course of investigation, the hands of police is not unbridled rather, the subsequent step, being cumbersome, has been entrusted to the Court, as it requires



judicious approach. For better appreciation, relevant provisions are detailed below:-

“73. Warrant may be directed any person.

(1) The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non- bailable, offence and is evading arrest.

(2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 71.”

“82. Proclamation for person absconding.

(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to



appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:-

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court- house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub- section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

“83. Attachment of Property of person absconding.

(1) The Court issuing a proclamation under section



82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person: Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to, be issued,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove, the whole or any part of his property from the local jurisdiction of the Court, it may order the attachment simultaneously with the issue of the proclamation.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made-

(a) by seizure; or

(b) by the appointment of a receiver; or



(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district which the land is situate, and in all other cases-

(a) by taking possession; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live- stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of



Civil Procedure, 1908 (5 of 1908).”

25. On the plain reading of Section 82 Cr.P.C., it is found that it has been bifurcated in two parts:-A) *for declaration of proclamation*, B) *declared as proclaim offender*. So far requirements for proclamation is concerned, the Court has firstly to satisfy itself that on account of dubious activity of the accused, warrant could not be executed and on account thereof, a proclamation to this effect is to be made under Form-4 and for that, the minimum time of 30 days should be given in order to have presence of accused by his own volition. Furthermore, as provided Sub-section-4, the accused of certain offences having detailed therein, if fails to appear within 30 days, then in that circumstance, the Court will declare him as a proclaimed offender and in either of the case, having violation, there could be attachment of the property as provided under Section 83 of the Cr.P.C., which includes movable as well as immovable.

26. In ***H. N. Rishbud vs. State of Delhi reported in A.I.R. 1955 SC 196***, the term ‘investigation’, so defined under Old Cr.P.C. has been properly explained as under:-

“Thus, under the Code investigation consists generally of the following steps:(1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest



of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under [section 173](#).”

27. Investigation under amended Code has been defined under **Section 2(h) of the Cr.P.C.**, for better appreciation, same is quoted below:-

“Section 2(h) in the Code of Criminal Procedure, 1973

(h) " investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;”

28. Rule 286 of Police Manual also cast an obligation on the I.O. to pray before the Court for issuance of warrant of arrest non-bailable against an accused, whose



complicity has properly been found, surfaced during commission of crime, absconds. In likewise manner, Rule-118(a) identifies status of accused as an absconder, who remains at large being offender of cognizable offence, whose complicity is found duly connected.

29. In ***State through C.B.I. vs. Dawood Ibrahim Kaskar and others reported in AIR 1997 SC 2494***, it has been held:-

“20. That [Section 73](#) confers a power upon a Magistrate to issue a warrant and that it can be exercised by him during investigation also, can be best understood with reference to [Section 155](#) of the Code. As already noticed under this Section a police officer can investigate into a non cognizable case with the order of a Magistrate and may exercise the same powers in respect of the investigation which he may exercise in a cognizable case, except that he cannot arrest without warrant. If with the order of a Magistrate the police starts investigation into a non-cognizable and non-bailable offence, (like [Sections 466](#) or 467 (Part I) [of the Indian Penal Code](#)) and if during investigation the Investigating Officer intends to arrest the person accused of the offence he has to seek for and obtain a warrant of arrest from the Magistrate. If the accused evade the arrest,



the only course left open to the Investigating Officer to ensure his presence would be to ask the Magistrate to invoke his powers under [Section 73](#) and thereafter those relating to proclamation and attachment. In such an eventuality, the Magistrate can legitimately exercise his power under [Section 73](#), for the person to be apprehended is 'accused of a non-bailable offence and is evading arrest.'

21. Another factor which clearly indicates that [Section 73](#) of the Code gives a power to the Magistrate to issue warrant of arrest and that too during investigation is evident from the provisions of part 'C' of Chapter VI of the Code, which we have earlier adverted to. Needless to say the provisions of proclamation and attachment as envisaged therein is to compel the appearance of a person who is evading arrest. Now, the power of issuing a proclamation under [Section 82](#) (quoted earlier) can be exercised by a Court only in respect of a person 'against whom a warrant has been issued by it'. In other words, unless the Court issues a warrant the provisions of [Section 82](#), and the other Sections that follow in that part, cannot be invoked in a situation where in spite of its best efforts the police cannot arrest a person under [Section 41](#). Resultantly, if it has to take the coercive measures for the



apprehension of such a person it has to approach the Court to issue warrant of arrest under [Section 73](#); and if need be to invoke the provisions of part 'C' of Chapter VI. [[Section 8](#) (3) in case the person is accused of an offence under TADA]

22. Lastly, we may refer to [Section 90](#), which appears in part 'D' of Chapter VI of the Code and expressly states that the provisions contained in the Chapter relating to a summon and warrant, and their issue, service and execution shall, so far as may be, apply to every summon and every warrants of arrest issued under [the Code](#). Therefore, when a Court issues a warrant of arrest, say under [Section 155](#) of the Code, any steps that it may have to subsequently take relating to that warrant of arrest can only be under Chapter VI."

30. In *Inder Mohan Goswami and another v. State of Uttaranchal and others reported in A.I.R. 2008 SC 251*, it has been held:-

"55. 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-bailable warrants should be avoided.”

31. In ***Siddharam Satlingappa Mhetre v. State of Maharashtra and others reported in (2011)1 SCC 694***, it has been held:-

“113. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

.....

118. In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.”



32. In *Arnesh Kumar v. State of Bihar and another reported in 2014 CRI.L.J. 3707*, the Apex Court has observed that the police has got right to apprehend an accused during course of investigation, if the offence is cognizable one, but it should not be in routine manner, rather there should be proper scrutiny of the material, more particularly, could it be properly dealt with in accordance with Section 41 (A) of the Cr.P.C. and observed:-

“13. We are of the opinion that if the provisions of [Section 41, Cr.PC](#) 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 Cr.PC](#) for effecting arrest be discouraged and discontinued.

14. Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually



and mechanically. In order to ensure what we have observed above, we give the following direction:

(1) All the State Governments to instruct its police officers not to automatically arrest when a case under [Section 498-A](#) of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from [Section 41, Cr.PC](#);

(2) All police officers be provided with a check list containing specified sub- clauses under [Section 41\(1\)\(b\)\(ii\)](#);

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

(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;

(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;

(6) Notice of appearance in terms of [Section 41A](#) of Cr.PC 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;

(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 High Court having territorial jurisdiction.

(8) Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.”

33. In ***Km. Hema Mishra vs. State of U.P. and others reported in 2014 CRI.L.J. 1107***, after considering almond object of Section 41A of the Cr.P.C., it has been held:-

“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 41A, 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.

.....

30. In Joginder Kumar v. State of U.P. and Others, 1994 Cr L.J. 1981, the Supreme Court observed:

“No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached



after some investigation as to the genuineness of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest."

34. In ***Vikas vs. State of Rajasthan reported in 2014 CRI.L.J. 183***, though the controversy was with regard to summoning of an additional accused under Section 319 Cr.P.C., but as warrant of arrest non-bailable was issued at first instance for seeking appearance and so, while considering the desirability, it has been held:-

"14. The Constitution of India is the grundnorm- the paramount law of the country. All other laws derive their origin and are supplementary and incidental to the principles laid down in the Constitution. Therefore, Criminal Law also derives its source and sustenance from the Constitution. The Constitution, on one hand, guarantees the Right to Life and Liberty to its citizens under [Article 21](#) and on the other hand imposes a duty and an obligation on the Judges while discharging their judicial function to protect and promote the liberty of the citizens. The issuance of non- bailable warrant in the first instance without using the other tools of summons and bailable warrant to secure attendance of such a person would impair the personal liberty guaranteed to every citizen under the Constitution.



This position is settled in the case of Inder Mohan Goswami; 2007 12 SCC 1 and in the case of [Raghuvansh Dewanchand Bhasin vs. State of Maharashtra and Anr.](#); (2012) 9 SCC 791 wherein it has been observed that personal liberty and the interest of the State Civilized countries is the most precious of all the human rights. The American Declaration of Independence 1776, French Declaration of the Rights of Men and the Citizen 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, [Article 21](#) of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law. The issuance of non-bailable warrant involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, this demands that the courts have to be extremely careful before issuing non-bailable warrants.”

