

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 2375 of 2022

Niranjan Mahato & Ors.

Versus

The State of West Bengal & Anr.

For the Petitioner : Mr. Aritra Bhattacharya, Adv.

For the State : Mr. Madhusudan Sur, Adv.
Mr. Dipankar Paramanick, Adv.

Heard on : 21.04.2023

Judgment on : 03.05.2023

Ajay Kumar Gupta, J:

1. This revisional application has been filed by the Petitioners under Sections 397/401 read with Section 482 of the Code of Criminal Procedure, 1973 feeling aggrieved and dissatisfied with the impugned order dated 17.06.2022 passed by the learned Chief Judicial Magistrate, Purulia in connection with G.R. Case No. 384/2022 arising out of Balarampur Police Station Case No. 32/2022 dated 19.02.2022 under Sections 498A/302/34 of the Indian Penal Code, whereby the learned Magistrate issued order of proclamation and attachment simultaneously against the present petitioners.

2. Petitioners' case, in brief, is that Balarampur Police Station Case No. 32/2022 dated 19.02.2022 was registered under Sections 498A/302/34 on the basis of complaint lodged by one Ajit Mahato to the effect that his daughter, namely, Tusu Mahato was married to one Bimal Mahato on 5th Day of Baisakh last year. He received a telephonic intimation from his son-in-law that his daughter has no more. Immediately he and others rushed to the matrimonial house of his daughter where they were informed that dead body of his daughter has been sent for post mortem examination at Purulia. It

was his firm belief that son-in-law along with others including the present petitioners strangled his daughter resulting her death.

3. After completion of investigation charge-sheet was submitted under Sections 498A/306/34 of the Indian Penal Code against the petitioners and two others, namely, Bimal Mahato and Arjun @ Puintu Mahato. In course of investigation, two accused persons, namely, Bimal Mahato and Arjun @ Puintu Mahato were arrested on 19.02.2022 and subsequently they were enlarged on bail after incarceration for some times. It is further contended that in view of the prayer made by the investigating officer warrant of arrest was issued on 07.05.2022 against the present petitioners. But without receiving execution report of W/A, the learned Court below further issued warrant of arrest, proclamation and attachment simultaneously on 17.06.2022 against the present petitioners is not sustainable in law. Therefore, the impugned order is perverse and bad in law. Warrant of arrest, proclamation and attachment against the present petitioners could not be issued simultaneously. Therefore, order dated 17.06.2022 is liable to be set aside.

4. Learned counsel appearing on behalf of the petitioners further relied on a judgment reported in **Inder Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors.**¹ to support his contention that warrant of arrest cannot be issued without satisfaction that the accused are abundant and evading arrest and further submitted that the Court should be extremely careful before issuing non-bailable warrant as issuance of warrant of arrest involves interference of personal liberty of individuals.

5. In reply, learned counsel appearing on behalf of the State submitted that the petitioners were evaded their arrest, absconded and concealed themselves as such the learned Court had no option when prayer was made by the I.O. to issue warrant of arrest. Accordingly, the learned Court below rightly issued warrant of arrest against the petitioners on 07.05.2022. Warrant of arrest could not be executed as the petitioners were evaded their arrest, absconded and concealed themselves. After receiving such non-execution report of warrant of arrest, the learned Magistrate rightly issued proclamation and attachment order under Sections 82 and 83 of the CrPC simultaneously after being satisfied. Finally, he submitted I.O. fails to

¹ (2008) 1 SCC (Cri) 259

arrest them, warrant could not be executed, the Court has to procure their attendance, took all processes to bring them before the Court. Coercive steps have been taken as there was no alternative before the Court below. Therefore, the Court below rightly issued proclamation and attachment after receiving non-execution report in respect of warrant of arrest as such revisional application has devoid of merit and liable to be dismissed.

6. Heard rival submissions of the parties and on perusal of record, at the very outset, it is necessary to quote the said impugned order dated 17.06.2022 passed by the learned Magistrate is as follows: -

“N.E.R. in respect of W/A against 3 accuseds have been received from O/C Balarampur P.S., Dist.- Purulia of accd. (1) Chamaklata Mahato, (2) Niranjan Mahato, (3) Namani Mahato. Perused the same. Issue W/A and P.A.

Accd. (4) Bimal Mahato is produced before this Court today from D.C.H. Purulia and remanded to J/C till 30.06.2022.

Accd. (5) Pintu Mahato @ Arjun is not produced before this Court today from D.C.H. Purulia.

Supdt. Of D.C.H Purulia is directed to produce the accd before this court on 30.06.2022 at 10.30 A.M.

To 30.06.2022 for production and E/R of W/A and P/A.”

7. From the perusal of the aforesaid order and materials available on record, it reveals after completion of investigation charge sheet was submitted against the present petitioners and two others, namely, Bimal Mahato and Arjun @ Puintu Mahato under Sections 498A/306/34 IPC. During investigation, only two accused persons, namely, Arjun @ Puintu Mahato and Bimal Mahato were arrested and subsequently both of them were released on bail on 10.05.2022 and 18.06.2022 respectively. Other three accused persons, who are the present petitioners, were not arrested during investigation. Furthermore, the de facto complainant alleged that the accused persons were threatening him. He appeared before the Learned Chief Judicial Magistrate on 25.03.2022 and made a prayer for necessary order. On such prayer, the learned Magistrate directed the O/C, Balarampur P.S. as well as the investigating officer of this case to see whether the allegations are true or not and they are further directed to see that no threat is caused by the accused persons upon the de facto complainant.

8. On 07.05.2022 investigating officer prayed before the learned Magistrate for issuance of warrant of arrest against the petitioners as they were absconding and concealing themselves from arrest. Accordingly, the learned Magistrate issued a warrant of arrest on 07.05.2022 but despite of such issuance of warrant of arrest, the Court could not procure their attendance as the present petitioners were neither arrested nor they had been surrendered voluntarily before the learned Magistrate or obtained any anticipatory bail from any competent Court.

9. It further reveals from the order dated 07.05.2022 warrant of arrest was issued against the present petitioners under Section 73 (1) of the Code of Criminal Procedure which reads as follows: -

“Section 73 (1). Warrant may be directed to 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.”

From reading of the aforesaid provision, this Court finds the Learned Magistrate has jurisdiction and power to issue warrant of arrest under Section 73 (1) when any convict escaped, proclaimed offender or any person who is accused of a non-bailable offence and is evading arrest. In the present case conditions as stipulated under section 73 (1) of the CrPC were fulfilled as the offence as alleged are non-bailable and accused persons were evading arrest. Accordingly, the I.O. of the case was prayed for issuing warrant of arrest. Accordingly, the learned Court below issued warrant of arrest.

10. It is true that the Hon'ble Supreme Court in the case of **Raghuvansh Dewanchand Bhasin versus State of Maharashtra reported in (2012) 9 SCC 791** has held that issuing non-bailable warrant of arrest directly involves curtailment of liberty of a person. It is also true the Hon'ble Supreme Court took note of the earlier judgment in the case of **Inder Mohan Goswami versus State of Uttaranchal reported in (2007) 12 SCC 1**. Paragraph 10 of the judgment rendered in the case of Raghuvansh Dewanchand Bhasin (supra) is quoted hereunder: -

“10. In Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors, a Bench of three learned Judges of this Court cautioned that before issuing non-bailable warrants, the courts should strike a balance between societal interests and personal liberty and exercise its discretion cautiously. Enumerating some of the circumstances which the court should bear in mind while issuing non-bailable warrant, it was 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."

11. In the instance case petitioners are also the accused persons in Balarampur Police Station Case No. 32/2022 dated 19.02.2022 under Sections 498A/302/34 were not arrested. I.O. prayed for issue of warrant of arrest against them when accused persons were evading

arrest and the offence as alleged are non-bailable. So, it needs to be presumed that they were absconder and evading arrest. The learned Magistrate issued warrant of arrest on the ground that it was the allegation that the accused persons were threatening the de facto complainant and evading arrest. Furthermore, offence as alleged is non-bailable. Hence, petitioners are unable to get benefits from aforesaid referred judgments. Accordingly, warrant of arrest issued by the learned Magistrate appears correct and in accordance with law which requires no interference.

12. Non-execution report of warrant of arrest was received by the learned Magistrate on 17.06.2022 as such Learned Magistrate issued proclamation and attachment under Sections 82 and 83 of the Cr.P.C. simultaneously. Feeling aggrieved and dissatisfied, petitioners rushed to this Court with their grievances for set aside the said impugned order otherwise indefeasible right of the present petitioners as provided under Section 438 of the Code of Criminal procedure has been endangered and, in such circumstances, the interference of this Court is highly solicited.

13. The order has already been quoted above. From the aforesaid order it can be easily ascertained that no reason whatsoever was assigned by the learned Magistrate while issuing proclamation and attachment simultaneously.

