

HIGH COURT OF CHHATTISGARH AT BILASPUR**CRMP No. 303 of 2021**

Dr. Ram Kumar Nayak S/o Shankar Lal Nayak, Aged about 39 years, R/o Village Sarkanda, Police Station & Tahsil Basna, Distt. Mahasamund, Chhattisgarh.

---Petitioner/Accused

Versus

Gajanan Agrawal S/o Gigranj Agrawal, Aged about 36 years, R/o Village Basna, Police Station and Tahsil Basna, Distt. Mahasamund, Chhattisgarh.

--- Respondent/Complainant

CRMP No. 308 of 2021

Dr. Ram Kumar Nayak S/o Shankar Lal Nayak, Aged about 39 years, R/o Village Sarkanda, Police Station & Tahsil Basna, Distt. Mahasamund, Chhattisgarh.

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--- Respondent/Complainant

For Petitioner :- Mr. Vaibhav A. Goverdhan, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

17/03/2021

1. Since common question of fact and law is involved in both of these petitions, therefore, they are heard together and are being disposed of by this common order.
2. In both of these petitions, the petitioner/accused and respondent/complainant are one and the same. The respondent/complainant preferred an application under Section 138 of the Negotiable Instruments Act, 1881 before learned Judicial Magistrate First Class, Basna, Distt. Mahasamund in which the petitioner/accused appeared and ultimately on 23/07/2018, final argument was heard and the matter was reserved for pronouncement of order on 30/07/2018 but unfortunately, on that day, the petitioner/accused became unwell and filed an application under Section 317 of CrPC for exemption from personal appearance which was granted and the matter was then fixed for the next day i.e. 31/07/2018, but on account of petitioner/accused suffering from paralysis, he again could not appear before the Court on 31/07/2018 and the matter was finally fixed for 06/08/2018. On 06/08/2018, when the

petitioner/accused still did not appear before that Court, learned trial Magistrate rejected petitioner's application for exemption from personal appearance and after declaring him as an absentee, straightway issued warrant of arrest against him and thereafter, on 20/08/2018, the warrant of arrest returned unserved. Ultimately, on 07/02/2019, learned trial Magistrate straightway declared the petitioner/accused to be absconded and issued a standing warrant of arrest against him which has been sought to be challenged by the petitioner/accused in both of these petitions.

3. Mr. Vaibhav A. Goverdhan, learned counsel for the petitioner/accused, would submit that the procedure laid down in sub-sections (1) and (2) of Section 82 of CrPC has not been followed by learned trial Magistrate and straightway permanent warrant of arrest has been issued against the petitioner/accused which is illegal and bad in law as the provisions contained under Section 82(1) & (2) have to be followed mandatorily before declaring any person as a proclaimed absconder, therefore, the standing warrant of arrest issued against the

petitioner/accused deserves to be set aside and the trial Court be directed to hear the matter afresh and pronounce the judgment as final arguments have already been heard on 23/07/2018 i.e. more than two years back and since the final argument has already been heard and merely because of the absence of the petitioner/accused, judgment could not be pronounced, petitioner/accused is ready and willing to appear before that Court.

4.I have heard learned counsel for the petitioner/accused, considered his submissions and perused the records.

5.Sub-sections (1) and (2) of Section 82 of CrPC provide 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."

6. A careful perusal of the aforesaid provision would show that sub-section (1) of Section 82 of CrPC provides that the Court must have reasons to believe that the person, against whom warrant of arrest has been issued, has absconded so that warrant could not be executed and only after the Court is satisfied that the person is absconding, the Court should issue proclamation requiring the accused to appear on a specified date on specified time not less than 30 days from the date of publication of such proclamation. Sub-section (2) of Section 82 of CrPC provides the manner of publication of proclamation.

7. The expression "reason to believe" occurring in Section 82 of CrPC suggests that the Court must be subjectively satisfied that the person has absconded or concealed himself on the materials

before him in order to avoid execution of warrant of arrest. [See: K.T.M.S. Abdul Cader v. Union of India¹ & Rohit Kumar v. State of NCT (Delhi)²]. Mere issuance of notice to the accused person does not amount to declaration as proclaimed offender, the Court must record reason that the accused person is absconding, as the provisions of Section 82(2) of CrPC are mandatory [See: Devendra Singh Negi v. State of UP³]. Similarly, the proclamation must give clear 30 days for the appearance of the accused, the provision as to 30 days being mandatory, where the period given is less than 30 days, proclamation being invalid would be quashed [See: Rohit Kumar (supra)]. The three clauses (a), (b) and (c) of Sub-section (2)(i) of Section 82 of CrPC are conjunctive and not disjunctive. The factum of valid proclamation depends on the satisfaction of each of these clauses [See: P.K. Gupta v. State of West Bengal⁴]. If a person is declared as an absconder, his right to get anticipatory bail is curtailed, therefore, the action under Section

1 1977 CrLJ 1708

2 2008 CrLJ 3561

3 1994 CrLJ 1783

4 1973 CrLJ 1368

82 of CrPC has to be taken with great caution by the concerned Magistrate.

