

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 468 OF 2023

1. Hansraj Munsiram Seniwai
2. Vikrant Madanlal Aggarwal ...Petitioners

Versus

1. The State of Maharashtra
2. The Senior Inspector of Police
Dharur Police Station, Beed ...Respondents

Mr. Ashish Dubey a/w Mr. B. N. Bhabhda, Advocates for
Petitioners.

Mr. G. O. Watamwar, APP for Respondents.

CORAM : R.M. JOSHI, J.

RESERVED ON : AUGUST 21, 2023
PRONOUNCED ON : AUGUST 29, 2023

ORDER

1. This Petition takes exception to the order dated 16.02.2023 passed by learned JMFC, Dharur below Exh. 81 rejecting application filed by the Petitioners for cancellation of non-bailable warrant issued against them.

2. It is the case of the Petitioner No. 1 that he is employee of M/s. Venture Impex of whose Petitioner No. 2 is proprietor. They are in the business of

importing Distillate Marine Fuel Oil for industrial use and possessing license for the business. Crime in question was registered on 21.11.2021 for the offence punishable under Sections 420, 471 read with Section 34 of the Indian Penal Code and Sections 3 and 4 of Essential Commodities Act and Sections 23(1)(a) of Petroleum Act. The said offence was registered against nine persons. After conclusion of investigation, charge-sheet came to be filed and R.C.C. No. 104/2022 was numbered. Learned trial Court issued non-bailable warrant against Petitioners.

3. It is the contention of Petitioners that they were completely unaware about any such proceedings and could know about it only from accused no. 11 Sharad Rastogi on 14.02.2023. It was learnt that the charge-sheet is filed under Section 299 of Cr.P.C against the present Petitioners and some other accused and warrant was issued against them. An application was moved on 16.02.2023 before learned JMFC, Dharur, District Beed along with undertaking that they will make themselves available on the next date of hearing and NBW was sought to be quashed. Learned JMFC rejected the said

application by passing impugned order dated 16.02.2023. Against the said rejection of the order of cancellation of NBW, anticipatory bail application was filed before the Sessions Court at Mumbai. This application was rejected by order dated 23.02.2023. Thereafter an application was filed before the Principal Seat of High Court at Bombay being ABA No. 695/2023 for transit bail. The said application came to be rejected by order dated 08.03.2023 with observation that the application for cancellation of NBW has already been rejected and that the said order has not been challenged. Hence, the present Petition.

4. Learned Counsel for the Petitioners submits that the learned trial Court has committed error in not cancelling NBW and insisting upon the presence of the Petitioner for the said purpose. It is submitted that the Court also failed to take into consideration the fact of summons of criminal case was never issued and question of issuance of NBW does not arise. It is his further submission that there is noncompliance of Sections 82 and 83 of the Code of Criminal Procedure, which is mandated to declare an accused as absconder.

By relying upon the order of this Court in B.A. No. 1272/2021 wherein it is held that where the charge-sheet is silent on the point as to what steps were made to apprehend accused and there is noncompliance of Sections 82 and 83 of the Code, filing of charge-sheet under Section 299 would not give right to file charge-sheet against the accused claiming him to be absconder.

5. Learned APP opposed the said contentions by submitting that offence committed by the Petitioners is serious in nature and learned JMFC has passed detailed order of rejecting the prayer of cancellation of NBW issued against them and hence, no interference is called in the said order.

6. Perusal of the record indicates that charge-sheet came to be filed in connection with Crime No. 260/2021 registered on 18.11.2021. The charge-sheet indicates that the same has been filed against accused nos. 10 to 14 under Section 299 of the Code. Perusal of the charge-sheet does not show as to the steps taken by the investigating agency for taking custody of these accused. There is further no material on record to indicate that the Petitioners were declared as

absconder by complying provisions of Sections 82 and 83 of the Code. Thus, as a matter of fact, the Petitioners were never declared as absconder accused. Section 299 of Code empowers the Court to record evidence in absence of the accused but that does not give any power to the investigating agency to file charge-sheet under the said provision against any accused. Needless to record that for the purpose of issuance of NBW against any person, the service of summons is pre-condition. Undisputedly herein this case no summons is issued to the Petitioners for the appearance in RCC No. 104/2022.

7. Learned Magistrate seems to have mistaken the request for cancellation of warrant as an application for grant of bail to the Petitioners. Since NBW was not issued by filing due procedure, it was always open for the learned Magistrate to cancel the said warrant of arrest and to issue summons to the Petitioners for their appearance. In case, thereafter they would fail to appear before the Court, appropriate steps could have been taken for securing their presence by adopting measures of issuance of bailable warrant and non-bailable warrant thereafter. No doubt, it is discretion

of the Magistrate to cancel the warrant of arrest in presence of accused before it, but there is no complete embargo on the cancellation of warrant in appropriate cases even on application through Advocate, with undertaking to appear before the Court thereafter. More particularly, when there was no compliance of pre-conditions for issuance of NBW, it was not justified for the said Court to refuse to cancel warrant and insist upon personal hearing. The principles laid down by Hon'ble Apex Court in case of Satyendra Kumar Antil Vs. Central Bureau of Investigation, (2022) 10 SCC 51, are not followed in the instant case, which highlighted the need of compliance of procedure before issuance of non-bailable warrant against accused.

8. In the facts and circumstances of the case, learned Magistrate was not justified in insisting physical presence of the accused for the purpose of cancellation of NBW in view of the fact that prior to issuance of such warrant, no summons was issued to the Petitioners nor Petitioners were declared as absconding accused after compliance mandatory provisions of Sections 82 and 83 of Cr.P.C.

9. In view of above discussion, the impugned order dated 16.02.2023 passed in R.C.C. No.104 of 2022 by learned Magistrate cannot sustain and same is set aside. NBW issued in this proceeding stands cancelled. It is clarified that setting aside of the impugned order and cancellation of NBW issued against Petitioner, shall not be construed as Petitioners having case for grant of bail on merits. Any application for bail, if filed, shall be decided on its own merit in accordance with law. It is further open for Magistrate to secure presence of Petitioners as per law.

10. Petition stands allowed in above terms.

(R.M. JOSHI, J.)

Malani