

(2015) 08 JH CK 0074

In the Jharkhand High Court

Case No : Writ Petition (Cr.) No. 250 of 2015

Balvir Singh Tomar

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 11-08-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 154, 157(1), 164, 41, 41(1)
Penal Code, 1860 (IPC) — Section 354, 354(A), 354b, 376(C), 506

Citation : (2015) 08 JH CK 0074

Hon'ble Judges : Ravi Nath Verma, J

Bench : Single Bench

Advocate : Anil Kumar Sinha, Senior Advocate, Krishna Murari, M. Asghar and D.S. Rathore, for the Appellant; Ram Nivas Roy, S.C., Advocates for the Respondent

Final Decision : Dismissed

Judgement

Ravi Nath Verma, J—The petitioner by invoking the extra ordinary jurisdiction of this Court under Section 226 of the Constitution of India has prayed for quashing the notice dated 09.06.2015 (Annexure-6) issued under Section 41(A) of the Code of Criminal Procedure (in short "the Code") in connection with Chutia P.S. Case No. 29 of 2015, under Sections 376(C)/511, 354, 354(A), 354b and 506 of the Indian Penal Code whereby and whereunder, the petitioner has been informed to appear before the Investigating Officer of the case and explain his defence.

2. At the instance of the informant Sonali Tripathi, the aforesaid case was instituted with the allegation that the informant is presently pursuing her Bachelors Course in Radiation and Imaging Technology, 2nd Year, NIMS University, Jaipur and resides in the college Hostel. On 25.10.2014, the Chancellor of her college Balvir Singh Tomar- the petitioner visited Ranchi and stayed in a Hotel. Since she was also in Ranchi, the petitioner invited her and her

father in hotel in a programme in connection with opening of a news channel. After conclusion of the said programme at about 8.00 p.m., the petitioner called her and informed that he wants to send her to Europe under students exchange programme and requested her to stay. Whereafter, her father went away to some other place. The petitioner called her in his room and repeated the same statement to send her to Europe in order to make her career and sat near her and using force upon her tried to open her clothes. The informant raised objection then he left her. Since the petitioner was aged about 70 years, she could not understand his bad intention. Thereafter, she was subjected to indecent behaviour by the petitioner on several occasion in his chamber on the same ground of being sent her to Europe. On 01.02.2015 at 6:30 a.m., she received a message on her "WhatsApp" and also received a call of petitioner on 04.02.2015 and talked her about 47 minutes. In the said conversation, he used words of dual meaning by saying that she should become his intimate and confidential and tried to impress upon her to fulfill his physical needs. She recorded the entire conversation in her mobile. Even in past, the petitioner had sexually exploited several girls for which 2-3 F.I.Rs. had been lodged but being influential and money powered man, he is still roaming free. She conveyed the entire incidence to her father, who directed her to immediately come to Ranchi. She came back to Ranchi on 05.02.2015 and lodged the present first information report.

3. On perusal of the record, it appears that the petitioner before filing of this writ application had filed anticipatory bail application before the Sessions court and after rejection of prayer, filed A.B.A. No. 1030 of 2015 before this Court. After the order of rejection by this Court, he preferred S.L.P.(Cr.) No. 4075 of 2015 before the Hon"ble Supreme Court, which was also dismissed vide order dated 26.05.2015. Since, non-bailable warrant was issued against him, he preferred one Criminal Revision No. 287 of 2015 before this Court with a prayer to quash the warrant of arrest and the processes issued under Section 82 of the Code. The said revision application was allowed vide order dated 26.03.2015 and the warrant of arrest was set aside. The petitioner had also preferred W.P.(Cr.) No. 75 of 2015 in this Court challenging the very institution of the first information report but during argument, his counsel prayed for withdrawal of the said writ, which was accorded by order dated 19.06.2015. One another Writ Application bearing W.P.(Cr.) No. 247 of 2015 has also been filed for quashing the first information report in connection with present Chutia P.S. Case No. 29 of 2015.

4. Learned senior counsel Mr. Anil Kumar Sinha after taking the Court through the allegations in the first information report and all other relevant materials, seriously contended that the registration of the crime was with malafide intention to harass this petitioner and it is in clear violation of the fundamental rights guaranteed to the petitioner under Articles 14, 19 and 21 of the Constitution of India as on the face of the allegations made in the F.I.R., no case is made out against the petitioner. It was also submitted that without complying the mandates given by Hon"ble Supreme Court to issue notice under Section 41(A) of the Code, warrant of arrest was earlier issued against the petitioner, which

was subsequently set aside and that even though the warrant of arrest was set aside, the I.O. of the case with mala fide intention had sent a notice showing issuance of non-bailable warrant to Security Incharge, Delhi Airport while this petitioner was going abroad as a member with the team of the President of India. Learned senior counsel further relying upon the mandates given by the Hon'ble Supreme Court in a case *Ramdeo Food Products Private Limited v. State of Gujarat*; 2015(2) JBCJ 518 (SC) submitted that before taking any step for arresting or before issuing a notice under Section 41-A of the Code, preliminary enquiry is to be conducted when there is a delay of more than three months in initiating criminal prosecution. It was also submitted that a notice under Section 41(A) of the Code (Annexure-6) has now been issued but the same is only an eye wash and it has been issued in a mechanical manner and that a representative of the petitioner had already appeared before the Investigating Officer and had submitted the gist of defence but the Investigating Officer wants the appearance of this petitioner before him with intention to arrest this petitioner, which would be evident from the act of the Investigating Officer that during pendency of this writ application, warrant of arrest has been issued against this petitioner, which has been brought on record by filing an interlocutory application. Hence, the prayer is to quash the notice issued under Section 41(A) of the Code as contained in Annexure-6 of this writ application.