8. At this stage, it would be appropriate to notice the orders dated 06/08/2018, 06/02/2019 and 07/02/2019 passed by learned trial Magistrate, which state as under :-

"06.08.18 परिवादी सहित श्री सलूजा अधिवक्ता उपस्थित |
आरोपी द्वारा श्री के के बारिक अधिवक्ता उपस्थित |
प्रकरण आज निर्णय हेतु नियत है |

इसी स्तर पर श्री बारिक अधिवक्ता ने एक आवेदन धारा 317 द.प्र.सं. का मय चिकित्सा प्रमाणपत्र सहित पेश कर निवेदन किया की आरोपी को स्वास्थ्य खराब है वह उपस्थित होने में असमर्थ है आज की तिथि के ठीक पूर्व की तिथि में भी बचाव पक्ष द्वारा धारा 317 द.प्र.सं. गैरहाजरी माफ़ी आवेदन मेडिकल के साथ प्रस्तुत किया है | बचाव पक्ष को निर्देशित किया गया था कि आरोपी को अनिवार्य रूप से उपस्थित रखे अन्यथा गैरहाजरी माफ़ी आवेदन स्वीकार नहीं किया जायेगा उसके पश्चात भी यह गैरहाजरी माफ़ी आवेदन प्रस्तुत किया गया है | प्रकरण निर्णय स्तर पर है अतः बताए गए कारण सदभाविक नहीं होने से धारा 317 द.प्र.सं. का गैरहाजरी माफ़ी आवेदन निरस्त किया जाता है | अभियुक्त के विरुद्ध अभियुक्त की अनुपस्थिति में निर्णय पारित नहीं किये जा सके |

अभियुक्त के विरुद्ध उपस्थिति सुनिश्चित करने हेतु गिरफ्तारी वारंट जारी किये जावे | आरोपी के जमानत मुचलके निरस्त किये जाते है | प्रकरण अभियुक्त की उपस्थिति हेतु नियत किया जाता है |

प्रकरण अभियुक्त की उपस्थिति हेतु दिनांक 20.08.18

सही /-

श्याम कुमार साहू
न्यायिक मजिस्ट्रेट प्रथम श्रेणी
बसना, महासमुंद (छ.ग.)"

06.02.2019 परिवादी द्वारा श्री सलूजा अधिवक्ता उपस्थित |
अभियुक्त अनुपस्थित |

प्रकरण अभियुक्त की उपस्थिति हेतु नियत है |

जारी गिरफ्तारी वारंट तामील | अदम तामील अप्राप्त |

पुनः अभियुक्त के विरुद्ध गिरफ्तारी वारंट जारी किया जावे |

प्रकरण वास्ते अभियुक्त की उपस्थिति हेतु :- 07/03/2019

सही /-

श्याम कुमार साहू

न्यायिक मजिस्ट्रेट प्रथम श्रेणी
बसना, महासमुंद (छ.ग.)

पश्चात्

इसी स्तर पर आरोपी डॉ० रामकुमार नायक को जारी गिरफ्तारी वारंट चौकी भंवरपुर थाना बसना के आरक्षक के द्वारा अदम तामील वापस प्रेषित, जिसके अनुसार गिरफ्तारी वारंट तमिलीकर्ता के द्वारा ग्राम सरकण्डा में जाकर आरोपी के बारे में पूछताछ किया तो पता चला की आरोपी एक वर्ष से कहा रहता है, कहा गया की कोई जानकारी नहीं है | अतः उक्त रिपोर्ट के अनुसार गिरफ्तारी वारंट की तमिलीकर्ता अधिकारी कर्मचारी को फरारी साक्ष्य हेतु समंस जारी हो |

पूर्व में दी गयी तिथि निरस्त की जाती है अब प्रकरण वास्ते फरारी साक्ष्य हेतु :- 07/02/2019

सही /-

श्याम कुमार साहू
न्यायिक मजिस्ट्रेट प्रथम श्रेणी
बसना, महासमुंद (छ.ग.)

