

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No. 1110 of 2019

Arising Out of COMPLAINT CASE No.-2001 Year-2013 District- Muzaffarpur

VIKRAM KUMAR TIWARY @ VIKRAM KUMAR S/O Brij Mohan Kumar
Resident of Village- Anandpur, behind Jal Mahal Bibiganj M.I.T. P.S. Sadar,
District- Muzaffarpur.

... .. Petitioner

Versus

1. The State of Bihar through the Director General Of Police, Bihar, Patna
2. The Inspector General of Police, Tirhut Range, Muzaffarpur.
3. The Deputy Inspector General of Police Saran Range, Chhapra.
4. The O/C, Fulwariya P.S. Gopalganj.
5. The O/C, Sheerpur O.P. P.S. Fulwariya, Dist. Gopalganj.
6. The Sub- Divisional Police Officer, Hathua, Dist.- Gopalganj
7. Shiva Shambhu Ram S/O Bhagwat Ram Resident of village- Dubey
Batrahan, P.S. Fulwariya, O.P. Sheerpur, District- Gopalganj.

... .. Respondents

Appearance :

For the Petitioner	:	Mr. Jagdish Prasad, Advocate Mr. Alok Kumar Alok, Advocate
For the Respondent-State:		Mr. M. Nasrul Huda Khan, SC-1

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date : 29-07-2019

Heard learned counsel for the petitioner.

2. This application under Articles 226 and 227 of the Constitution of India has been filed by the petitioner for directing the respondent-authorities to take proper action in connection with Trial No. 533 of 2017 arising out of Complaint Case No. 2001 of 2013 pending before the learned Judicial Magistrate, 1st Class, Muzaffarpur in which processes under Sections 82 and 83 of the Code of Criminal Procedure



(for short 'Cr.P.C.') have been issued against respondent no. 7.

3. Learned counsel appearing for the petitioner submitted that the complaint was filed in the court of Chief Judicial Magistrate, Muzaffarpur on 29.07.2013 under Sections 406 and 420 of the Indian Penal Code and Section 138 of the Negotiable Instruments Act. Vide order dated 29.07.2013 itself, the learned Chief Judicial Magistrate, Muzaffarpur transferred the case to the court of Shri Mithilesh Kumar, Judicial Magistrate, 1st Class, Muzaffarpur under Section 192 of the Cr.P.C. for inquiry and disposal of the case in accordance with law. Thereafter, the statement of the complainant was recorded on oath under Section 200 of the Cr.P.C. In course of inquiry conducted under Section 202 of the Cr.P.C., two witnesses were examined, whereafter vide order dated 24.01.2014, the learned Judicial Magistrate summoned respondent no. 7 to face trial for the offence punishable under Section 138 of the Negotiable Instruments Act. Since respondent no. 7 did not appear before the court after issuance of summons, bailable warrant of arrest was issued vide order dated 20.10.2014. Thereafter, non-bailable warrant of arrest was issued against him vide order dated 25.11.2014. As the respondent no. 7, who was summoned to face trial did not



appear in spite of issuance ofailable and non-ailable warrant of arrests, the order of proclamation was made under Section 82 of the Cr.P.C. on 11.07.2016. After order of proclamation, vide order dated 03.04.2017, order of attachment was issued against respondent no. 7 under Section 83 of the Cr.P.C. Thereafter, vide order dated 18.10.2017, respondent no. 7 was declared absconder and the office was directed to keep the record in safe custody.

4. He submitted that all the steps taken by the learned Magistrate to ensure presence of the accused before the court have failed to yield any result and the respondent no. 7 is still evading to appear before the court. He contended that in view of the willful defiance of the orders passed by the Jurisdictional Magistrate by the accused, a direction be issued to the official respondents to immediately arrest respondent no. 7 and produce him before the court in connection with Complaint Case No. 2001 of 2013.

5. Having heard learned counsel for the petitioner and perused the orders passed by the court below, as contained in Annexure-1 to the present application, I find that though summons was issued against respondent no. 7 in the complaint case in question, vide order dated 24.01.2014, the



service report of summons was never received. In absence of any service report, the court proceeded ahead and issued bailable and non-bailable warrant of arrest against respondent no. 7. Even the bailable and non-bailable warrants of arrest were never served upon the respondent no. 7, but he was declared a proclaimed offender and, thereafter, the order of attachment was also passed against him.

