

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr. M.P. No. 2722 of 2019

1. Md. Rustum Alam @ Rustom
2. Md. Sahzad @ Md. Sajjad
3. Saleha Bibi @ Saleha Khatoon
4. Md. Sohrab ... **Petitioners**

-versus-

The State of Jharkhand ... **Opposite Party**

CORAM : HON'BLE MR. JUSTICE ANANDA SEN

For the Petitioners : Mr. Kumar Amit, Advocate
For the State : Mr. Sardhu Mahto, A.P.P.

ORDER

Reserved On 10.12.2019

Pronounced on 27/04/2020

5/ 27.04.2020 In this criminal miscellaneous petition, the petitioners have prayed for quashing the orders dated 08.02.2018, by which non-bailable warrant of arrest has been issued, 26.06.2018, by which process under Section 82 of the Code of Criminal Procedure (hereinafter referred to as **the Code**) and 30.01.2019, by which process under Section 83 of the Code have been issued, against the petitioners, by the Chief Judicial Magistrate, Latehar in connection with Complaint Case No. 399 of 2016.

2. In this criminal miscellaneous petition filed under Section 482 of the Code, the points, which have been raised by the learned counsel are by way of challenge to the orders issuing non-bailable warrant of arrest and the orders by which process and order of attachment, respectively issued under Sections 82 and 83 of the Code.

3. The main contention of the petitioners is that the Court below, in a most mechanical manner issued non-bailable warrant of arrest. In the similar manner the process under section 82 of the Code and thereafter attachment order in terms of Section 83 of the Code have been issued. It is their

contention that, even without receipt of the service report of bailable warrant of arrest, non-bailable warrant of arrest have been issued against the petitioners. Similarly, without there being any service report of non-bailable warrant of arrest, process under Section 82 of the Code has been issued. Further, without any service of the process under Section 82 of the Code, attachment order in terms of Section 83 of the Code has been issued. It is also the case of the petitioners that the processes are being issued in utter violation of the respective provisions laid down in the Code, i.e. Sections 73, 82 & 83 thereof, thus, these orders need to be set aside.

4. The petitioners also submit that the Court should have been satisfied that there is necessity to issue warrants and orders in terms of Sections 82 and 83 of the Code and the satisfaction should be recorded in the order itself. This recording would suggest that the court has applied its mind and has satisfied himself that the processes under Sections 82 of the Code and attachment order under Section 83 of the Code are necessary to be issued for procuring attendance of the accused. In this case, in a most mechanical manner the orders have been passed by the Court even without recording any satisfaction, which renders the impugned orders invalid. It is submitted that the Hon'ble Supreme Court has held that issuing a warrant of arrest is a very serious act, which directly affects the rights of an individual and while doing so, the Court has to be very cautious. It is submitted that only after fulfilling the mandatory prerequisites and after compliance of the provisions of the Code, these processes can be issued. It is further submitted that in absence of any subjective satisfaction, which must be based on materials on record, the impugned orders need to be set aside. They submit that consequence of order passed under Sections 82 and 83 of the Code is serious, thus, the orders passed under the aforesaid Sections must be passed judiciously and not mechanically.

5. Learned A.P.P., appearing on behalf of the State, submits that as the petitioners failed to appear before the Court below, the Court had no other option but to issue warrants of arrest and thereafter, processes under Sections 82 of the Code and order of attachment under Section 83 of the Code. He submits that there is no illegality in the impugned orders issuingailable and non-ailable warrants of arrest and also the processes under Section 82 of the Code and order of attachment under Section 83 of the Code. He submits that when an accused fails to appear in Court, the Court, to procure his attendance, can take all coercive steps.

6. I have heard learned counsel for the petitioners and the State at length. I have also heard the counsel appearing on behalf of the petitioners in Cr. M.P. No. 435 of 2019 (Mr. Jitendra S. Singh) and Cr. M.P. No.2686 of 2019 (Mr. Indrajit Sinha) as the grounds taken in those applications are also similar. All the lawyers had argued to their satisfaction.

7. The main challenge is the orders issuing non-ailable warrants of arrest and processes under Sections 82 of the Code and order of attachment under Section 83 of the Code on the ground that the nature and the manner by which these impugned orders have been passed is illegal as it does not conform the procedure laid down by law.

8. To judge the submission of the parties and the correctness of the orders, I have gone through the petition including the impugned orders. It is necessary to quote the impugned orders, which is subject matter of this case. The same are quoted herein below:-

***“08.02.2018-** Attendance of complt through lawyer has been filed.*

Accused is absent. O/C to issue N/B/W against the absent accused.

