

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.75288 of 2018

Arising Out of PS. Case No.-353 Year-2018 Thana- JOGAPATTI District- West Champaran

1. Bharat Yadav, son of Jokhan Yadav
2. Pandit Yadav, son of Jokhan Yadav. Both are residents of Village- Chandraul, Police Station- Yogapatti (Nawalpur), District- West Champaran.

... .. Petitioner/s

Versus

The State Of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Brij Kishor Mishra

For the Opposite Party/s : Smt Renu Kumari

CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
ORAL ORDER

2 16-01-2019 Heard learned counsels for the petitioners, informant and the State.

The petitioners are apprehending arrest in a case registered for the offence punishable under Sections 341, 342, 504, 506, 384, 386 and 427/34 of the IPC.

The prosecution case got initiated on the basis of written report dated 09.07.2018 submitted by Bhatuman Yadav to the Station House Officer, Nawalpur Police Station is to the effect that since last few months, the five FIR named accused persons, including the petitioners, were demanding Rupees One Lac as loan. However, the informant expressed his inability to give loan. The accused persons, gave life threatening to the informant, thereafter, the informant realized that the amount was not being sought as a loan, but it was demand of extortion. On



01.07.2018, at 4.00 P.M. when the wife of the informant, namely Saroj Devi went to bring grass from the agricultural field, where she was surrounded by the accused persons, who while abusing asked her to deliver the extortion amount of Rupees One Lac by her husband within a period of two days, otherwise her husband and children will be killed. It is further alleged that on 03.07.2018, the accused persons came to the house of the informant, dug a ditch adjacent to his house, as a result, part of his house got demolished.

It is submitted by the learned counsel for the petitioners that for the occurrence of 03.07.2018, the written report was submitted on 09.07.2018 and even assuming the accusation to be true, no offence either under Section 384 or 386 of the I.P.C. is made out against the petitioners. It is further submitted that since the petitioners are next door neighbours and were constructing their boundary wall and for laying the foundation, the earth was dug, as a result, a portion of the boundary wall of the informant got demolished. In fact, in the background of a dispute with regard to construction of boundary wall, the accusation has maliciously been levelled against the petitioners. A statement has been made in the paragraph no.3 of the petition that the petitioners are not having any criminal antecedent.



The informant has appeared and contested the anticipatory bail application primarily on the ground of maintainability. It is the stand of the informant that the warrants followed by proclamation under Section 82 of the Cr. P.C. having been issued, the instant anticipatory bail application is rendered non-maintainable in terms of the law laid down by the Hon'ble Apex Court in the case of *State of Madhya Pradesh Vrs. Pradeep Sharma* reported in *(2014) 2 SCC 171*. The accusation of demand of extortion is specific. Moreover, the accused persons have caused huge loss to the informant by demolishing a portion of the house.

Since the learned counsel for the informant has raised the issue of maintainability of the present anticipatory bail application in view of issuance of process under Section 82 of the Cr. P.C. vide order dated 26.11.2018, passed by the learned CJM, West Champaran, Bettiah, in Yogapatti P.S. Case No.353 of 2018, hence, in order to appreciate the issue involved, it will be useful to quote the provisions under Section 82 of the Cr. P.C., which reads as under :-

“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.

[(4) Where a proclamation published under sub-Section (1) is in respect of a person accused of an offence punishable under section 302,304,364,367,382,392,393,394,395,396,397,398,399,400,402,436,449,459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a



declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section(1)]

From perusal of the aforementioned provisions it appears that Section 82 of the Cr.P.C. stipulates provision of proclamation by Court against person who is absconding. Section 82(1) of the Cr. P.C. clearly envisages that if the Court has reason to believe 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 a period of thirty days from the date of publishing such proclamation. Meaning thereby that the Court has to come to a conclusion that the person concerned is absconding and concealing himself so that warrant could not be executed and for publication of such proclamation a notice is required stipulating minimum period of thirty days.

The decision of the Hon'ble Apex Court being relied upon by the informant is based on the earlier judgment of the Hon'ble Apex Court in the case of *Lavesh Vrs. State (NCT of Delhi)* reported in (2012) 8 SCC 730 and the case of *Adri Dharam Das Vrs. State of West Bengal* reported in (2005) 4SCC 303. Before



addressing the contention of the learned counsel for the informant, it would be gainful to reproduce para 12 of the Judgment of the Hon'ble Apex Court in the case of Laves Vrs. State (Supra) which reads thus;

“12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared its absconder. Normally when the accused is absconding and declared as a proclaimed offender, there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.”

Similarly in the case of *State of M.P.Vrs. Pradeep Sharma* being relied upon by the informant, in para 16 of the Hon'ble Apex Court has deduced an inference from the decision of the Laves Case (supra) that if any one is declared as an absconder/proclaimed offender in terms of Section 82 of the Cr.P.C., he is not entitled to the relief of anticipatory bail.

The orders dated 01.11.2018 and 26.11.2018, passed by the learned CJM, West Champaran,, Bettiah in Yogapatti Case No.353 of 2018 has been brought on record by way of counter affidavit filed on behalf of the informant, whereby, the warrant



of arrest and process under Section 82 of the Cr.P.C have been issued. Both the orders aforementioned read as under :

“1/11/2018- I.O. of this case has been filed a petition to issue W/A against accused person Bharat Yadav and Pandit Yadav.

Heard and perused the case record. Prayer allowed. Issue W/A.

26.11.2018. - I.O. of this case has been filed a petition to issue 82 Cr.P.C. with return W/A against accused person Bharat Yadav and Pandity Yadav.

Heard and perused the case record. Prayer allowed. Issue 82 Cr.P.C.”

The order dated 01.11.2018 indicates that the I.O. of the case has filed a petition to issue warrant of arrest against the accused persons Bharat Yadav and Pandit Yadav and thereafter, the CJM, has allowed the prayer and directed for issuance of warrant of arrest merely on the basis that he has heard and perused the case record.

Thereafter, the order dated 26.11.2018 indicates that the I.O. has filed a petition along with return warrant of arrest to issue therein proclamation under Section 82 of the Cr. P.C. against the accused persons and on the basis of such prayer, proclamation order under Section 82 of the Cr. P.C has been issued.

On perusal of the order dated 01.11.2018, it appears that if



such order does not mention the ground which has been taken by the I.O., while seeking the warrant of arrest. Section 73 of the Cr. P.C. provides for issuance of warrant, which the Magistrate may direct to any person within his local jurisdiction for arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest.

The order dated 01.11.2018 does not make out any special case, as to why the indulgence of the Court was sought for, while seeking the warrant of arrest under Section 73 of the Cr.P.C. and none of the three requirements of Section 73 of the Cr.P.C., i.e., (i) escaped convict, (ii) Proclaimed Offender and (iii) person who is accused of a non-bailable offence and is evading arrest, has either been the ground of seeking or the ground for issuance of warrant of arrest. Such power under Section 73 Cr.P.C., in considered opinion of this Court cannot be issued mechanically and in a perfunctory manner, on the mere asking of the I.O. Hence, the order dated 01.11.2018 loses any legal sanctity and is apparently an illegal exercise of jurisdiction.

Coming to the order dated 26.11.2018, whereby proclamation order under Section 82 of the Cr.P.C. has been



sought by the I.O. and has at the same time been issued by the Court below, this Court again takes note of the fact that the proclamation order under Section 82 of the Cr.P.C. has also been issued on the mere asking. Section 82 of the Cr.P.C. provides that if any Court has reason to believe that any person against whom a warrant has been issued by it has absconded or is concealing himself so that the warrant cannot be executed, such Court may publish a written proclamation requiring the accused to appear at a specific place and specific time, not less than thirty days from the date of proclamation. Hence, again in considered opinion of this Court, neither any ground/reason has been the basis of seeking of proclamation under Section 82, nor has there been any ground or basis for issuance of such proclamation by the Court. Thus, the order dated 26.11.2018 is also sans any reason or satisfaction of the Court. Reason is the soul and spirit of every order, in the absence of which every such order passed in exercise of statutory power vested in the authority/court, renders such order inexistent and illegal.

Moreover, the very basis and foundation of order under Section 82 of the Cr.P.C., is, a valid issuance of warrant under Section 73 of the Cr.P.C. and when the order under Section 73 of the Cr.P.C. loses legal sanctity, then every subsequent



corollary order either under Section 82 or Section 83 of the Cr.P.C., becomes inexistent and illegal exercise of jurisdiction. Reliance can also be placed on the decision in the case of *Usha Mishra Vs. the State of Bihar*, reported in 2007(3) PLJR 748 and *Krishna Murari Yadav Vs. the State of Bihar*, reported in 2005(3) PLJR 746.