14. Now two law points emerge before this Court are as follows:-

1. Whether proclamation and attachment can be issued simultaneously without assigning reasons or satisfaction of the Court?
2. Whether impugned order dated 17.06.2022 passed by the learned Magistrate is sustainable in law as provided in the relevant Sections of the Code?

Before deciding these issues, this Court would like to refer Sections 82 and 83 of the Cr.P.C. for ready reference and discussion:

Section 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).]

Section 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 in 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)."

15. It is clear from the provision mentioned in Sub-section (1) of Section 82 of the Code that the Court must have reasons to believe that the person, against whom warrant has been issued, has absconded or concealing himself so that the warrant cannot be executed. In view of the said provision, only after the Court is satisfied that the person is absconding, or is concealing, and it is not possible to arrest him, 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.

16. Thus, satisfaction of the Court has to be recorded in the order while issuing processes under Section 82 of the Code but order does not indicate the same. Sub-section (1) of Section 82 of the Code provides that the Court has to publish the written proclamation requiring the person to appear on a specified date and specified place not less than 30 days from the date of such publication. Thus, it is the duty of the Court to mention the specific place and the date where the person needs to be present him in compliance of the proclamation order. This date and place should be mentioned in the order itself. Form IV, which is part of Second Schedule of Code is the Form in which proclamation is required to be issued. This is a statutory Form. This Form is required to be filled up by the Office of the Court. Thus, the date and place, which is mentioned in the said Form, must also be reflected in the order sheet. This will mean that the Court has fixed the place, time and the date and not the Bench Clerks or the Office Clerks, as it is the mandate of the law that the Court has to fix the place, time and the date of appearance. The Form IV, must be filled up as per the date, time, place fixed by the Court, which should be reflected in the order sheet.

17. The Hon'ble Supreme Court after relying on other judgments, has held in the case of **State of Madhya Pradesh versus Pradeep Sharma reported in (2014) 2 SCC 171**, that :-

“if a person is declared as proclaimed offender/absconder in terms of Section 82 of the Code, he is not entitled for relief of anticipatory bail.”

Thus, when the relief of anticipatory bail is curtailed, as a consequence of an order passed under Section 82 of the Code, declaring a person absconder/proclaimed offender, the said order cannot be passed in mechanical manner without recording satisfaction and reasons nor can be passed without following the procedure as laid down in the Code. In view of the aforesaid circumstances and the consequence one has to face, the Court has to be very cautious while issuing an order under Section 82 of the Code.

18. While going through the order under challenge, this Court finds that simply after receiving non-execution report of warrant of arrest, the Court had issued order of proclamation and attachment under Sections 82 and 83 of the Code simultaneously in a most

mechanical manner without recording subjective satisfaction as to why it is necessary to issue the proclamation and attachment.

19. The petitioners challenged the said order before this Court as the Magistrate issued proclamation and attachment order in terms of Sections 82 and 83 of the Code simultaneously. There is an exception to this rule when both the processes, i.e. proclamation under Section 82 of the Code and attachment order in terms of Section 83 of the Code are issued simultaneously. The first proviso to Section 83 (1) of the Code provides for the circumstance and the situation where it is necessary to issue both the proclamation and attachment order simultaneously and how the same can be issued and the requirements thereof. Court can issue Proclamation and Attachment simultaneously provided the Court should satisfy, 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. Then only Court may order the attachment simultaneously with the issue of the proclamation.

20. Section 83(1) of the Code clearly provides the Court, which is issuing proclamation under Section 82 of the Code, for the reasons to be recorded in writing, may issue order for attachment of movable or immovable properties. It is, thus, the mandate of the law that the reasons for issuing attachment order simultaneously have to be recorded in the order itself. Non recording of the reasons will make the order absolutely bad and unsustainable in the eyes of law.

21. In the case in hand, no reasons, as necessitated in terms of Section 83(1) of the Code is mentioned in the impugned order. Furthermore, there is no statement in compliance of Section 82(1) of the Code available on record. These lapses make the impugned order under Sections 82 and Section 83 of the Code bad in law, which needs to be set aside.

22. Under the above circumstances, the impugned order dated 17.06.2022 is hereby set aside.

23. Revisional application is, thus, allowed without order as to costs.

24. Let a copy of judgment of this Court be sent to the Court concerned for information and to proceed afresh in accordance with law.

25. Photostat certified copy of this judgment, if applied for, is to be given as expeditiously to the parties on compliance of all formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)