Put up on 27.02.2018 for app.”

***26.06.18.-** Attendance of complt. Through lawyer has been filed.*

*Accused is absent. E/R of N/B/W not received.
O/C to issue process u/s 82 Cr.P.C. against the
accused persons.
Put up on 26.07.2018 for apper.*

30.1.19- *Complt is on attendance.
Accused is absent.
O/C to issue process u/s 83 Cr.P.C. against the absent
accused.
Put up on 14/2/19 for appearance.”*

9. Chapter VI of the Code of Criminal Procedure, 1973 deals with the process to compel appearance. The said chapter is divided in four parts. Part ‘A’ relates to summons; Part ‘B’ relates to warrant of arrest, Part ‘C’ relates to proclamation and attachment; and Part ‘D’ relates to other rules regarding processes. In the present case, this Court is not concerned with the provisions as enumerated in Part ‘A’ and Part ‘D’ of Chapter VI.

10. On 08.02.2018, warrant of arrest has been issued. The order has already been quoted above. From the aforesaid order, I find that as the accused was absent, the Court issued non-bailable warrant of arrest against the accused. Warrant is issued in terms of Section 73 of the Code. Now the question is whether the aforesaid order fulfils the condition laid down under Section 73 of the Code of Criminal Procedure or not. Section 73 of the Code reads as follows: -

73. 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.*
(2) *Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.*
(3) *When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under Section 71.*

11. From a reading of the aforesaid provision of law, I find that a Magistrate has jurisdiction and power to issue warrant of arrest, which can be directed against any escaped convict, proclaimed offender, against any person who is an accused of a non-bailable offence and is evading arrest. Thus, person against whom warrant of arrest can be issued, must fall in either of the aforesaid three categories. Admittedly, in the case in hand, when warrant of arrest was issued, these petitioners were neither an escaped convict nor a proclaimed offender. They can, at best, fall in the third category, i.e., “an accused of a non-bailable offence and is evading arrest”. So, it can be presumed that Court has issued warrant on the ground that the petitioners are accused of non-bailable offence. Only being an accused of a non-bailable offence is not a ground to issue warrant of arrest, as per the provisions of Section 73 of the Code. The said accused, who is wanted in a case involving a non-bailable offence, must also be evading his arrest. The word ‘**and**’ used in Section 73(1) of the Code is a conjunctive clause. Thus, both the conditions should simultaneously exist to enable the Court to issue warrant of arrest. This position of law should have been considered by the Court while issuing a warrant of arrest. This means that a person not only should be an accused of an offence, non-bailable in nature, but also should be found evading his arrest. There is nothing in the impugned orders to suggest that the petitioners were evading arrest.

12. 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. 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 12 of the judgment

rendered in the case of **Raghuvansh Dewanchand Bhasin (supra)** is quoted hereunder: -

12. In Inder Mohan Goswami v. State of Uttaranchal, 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 (SCC pp. 17-18, paras 53-55)

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.

13. If liberty of a person is to be curtailed, the same has to be done strictly in accordance with the law so provided for. In this case, it is being curtailed by issuance of non-bailable warrant of arrest. Thus, the Court has to

record his satisfaction that the conditions laid down in the law for issuing warrant of arrest has been fulfilled and the procedure has been complied with. This satisfaction of the Court should be reflected in the order itself, to be gathered from the record, then only warrant of arrest can be issued. The Court has to prima-facie be satisfied that the person accused of committing a non-bailable offence is also evading his arrest. There has to be material before the Court to reach at the aforesaid conclusion. Without recording such subjective satisfaction to the effect that the accused is also evading his arrest, which should be on the basis of the materials placed before the Court, warrant of arrest cannot be issued. This satisfaction can be derived from the police paper/ case diary. Mere absence of the accused cannot give rise to a presumption that he is evading arrest, which in turn cannot be the sole ground to issue warrant of arrest.

14. In this case only on the ground of absence of the accused, the warrant has been issued. Further, from the record, I also find that the service report of bailable warrant was not before the Court. Thus, the order issuing warrant of arrest, without recording satisfaction that the accused are evading their arrest, is not in consonance with the provisions of Section 73(1) of the Code. Accordingly, the order by which non-bailable warrant of arrest has been issued against the petitioners, is, hereby, quashed and set aside.

15. Now, the second issue raised in this case is in respect of issuance of processes under Section 82 of the Code. Section 82 of the Code has five sub sections. It is necessary to quote Section 82 of the Code in its entirety, which reads 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.

(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)

16. From perusal of sub section (1) of Section 82 of the Code, it is clear 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.

17. Sub section (2) of Section 82 of the Code provides how the proclamation has to be published. Section 82(2)(i)(a)(b)(c) provides that the same has to be publicly read in some conspicuous place of the town or village where the person ordinarily resides. The proclamation should also be affixed to some conspicuous part of the house of homestead where the person ordinarily resides. There is a requirement of fixing a copy of the proclamation at some conspicuous part of the court-house also. Over and above the said procedure, a provision has been made in 82(2)(ii) of the Code for a direction to publish the same in a newspaper. This part relating to publication in newspaper is not mandatory, but the previous procedures are.

18. Sub section (3) of Section 82 of the Code is a very important provision, which requires the Court to record that the requirements of sub section (2)(i) of Section 82 of the Code has duly been complied with. This provision is also mandatory in nature.

19. Sub section (4) of Section 82 of the Code provides that if a person is accused of an offence punishable under Sections 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 186), and such person fails to appear, complying with the proclamation, he will be declared as a proclaimed offender.

This is a penal clause as a “proclaimed offender” becomes an accused punishable in terms of Section 174A of the Indian Penal Code. This is a separate offence by itself. He can be tried, convicted and punished for a term, which may extend to 7 (seven) years and also shall be liable to payment of fine.

20. When violation of any procedure of law attracts a penal provision (herein declaration as proclaimed offender), the procedure, which seeks to declare him an offender, has to be strictly followed and cannot be relaxed. This penal provision makes compliance of Section 82(3) of the Code mandatory in

nature. In this regard it is necessary to refer a judgment of Hon'ble Supreme Court. The Supreme Court in the case of **Securities and Exchange Board of India versus Gaurav Varshney and Another** reported in **(2016) 14 SCC 430 (para 32.5)** has held as under: -

32.5 And filthy because, contravention of Section 12(1-B) entails penal consequences, and therefore, cannot be construed as directory. We therefore hereby accept the submission advanced on behalf of the learned counsel for the Board and hold that the bar created for new operators, of a collective investment initiative, was absolute and mandatory. The bar under Section 12(1-B) restrained persons (who were not engaged in any collective investment venture up to 25.01.1995) from commencing activities concerning collective investment, till they had obtained a certificate of registration, in consonance with the Collective Investment Regulations.

21. Thus, from the reading of Section 82 of the Code, it is clear that at first the Court has to have sufficient materials before him to reach to a conclusion to believe that a person, against whom warrant of arrest has been issued, is absconding or is concealing himself, and it is not possible for the authorities to execute the warrant of arrest. This satisfaction has to be recorded in the order while issuing processes under Section 82 of the Code. In this situation also, from the records of the case, the Court has derive the aforesaid satisfaction. Non-recording of subjective satisfaction in the order will make the order bad and a non-speaking one. A non-speaking order involving a procedure, which attracts a penal offence (if the order is not complied with), cannot sustain in the eyes of law.

22. Further, 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 present himself in

compliance of the proclamation order. This date and place should be mentioned in the order itself.

23. Form IV, which is part of Second Schedule of Code is the form in which proclamation is required to be issued. The said form provides for mentioning the place and date, for the person to appear in compliance of the order. This is a statutory form. This form is filled by the Office of the Court. Thus, the date and place, which is mentioned in the said form must also be reflected in the ordersheet. 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, which is a statutory form, must be scrupulously followed and filled up as per the date, time, place fixed by the Court, which should be reflected in the ordersheet.

24. The Supreme Court, in the context of service of summons under the Civil Procedure Code, 1908, in the case of ***Auto Cars versus Trimurti Cargo Movers Pvt. Ltd. & Ors.*** reported in ***(2018) 15 SCC 166***, held that any non-compliance with the statutory requirements regarding mentioning of the specific “day, date, year and time” would amount to material infirmity rendering summons as well as their service bad in law and consequently cannot be held to be duly served.

The Supreme Court, while taking note of the statutory form as mentioned in the Appendix-B to the Code of Civil Procedure, as also the provisions of Section 27 and Order 5 of the Code of Civil Procedure, held that the requirements specified in law by the statute are not an empty formality. The Supreme Court, while interpreting the provisions of the Code of Civil Procedure, held that the provisions relating to service of summons are mandatory in nature and relied upon a well settled principle of interpretation that when the legislature provides a particular thing to be done in a particular

manner, then such thing has to be done in the same prescribed manner and in no other manner.