The orders dated 01.11.2018 and 26.11.2018, have been passed in a routine manner, without indicating the satisfaction of the Magistrate and without reflecting that the Magistrate had any reason to believe for passing such order, hence both the orders are *de hors* the requirements as stipulated under Sections 73 and 82 of the Cr.P.C.

Under such circumstances, where the issuance of warrant or arrest and the subsequent issuance of proclamation order, are without any legal sanctity, then it cannot be said that the anticipatory bail is not maintainable, in view of the decisions relied upon by the informant.

Moreover, it is a settled principle of law that where a thing is prescribed to be done in a particular manner, then it is required to be done in that particular manner only.

The ratio of the Hon'ble Apex Court has to be read and interpreted with a Caveat. Merely because a Warrant has been



issued or proclamation under Section 82 of the Cr.P.C. has been issued even though in express violation of the statutory requirements and statutory *sine qua non*, such warrants or proclamations would not deprive any person from exercising his statutory right to seek anticipatory bail as stipulated under Section 438 of the Code of Criminal Procedure. The issuance of warrant or issuance of proclamation under Section 82 of the Cr.P.C. in order to render an anticipatory bail application non-maintainable has to be in accordance with the law and as per the requirements under Section 82 of the Cr.P.C. An order of proclamation under Section 82 of the Cr.P.C. would not *ipso facto* render an anticipatory bail application non-maintainable, if the said proclamation have been issued with a complete non-application of mind and on the mere asking of the investigating agency. The recording of the satisfaction before issuance of the order of proclamation is the requirement of statute and has to be scrupulously followed. Any deviation would render the order of proclamation a nullity in the eyes of law and would be rendered unenforceable.

Viewed from the aforesaid angle and the statutory requirement of recording the satisfaction, it can be safely concluded that the learned Court below has issued warrant and



also an order of proclamation under Section 82 of the Cr.P.C. merely on the asking of the investigation agency without recording even a *prima facie* satisfaction of the existence of the statutory *sine qua non* .

The only question thus which warrants consideration is as to whether an order of issuance of warrant or proclamation under Section 82 of the Cr.P.C, how so ever illegal could render an anticipatory bail application non-maintainable. The answer has to be in negative.

There is yet another angle attached to the facts of the present case. Law is well settled that even a person accused of a crime can not be treated except in accordance with the provisions of law. Procedures cannot be abused for some collateral purposes. This Court had the occasion to come across at numerous instances the practice of police praying for issuance of warrants for arrest even in cognizable cases where the police has authorities to arrest without a warrant.

The law in this regard is well settled the Apex Court in the case of *CBI Vrs. Daud Ibrahim* since reported in *AIR (1977) SC 2494* para 23 has held that warrant of arrest under Section 73 of the Cr.P.C. normally is not to be issued by Courts solely for the purpose for production of accused before the police in aid of



investigation for the simple reason that police even without warrant of arrest in a cognizable case has a right to arrest a person.

A bench of this Hon'ble Court in the case of *Nalini Kant Agrawal Vrs. State of Bihar* reported in 2003(1) PLJR 350 has held that though the Court has power under Section 73 of the Cr.P.C. to issue warrant, it is only for the purposes of securing appearance before the Court and not before the police.

Examined thus, the objection with regard to maintainability of the instant anticipatory bail application is fit to be dispelled and rejected.

Now coming to the merits of the case, considering the delayed lodging of the written report, accusation being levelled in the background of boundary dispute between the parties and the accusation *prima facie* constitute offence under Section 385 of the I.P.C., which is bailable, coupled with the statement made in paragraph no.3 of the petition that the petitioners are not having any criminal antecedent, let the above named petitioners be released on anticipatory bail in the event of arrest/surrender before the learned Court below within a period of twelve weeks from today, on furnishing bail bonds of Rs. 10,000/- (ten thousand) each with two sureties of like amount each to the



satisfaction of learned **C.J.M., Bettiah, West Champaran** in connection with **Yogapatti (Nawalpur) P.S. Case No.353 of 2018**, subject to the condition as laid down under Section 438(2) of the Cr. P.C.

(Dinesh Kumar Singh, J)

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