6. The steps taken by the court in order to ensure appearance of the accused were without verifying the fact as to whether the summons issued were ever served upon the respondent no. 7 or not.

7. The well settled legal principle and the provision of law for securing appearance of the accused persons in a criminal case have not been followed. 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 completely lost while passing orders in the present case.

8. It would be pertinent to note here that the basic purpose of the provisions prescribed in the Cr.P.C. is to ensure fair trial. 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.

9. 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.

10. 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 the offence under Section 174 of the Indian Penal Code.

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 the aforesaid 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.

13. Sub-section (3) of the aforesaid Section 62 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.

14. 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.

15. 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.

16. Where personal service under Section 62 of the CrP.C. and extended service under Section 64 of the CrP.C. cannot be effected, the law permits substituted service under Section 65 of the CrP.C.

17. 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 CrP.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.

18. Thus, it is the duty of the court to enquire about the service of the summons upon the accused.

19. If the summons are not served, it is the bounden duty of the court to see to it that they are served.

20. If it is found that summons 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 to issue warrant, if necessary, non-bailable to ensure the presence of the accused in the court.

21. The Cr.P.C. discusses warrant of arrest from Section 70 onwards.

22. 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.

23. 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.

24. 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.

25. Sections 72 to 74 prescribe the procedure and deal with direction of warrants to the concerned officers.



26. Section 76 of the Cr.P.C. stipulates that the person arrested must be brought before the court without unnecessary delay.

27. Section 77 of the Cr.P.C. provides that warrants may be executed at any place in India.

28. On perusal of the order-sheet, it is manifest that in absence of service report of summons, bailable warrant of arrest was issued and, in absence of the service report of bailable warrant of arrest, non-bailable warrant of arrest and processes under Sections 82 and 83 of the Cr.P.C. were issued against the respondent no.7. The learned Magistrate, while passing the aforesaid orders, completely failed to apply his judicial mind and passed the orders mechanically.

29. 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) and (ii) attachment and sale of property (Section 83).

30. 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 respondent no. 7 absconded or he is concealing himself before issuing the proclamation. It is also not known as to whether the proclamation was ever issued or the same remained merely in the order-sheet of the Magistrate.

31. 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.

32. In the present case, as seen above, after issuance of summons there is no report that it was served upon the respondent no. 7 and, in absence of service report of the summons, the court issued bailable warrant of arrest against



the respondent no. 7. Further, in absence of service report of bailable warrant of arrest, the court issued non-bailable warrant of arrest against the respondent no. 7. Furthermore, there being no report regarding service of summons, bailable warrant of arrest and non-bailable warrant of arrest and without expressing satisfaction that the respondent no. 7 is absconding or concealing himself, the learned Magistrate passed orders under Sections 82 and 83 of the Cr.P.C.

33. 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 Cr.P.C. can afford to traverse beyond the provisions of the law.

34. In **Inder Mohan Goswami and another vs. State of Uttaranchal and Others**, since reported in **(2007) 12 SCC 1**, 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 or



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 issue bailable 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-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable 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-bailable 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-bailable warrant.”

35. 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).

36. The learned Magistrate has adopted a procedure which can lead to drastic consequences. It is entirely undesirable that he 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 summons was not 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 summons 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, he adopted an easy route by taking drastic steps against the respondent no. 7 and issued order of proclamation and attachment of property even without recording any reason for the same.

37. In view of the discussions made



above, I am of the considered opinion that the order issuing
bailable warrant on 20.10.2014 and all subsequent orders passed
in the case including the issuance of non-bailable warrant of
arrest, order of proclamation and order of attachment are bad in
law.

38. Thus, they are set aside.

39. The prayer of the petitioner to direct
the respondent authorities to take action against the respondent
no. 7 in the complaint case in question is rejected.

40. Registry is directed to forthwith
communicate a copy of the order to the court of the
Jurisdictional Magistrate, Muzaffarpur.

(Ashwani Kumar Singh, J)

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AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	05.08.2019
Transmission Date	05.08.2019