25. The aforesaid principle laid down by the Hon'ble Supreme Court can very well be applied here and in the cases where warrants, processes and attachment orders are issued in terms of the Code and the statutory forms appended to the statute.

26. Another aspect which has to be taken note of, is that the the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh versus Pradeep Sharma*** reported in ***(2014) 2 SCC 171***, after relying on other judgments, has held 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, the said order cannot be passed in mechanical manner without recording satisfaction and reasons nor can the same 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.

27. While going through the order issuing processes under Section 82 of the Code in this case, I find that simply because the accused are absent, the Courts have issued processes under Section 82 of the Code in a most mechanical manner without recording subjective satisfaction as to why it is necessary to issue the proclamation. There is no material which suggests that the Court has reasons to believe that the petitioners have absconded or are concealing themselves so that warrant cannot be executed. Further, neither the place nor the date of appearance of the accused is mentioned in the ordersheet, recording of which is mandatory in terms of Section 82(1) of the Code. These laches make the order issuing processes under Section 82 of the

Code, absolutely bad and unsustainable in the eyes of law. Thus, the said order is also, hereby, quashed and set aside.

28. The next challenge is thrown to the attachment order passed in terms of Section 83 of the Code. I find that the attachment order in terms of Section 83 of the Code has been passed since the accused remained absent inspite of issuance of processes under Section 82 of the Code. This also cannot be a ground for passing an attachment order in terms of Section 83 of the Code.

29. Here it is necessary to quote the provisions of Section 83(1) of the Code, which reads as under: -

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.

30. Section 83(1) of the Code clearly provides that the Court, which is issuing proclamation under Section 82 of the Code, **for the reasons to be recorded in writing**, may order for attachment of moveable or immovable properties. It is, thus, the mandate of the law that the reasons for issuing attachment order has to be recorded in the order itself. Non recording of the reasons will make the order invalid and unsustainable.

31. Further, from the aforesaid provision of law, it is clear that attachment order under Section 83 of the Code can be issued to attach the property belonging to the proclaimed person. Statement to the effect that the

proclamation was duly published has to be made in terms of Section 82(3) of the Code, which provides that the Court has to record a statement in writing to the effect that the proclamation was duly published on the specified date in the specified manner as provided in Clause (i) of sub section (2) to Section 82 of the Code. This statement of the Court, which is to be recorded as per the statute, is a conclusive evidence that the requirement of law has been complied with, which is a pre-requisite for declaring a person a proclaimed offender/person absconding. Without recording the aforesaid statement in writing to the effect that the requirement of Section 82 of the Code has been complied with, a person cannot be declared to be a proclaimed offender/absconder, an attachment order in terms of Section 83 of the Code cannot be issued.

32. Thus, before issuing any attachment order under Section 83 of the Code against a person absconding, the statement, as envisaged in terms of Section 82(3) of the Code has to be on record. This is all the more necessary, as mentioned earlier, the said person can be tried and punished for a separate offence punishable under Section 174A of the Indian Penal Code.

33. 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. Since this is not the subject matter before this Court, I am not dealing with the said proviso. The fact remains that in a case where processes in terms of Section 82 and 83 of the Code are issued separately, then without recording a statement, as envisaged under Section 82(3) of the Code, attachment order under Section 83 of the Code cannot be issued. The absence of the said statement will lead

to a conclusion that there was nothing before the Court to suggest that the proclamation under Section 82 of the Code so issued, was properly served. Until and unless proclamation under Section 82 of the Code is properly served, attachment order under Section 83 of the Code cannot be issued.

34. In the case in hand, I further find that no reasons, as necessitated in terms of Section 83(1) of the Code is mentioned in the impugned orders. Further, there is no statement in compliance of Section 82(3) of the Code on record. These lapses make the impugned orders under Section 82 and Section 83 of the Code bad in law, which needs to be quashed.

35. In view of what has been discussed and held above, I find that none of the provisions, as envisaged in Sections 73, 82 and 83 of the Code has been complied with by the Court below. Non-compliance of the mandatory provisions of law renders the impugned orders, by which order issuing non-bailable warrant of arrest, proclamation under Section 82 of the Code and attachment order, in terms of Section 83 of the Code have been passed in this case, are bad and, thus, are quashed and set aside.

36. The matter is remitted to the Court concerned to proceed afresh and pass fresh orders in accordance with law, after complying with the provisions as provided in the relevant Sections of Code and also in terms of the discussion made above.

37. This criminal miscellaneous petition, thus, stands allowed to the aforesaid extent.

(Ananda Sen, J.)