07.02.2019

परिवादी सहित श्री बी. एस. सलूजा अधिवक्ता
उपस्थित |

आरोपी अनुपस्थित |

प्रकरण आज आरोपी के फरारी साक्ष्य हेतु नियत है |

आरोपी को जारी गिरफ्तारी वारंट तामिलकर्ता प्रधान आरक्षक बैजनाथ सिंह क्रमांक 88 उपस्थित, उनका फरारी साक्ष्य अंकित किया गया |

यह प्रकरण दिनांक 15.06.2015 को अभियुक्त के विरुद्ध प्रस्तुत किया गया था | आरोपी दिनांक 30.07.2018 से अनुपस्थित है, आरोपी की अनुपस्थिति के कारण दिनांक 06.08.2018 को निर्णय स्तर पर आरोपी के विरुद्ध गिरफ्तारी वारंट जारी किये जाने का आदेश दिया गया है |

परिवादी अधिवक्ता श्री सलूजा के द्वारा भी यह व्यक्त किया गया है कि अभियुक्त को जारी गिरफ्तारी वारंट की तामिली नहीं हो पा रही है | उपरोक्त परिस्थितियों में अभियुक्त के विरुद्ध धारा 299 द.प्र.सं. की कार्यवाही कर उसे फरार घोषित किया जा सकता है | परिवादी अधिवक्ता श्री सलूजा ने यह भी व्यक्त किया है कि प्रकरण निर्णय स्तर पर रहा है, अभियुक्त की उपस्थिति उपरांत ही अग्रिम कार्यवाही किया जाना उचित होता है | अतः प्रकरण में अभियुक्त की उपस्थिति तक कार्यवाही रोकी जावे |

प्रकरण में गिरफ्तारी वारंट की तामिली करता प्रधान आरक्षक बैजनाथ सिंह फरारी साक्ष्य हेतु उपस्थित है उसका कथन लेखबद्ध किया गया है, उसके कथन अनुसार वह आरोपी के गाँव जाकर आरोपी के सम्बन्ध में पूछताछ किया तो आरोपी के सम्बन्ध में वह कहा गया है, कहा गया है, इसकी जानकारी नहीं होना बताये है, प्रधान आरक्षक बैजनाथ सिंह के कथन अनुसार आरोपी का निकट भविष्य में मिलने की कोई सम्भावना नहीं है |

प्रकरण आरोपी की अनुपस्थिति के कारण अनावश्यक रूप से लंबित है | आरोपी डॉ. रामकुमार नायक का निकट भविष्य में मिलने की संभावना प्रतीत नहीं होती है| अतः आरोपी डॉ. रामकुमार नायक को फरार घोषित किया जाता है| प्रकरण में आरोपी डॉ. रामकुमार के विरुद्ध स्थायी गिरफ्तारी वारंट जारी हो।

प्रकरण व्यवस्थित कर सुरक्षित रखे जाने हेतु अभिलेखागार प्रेषित किया जावे एवं प्रकरण के मुख्य पृष्ठ पर लाल स्याही से यह अंकित किया जावे कि " अभियुक्त फरार है, अतः प्रकरण सुरक्षित रखा जावे।"

प्रकरण अभिलेखगार प्रेषित हो |

सही /-

श्याम कुमार साहू
न्यायिक मजिस्ट्रेट प्रथम श्रेणी
बसना, महासमुंद (छ.ग.)"

9. A careful perusal of the aforesaid orders would show that on 06/08/2018, learned trial Magistrate issued warrant of arrest against the petitioner/accused and when it returned unserved, on 06/02/2019, he directed for issuance of fresh warrant of arrest against the petitioner/accused and fixed the matter for 07/03/2019 and signed it but thereafter, he again recalled that order and placed the matter for consideration on 07/02/2019. Then, on 07/02/2019, learned trial Magistrate declared the petitioner/accused as an absconder giving complete go-by to the provisions contained under sub-sections (1) and (2) of Section 82 of CrPC. It is quite apparent from the aforesaid orders that the Court has not recorded satisfaction that petitioner/accused is absconding or is

concealing himself in order to avoid service of warrant of arrest issued against him and moreover, the proclamation has also not been published asking him to appear within 30 days at specified time and place in the manner prescribed under Section 82(2) of CrPC and straightway, petitioner/accused has been declared as absconder and permanent warrant of arrest has been issued against him. The procedure adopted by learned trial Magistrate is contrary to sub-sections (1) and (2) of Section 82 of CrPC and without following the procedure which is mandatory in character, the petitioner/accused has been declared as absconder and permanent warrant of arrest has been issued against him, which is absolutely illegal and bad in law, as such, the impugned orders are hereby set aside in both the petitions. Petitioner/accused is accordingly directed to appear before the trial Magistrate on 05/04/2021. The evidence has already been closed and the matter has been heard, but since it has been stated at the Bar that the Judicial Magistrate First Class, Basna, Mahasamund who heard the matter has now been transferred, the

trial Magistrate currently posted at Basna, Mahasamund is directed to decide the matter within 30 days from the date of receipt of copy of this order.

10. With the aforesaid observations/directions, both the petitions are disposed of. No cost(s).

11. A copy of this order be sent to the Judicial Magistrate First Class, Basna Mahasamund as well as to Shri Shyam Kumar Sahu, the then J.M.F.C., at the place of his posting for information.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet