

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(Criminal Revisional Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 161 of 2024

Md. Enamul @ Enamul Rahaman

Vs.

The State of West Bengal & Ors.

For the Petitioner : Mr. Jaydeep Kanta Bhowmik
Mr. Sayantan Bhowmik
Mr. Subham Kumar
Ms. Rikta Sarkar
Ms. Sayantani Das

For the State : Mr. Aditi Shankar Chakraborty, Ld. APP
Mr. Arjun Chowdhury

Order dated : 11.07.2024

Ajoy Kumar Mukherjee, J.:

1. Being aggrieved and dissatisfied with the order dated 1st February 2024 and also being aggrieved by connected subsequent orders passed by Chief Judicial Magistrate Jalpaiguri in GR case No. 4836 of 2023 the petitioner herein contended that on the basis of the written complaint lodged by a BSF Personnel at Kotwali Police Station, aforesaid criminal proceeding under section 14 of the Foreigners Act has been initiated against one Bangladeshi national and two others including the petitioner herein.

2. Petitioner submits that he has no nexus with the alleged offences and he was quite unaware about the existence of the said case. Even not on a single occasion, the investigating officer visited the house of the petitioner in connection with the alleged offences. However after completion of investigation charge sheet has been submitted against petitioner and two others under sections 14A/14C of the Foreigners Act, showing the petitioner and another person as absconder.

3. It is further submitted that on 01.02.2024 learned Court below without applying his judicial mind was pleased to issue warrant of arrest against the petitioner. He further submits that thereafter next date was fixed on 15.02.2024 and subsequently on 28.02.2024, the court below issued arbitrarily warrant of proclamation as well as warrant of arrest against the petitioner. Thus the petitioner submits that the impugned order passed by the court below is not only bad in the eye of law but also it became a mark of derision of justice. Accordingly the petitioner has prayed for setting aside the order impugned.

4. Mr. Chakraborty learned counsel appearing on behalf of the state submits that from the certified copy of orders annexed with the case it clearly reveals that inspite of specific knowledge, the petitioner herein was evading the process of court and as such the court below was justified in issuing warrant of arrest against the petitioner and as warrant of arrest could not be executed against the petitioner herein, the court below was further justified in issuing the warrant of proclamation and warrant of attachment by the order dated 28.02.2024.

5. I have considered submissions made by both the parties.

6. On perusal of the order dated 01.02.2024 it appears that no service return of summons was received from I.C. Kotwali P.S. in respect of present petitioner Md. Enamul and one Md. Maqbul. However on the basis of submission made by Additional Public Prosecutor (APP) that there is no chance that the summon could be served upon the said two accused persons and on the basis of prayer made by learned APP for issuance of warrant of arrest against the said two accused persons, the court below issued warrant of arrest showing said two accused persons including the present petitioner as absconder and 15th February 2024 was fixed for execution report in respect of said two accused persons.

7. It further appears that by a subsequent order dated 28.02.2024 the court recorded that no execution report of warrant of arrest in respect of the present petitioner and the other accused was received, but court below issued warrant of proclamation and warrant of attachment at the same time against the said two accused persons fixing next date for execution report of warrant of proclamation and warrant of arrest.

8. Needless to mention that before issuing warrant of arrest or before issuing the proclamation, court below must have reason to believe that the accused is absconding or concealing himself to avoid execution of warrant. In the present case irrespective of the fact that no service return of summons was received by the court, the warrant of arrest was issued and not only that though police has not submitted any non-execution report in connection with warrant of arrest, the court below issued the order of proclamation and attachment simultaneously.

9. The expression “reason to believe” occurring in section 82 suggests that the magistrate must be subjectively satisfied that the persons has

absconded or has concealed himself on the materials before him. Here the petitioner/accused has clearly stated on oath in his application that he was not at all aware about the issuance of warrant of arrest against him and also regarding the notices issued by the investigating officer and the investigating team never went to his house during investigation. Accordingly it is not clear how the court came to the conclusion that the petitioner was evading the investigation or the court process for which the warrant of arrest or the proclamation order needed to be issued. Moreover , when there is no material that the accused was absconding, order of attachment without issuing proclamation under section 82, is an illegal order because in order to attract penal consequences mentioned in the section, the proclamation under the previous section should be a valid proclamation satisfying all the requirements with regard to its publication.

10. It is needless to state that jurisdiction to pass an order of attachment cannot be assumed by the court below unless a proclamation under section 82 of the code has been issued. The provisions make it clear that the normal rule to be followed by the magistrate is to wait until the expiry of 30 days to enable the accused to appear in terms of the proclamation. The words "*at any time after the issue of proclamation*" appearing in section 83(1) only means that if after the issue of proclamation either of the two conditions mentioned in clauses (a) or (b) of the proviso to section 83 (i) comes into existence, an attachment may be made without waiting for 30 days to expiry but even in such a case the magistrate has to record reasons for arriving at the judicial satisfaction that conditions mentioned in section 83 (1) (a) or (b) has been satisfied and for which he has issued simultaneous order for proclamation and attachment. In the present context even without

having received any report that the person against whom warrant of arrest was issued has absconded, the magistrate concerned had issued warrant of arrest and thereafter passed an order of proclamation and attachment simultaneously.

11. In such view of the matter the order impugned passed by the court regarding issuance of warrant of arrest dated 01.02.2024 as well as order regarding issuance of writ of proclamation and writ of attachment simultaneously without assigning reason vide order dated 28.02.2024 are illegal and accordingly hereby recalled.

12. Petitioner is given liberty to surrender before the court below within a period of 30 days from the date of communication of the order and in the event of such surrender, the court below will dispose of petitioners prayer, if any, in accordance with law. In the absence of surrender by the petitioner as above the order impugned regarding issuance of warrant of arrest dated 01.02.2024 shall revive.

13. CRR. 161 of 2024 is accordingly disposed of.

14. Urgent certified copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Ajoy Kumar Mukherjee, J.)