

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.66151 of 2023**

Arising Out of PS. Case No.-791 Year-2015 Thana- AURANGABAD COMPLAINT CASE
District- Aurangabad

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1. AJEET KUMAR SON OF VIJAY PRASAD @ PARMESHWAR SINGH
 2. PAPPU KUMAR SON OF VIJAY PRASAD @ PARMESHWR SINGH
BOTH RESIDENTS OF VILLAGE- NARAYANPUR, P.O.-
KAPSIYAWAN, P.S.- HILSA, DISTRICT- NALANDA

... .. Petitioner/s

Versus

1. THE STATE OF BIHAR
2. ALOK RANJAN @ LOVEKESH CHAUDHARY SON OF
NARMADESHWAR CHAUDHARY RESIDENT OF VILLAGE- HATHNI,
P.S.- NOKHA, DISTRICT- ROHTAS PRESENTLY RESIDING AT
JASOIYA MORE, PURANI G.T. MORE, P.S.- AURANGABAD NAGAR,
DISTRICT- AURANGABAD

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Kumar Kaushik, Advocate
For the Opposite Party/s : Mr. Mithlesh Kumar Khare, APP

**CORAM: HONOURABLE MR. JUSTICE PARTHA SARTHY
C.A.V. JUDGMENT**

Date : 14-08-2024

1. Heard learned counsel for the petitioners and learned counsel for the State of Bihar. No one appeared on behalf of the opposite party no.2.

2. The instant application has been filed praying for quashing the order dated 20.6.2023 passed in Complaint Case no.791 of 2015 whereby the learned Additional Chief Judicial Magistrate-VII, Aurangabad was pleased to order for issuance of process under section 82 of the Cr.P.C.

3. Learned counsel for the petitioners submits that by



order dated 24.8.2023, the process under section 83 of the Cr.P.C. was also issued.

4. As per the prosecution case based on the complaint filed by the opposite party no.2 on 13.8.2015 in the Court of learned Chief Judicial Magistrate, Aurangabad alleges inter alia that he is the Supervisor of Rohtas Transport Agency which looks after the booking of the vehicles inside the factory for loading and unloading work. It is stated that showing the fraudulent owner book of truck bearing registration no.BR 25G-353, the petitioners, who were the driver and the conductor, got the material loaded on the truck and took Rs.18,740/ as rent for the same. For the said purpose, they were to receive Rs.1,32,059/ after reaching the goods to Laxmi Cement Store. It is further stated that on 22.7.2015, once again showing the fraudulent papers of the owner of MH-16Q-5254, the accused loaded 420 bags of cement weighing 50 kgs each worth Rs.1,21,863/ on their truck. The complainant stated that on both the occasions, the goods loaded on the truck did not reach the destination and on making enquiries from the office, it transpired that all the documents which had been produced including the registration papers were forged and fabricated. It is in this manner that a total of 820 bags of cement having a total value of Rs.2,53,122/ have



been taken away and it is on account of making enquiries in the office of the truck registration etc. that there was delay on the part of the complainant in lodging the case. It is stated that on going to the police station, the case was not registered and hence the instant complaint.

5. On the complaint filed by the opposite party no.2, Complaint Case no.791 of 2015 was registered in the Court of the learned Chief Judicial Magistrate, Aurangabad. The complainant and the witnesses were examined in support of the complaint and by order dated 13.5.2016 passed in Complaint Case no.791 of 2015, cognizance was taken under sections 406, 420 and 120B of the Indian Penal Code and summons were ordered to be issued. Requisites were filed by the complainant and summons issued on 20.5.2016 followed byailable warrant on 12.9.2017, non-ailable warrant on 29.5.2018, process under section 82 Cr.P.C. on 20.6.2023 and process under section 83 Cr.P.C. was issued on 24.8.2023.

6. Learned counsel for the petitioners submits that the entire ordersheet of the learned trial Court of Complaint Case no.791 of 2015 has been brought on record as Annexure-P/2 to the petition. Referring to the same, it is submitted that it does not disclose service of summon nor execution ofailable warrant or



non-bailable warrant against the petitioners. It is thus submitted that there being no service report of notice, the order under section 82 Cr.P.C. as also under section 83 Cr.P.C. should not have been passed and the same having been passed are illegal, not sustainable and fit to be quashed. Learned counsel for the petitioners in support of his submissions has relied on a number of judgments including that of this Court dated 8.3.2018 passed in **Cr. Misc. no.629 of 2018 (Sanjay Kumar vs. The State of Bihar and Anr.)**.