35. In ***Inder Mohan Goswami and another vs. State of Uttaranchal and others reported in (2007) 12 SCC 1***, wherein the whole prosecution was challenged, the question was “Before parting with this appeal, we would like to discuss an issue which is of great public importance, i.e., how and when warrants should be issued by the Court? It has come to our notice that in many cases that



*bailable and non-bailable warrants are issued casually and mechanically. In the instant case, the court without properly comprehending the nature of controversy involved” and during course thereof, the principle decided in **State of U.P. vs. Poosu & Another (1976)3 SCC 1, Omwati vs. State of UP & another reported in (2004) 4 SCC 425**, have been considered along with the connotation of liberty and further, it has been observed that issuance of warrant of arrest happens to be discretion of the Court, but before that the situation should be judiciously approached by the Court.*

36. In **Raghuvansh Dewanchand Bhasin vs. State of Maharashtra & Another reported in (2012) 9 SCC 791**, wherein a proceeding under Section 324 of the I.P.C., the petitioner became absent and on account thereof, the Court issued non-bailable warrant. However, after appearance of the petitioner, the same was recalled, but as the same was not communicated, was misused by the complainant, who got the petitioner apprehended and in the aforesaid background the matter sailed upto Apex Court. During course thereof, with regard to circumstances justifying issuance of non-bailable warrant, the same has been properly explained as under:-

“21.The last issue raised that remains to be considered is whether the Courts can at all issue a warrant, called a "non-bailable" warrant because



no such terminology is found in [the Code](#) as well as in Form 2 of the Second Schedule to [the Code](#). It is true that neither [Section 70](#) nor [Section 71](#), appearing in Chapter VI of the Code, enumerating the processes to compel appearance, as also Form 2 uses the expression like "non-bailable". [Section 70](#) merely speaks of form of warrant of arrest, and ordains that it will remain in force until it is cancelled. Similarly [Section 71](#) talks of discretionary power of Court to specify about the security to be taken in case the person is to be released on his arrest pursuant to the execution of the warrant issued under [Section 70](#) of the Code. Sub-section (2) of [Section 71](#) of the Code specifies the endorsements which can be made on a warrant. Nevertheless, we feel that the endorsement of the expression "non-bailable" on a warrant is to facilitate the executing authority as well as the person against whom the warrant is sought to be executed to make them aware as to the nature of the warrant that has been issued. In our view, merely because Form No.2, issued under [Section 476](#) of the Code, and set forth in the Second schedule, nowhere uses the expression bailable or non-bailable warrant, that does not prohibit the Courts from using the said word or expression while issuing the



warrant or even to make endorsement to that effect on the warrant so issued. Any endorsement/variation, which is made on such warrant for the benefit of the person against whom the warrant is issued or the persons who are required to execute the warrant, would not render the warrant to be bad in law. What is material is that there is a power vested in the Court to issue a warrant and that power is to be exercised judiciously depending upon the facts and circumstances of each case. Being so, merely because the warrant uses the expression like "non-bailable" and that such terminology is not to be found in either [Section 70](#) or [Section 71](#) of the Code that by itself cannot render the warrant bad in law. The argument is devoid of substance and is rejected accordingly."

37. In *Umesh Kumar and another vs. State of Jharkhand through Vigilance and another, Cr.M.P. No.744 of 2013 with Cr.M.P. No.750 of 2013 with Cr.M.P. No.752 of 2013*, petitioners have challenged the order of issuance of non-bailable warrant of arrest against them and after considering the aforesaid ticklish question over competency of Court over issuance of warrant of arrest non-bailable in consonance with the provisions of Section 73(1) Cr.P.C. has dealt with under



Para-10 and 11 in following manner:-

"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 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 Justice Cardozo 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. Vs. Poosu & Anr. (1976) 3 SCC 1).”

38. So, after going through different judicial pronouncement as referred above, in consonance with the relevant provisions under the Cr.P.C., it has become crystal clear that police has got power to arrest an accused during course of investigation, if the offence is cognizable, non-bailable, with discretion as provided under Section 41A of the Cr.P.C. Furthermore, to secure presence of absenting accused, police is legally entitled to seek the processes duly identified under Chapter-VI of the Cr.P.C.



39. Coming to facts of the case, it is evident that vide order dated 09.06.2014, warrant of arrest non-bailable had already been issued followed with execution report that accused is evading his presence, whereupon process in terms of Section 83 was prayed for, and that has also been issued awaiting the execution report. Moreover, petitioner has not undertaken to have his presence before the I.O., nor before the Court. Apart from this, being absconder would he be entitled to ask for illegal probities. However, it is made clear that only awaiting presence of accused, police report would not be held upon, is not requirement of law as provided under Section 173 Cr.P.C.

40. Consequent thereupon, instant petition lacks merit and is accordingly, dismissed.

(Aditya Kumar Trivedi, J)

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