7. The application is opposed by learned APP for the State. It is submitted by learned counsel appearing for the State that summons having been issued for appearance of the petitioners and on the petitioners not appearing that the bailable warrants were issued followed by the non-bailable warrants. On the petitioners still avoiding appearance that the process under section 82 of the Cr.P.C. was issued on 20.6.2023 followed by the process under section 83 Cr.P.C. on 24.8.2023.

8. Having heard learned counsel for the parties and having perused the material on record, this Court finds that the complaint having been filed as stated herein above after completion of enquiry, cognizance was taken in the case on 13.5.2016 under sections 406, 420 and 120B of the Indian Penal



Code and summons were ordered to be issued for appearance of the petitioners. Having perused the photocopy of the certified copy of the ordersheet of the learned trial Court hearing the complaint case, it transpires that the requisites were filed on 18.5.2016 and the summons issued on 20.5.2016. The case was taken up on different dates including 22.6.2016, 30.8.2016, 14.11.2016, 23.1.2017, 9.3.2017, 8.5.2017, 29.5.2017 and 22.8.2017. All these orders record that the service report with respect to the issuance of summons are awaited. Without there being any service report with respect to the issuance of summons, by order dated 12.9.2017 bailable warrants were ordered to be issued and once again without awaiting any report of service of bailable warrant, by order dated 29.5.2018 non-bailable warrants were issued.

9. This Court further finds that the matter was heard on as many as 21 dates in between 14.8.2018 and 8.5.2023 but the ordersheet nowhere records of service of non-bailable warrant. By order dated 20.6.2023, without there being any service report on record nor the Court having recorded its satisfaction to the effect that the petitioners are avoiding service etc., by order dated 20.6.2023, the learned trial Court orders for issuance of process under section 82 of the Cr.P.C. Thereafter the order dated



24.7.2023 records that the service report with respect to process under section 82 Cr.P.C. is still awaited and without there being any service report, by order dated 24.8.2023, the learned trial Court orders for issuance of process under section 83 Cr.P.C.

10. This Court in the case of Sanjay Kumar (supra) held as follows:

“17. On perusal of the order-sheet, it is manifest that in absence of service report of summonses,ailable warrants of arrest were issued against the petitioner and in absence of service report ofailable warrants of arrest, the court issued non-ailable warrant of arrest and processes under Sections 82 and 83 of the Cr.P.C. The learned Magistrate, while passing the order, completely failed to apply her judicial mind and passed the order mechanically.

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

19. 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 accused persons absconded or they are concealing themselves before issuing the proclamation. It is also not known as to whether the proclamation was



even issued or the same remained merely in the order-sheet of the Magistrate.

20. 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.

21. In the present case, as seen above, after issuance of summonses there is no report that they were served upon the accused persons and in absence of service report of the summonses, the court issued warrants of arrest against the accused persons. Further, in absence of service report ofailable warrants of arrest, the court issued non-ailable warrants of arrest against the accused persons. Furthermore, there being no report regarding service of summonses,ailable warrants of arrest and non-ailable warrants of arrest and without expressing satisfaction that the accused persons are absconding or concealing themselves, the learned Magistrate passed order for publishing a written proclamation requiring the petitioner to appear before the court and even without satisfying himself as to whether written proclamation was even published again issued a composite order under Sections 82 and 83 of the Cr.P.C.

22. 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 Criminal Procedure Code can afford to traverse beyond the provisions of the law.



23. In **Inder Mohan Goswami** (*supra*) 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 of 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."

24. 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)."

11. Coming to the facts of the instant case as stated herein above as also evident from the ordersheet of the learned trial Court, herein also the learned trial Court proceeded in the matter without there being any service report of the summons or bailable warrant of arrest. The procedure adopted by the learned



trial Court was of issuing nonailable warrant, process under section 82 and thereafter under section 83 Cr.P.C. even without recording its reasons and satisfaction to the effect that the petitioners were deliberately avoiding service. The orders issuing process under section 82 Cr.P.C. as also under section 83 Cr.P.C. were clearly contrary to the procedure prescribed under the Code of Criminal Procedure. The same thus being not sustainable, are both fit to be quashed.

12. The order dated 20.6.2023 as also the order dated 24.8.2023 issuing process against the petitioners under section 82 and 83 of the Cr.P.C. in connection with Complaint Case no.791 of 2015 pending in the Court of learned Additional Chief Judicial Magistrate-VII, Aurangabad, being not sustainable, are both hereby quashed.

13. The application is allowed.

(Partha Sarthy, J)

Saurabh/-

AFR/NAFR	
CAV DATE	17.05.2024
Uploading Date	14.08.2024
Transmission Date	