5. Contrary to the aforesaid submissions, learned counsel representing the State relying upon different paragraphs of the counter affidavit seriously contended that the victim-informant in her statement recorded under Section 164 of the Code has made serious allegation of her sexual assault corroborating the allegations made in the first information report, which are all cognizable in nature. It was also submitted that warrant of arrest issued earlier was set aside on the submission of the senior counsel Mr. Sinha in the revision application that in view of Section 41(A) of the Code, a notice was mandatory to be issued before taking any step for issuance of warrant of arrest but now, even after issuance of notice, he is still evading. It was also submitted that besides the notice under Section 41-"A" of the Code, two other notices were also issued for his appearance before the Investigating Officer. It was also submitted that since the allegation made by the informant in the first information report was a continuing offence, there is no delay in lodging the F.I.R. and the observation of the Hon'ble Supreme Court in *Ramdev Food Products Private Limited* (supra), has no application in the instant case and no preliminary enquiry was required.

6. Chapter-XII of the Code deals with the information to the police and their powers to investigate, provides for entering information relating to a cognizable offence in station diary to be kept by the Officer-in-Charge of a Police Station as provided under Section 154 of the Code, which is usually known as First Information Report (in short "F.I.R."). After recording the F.I.R., if the Officer-in-Charge of the Police Station has reason to suspect commission of a cognizable offence, which he is empowered to investigate subject to compliance of other requirements, he shall proceed to investigate the facts and circumstances and if

finds necessary, to take steps for arrest of the offender as provided under Section 157(1) of the Code. After initiation of the investigation, in the first place arrest of an accused is a part of the investigation and is well within the discretion of the Investigating Officer. Section 41 of the Code provides the discretion to a Police Officer to arrest without an order from a Magistrate and without a warrant, if a cognizable offence has been committed. Obviously, the Investigating Officer is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged in an appropriate case after some investigation. If the circumstances so prevail and the Investigating Officer finds it necessary, may arrest the accused persons. It is no doubt, the arrest of a person is an encroachment on the liberty of the subject and affects the reputation and status of the citizen and so the Investigating Officer has to exercise that power very cautiously. Considering the circumstances, the Hon"ble Supreme Court in the case Lalita Kumari Vs. Govt. of U.P. and Others, (2013) 12 AD 209 : AIR 2014 SC 187 : (2014) CriLJ 470 : (2013) 6 CTC 353 : (2014) 1 JCC 1 : (2013) 14 JT 399 : (2013) 4 RCR(Criminal) 979 : (2013) 13 SCALE 559 : (2014) 2 SCC 1 : (2014) 1 SCJ 68 in paragraphs 115 and 120.6 held as follows:--

"115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instance where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

- (a) Matrimonial disputes/family disputes
- (b) Commercial offences
- (c) Medical negligence cases
- (d) Corruption cases
- (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months" delay in reporting the matter without satisfactorily explaining the reasons for delay."

7. From bare perusal of the aforesaid finding, it appears that prompt registration of the F.I.R. is mandatory but power of arresting or of investigation should not be mechanical rather it requires the application of mind in the manner provided. In the instant case, from the F.I.R., it appears that the first offence of this petitioner with the informant was committed on 25.10.2014 when he visited Ranchi but after return of the informant to the University on 06.11.2014, again, she was called by the petitioner on 07.11.2014 and the same continued till 04.02.2015

and so, the Category "e" of paragraph - 120.6 as given in the above case Lalita Kumari (supra) where preliminary enquiry is required in cases where steps for initiation of criminal prosecution were taken after three months, is not fully applicable in the present case as it was a continuing offence. However, the court while issuing non-bailable warrant in any case has to see and examine the provisions of Section 41 and 41(A) of the Code, which subsequently came in existence after amendment in the year 2010 of the Code. For better appreciation, a reference of Section 41 of the Code is necessary, which is reproduced herein below:--

"Section 41. When police may arrest without warrant.--(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a)

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely

(i)

(ii) the police officer is satisfied that such arrest is necessary-

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to the police officer; or

(e) as unless such person is arrested, his presence in the court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest."

8. Obviously from the aforesaid provision, it is amply clear that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A Police Officer before arrest, in

such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured.

Section 41(A) of the Code, which aimed to avoid any unnecessary arrest or threat of arrest of the accused, was inserted in the Code by amendment, which is re-produced herein below:--

"Section 41-A.--Notice of appearance before police officer - (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent court in this behalf, arrest him for the offence mentioned in the notice."

9. The Hon"ble Supreme Court in the case *Km. Hema Mishra Vs. State of U.P. and Others*, AIR 2014 SC 1066 : (2014) AIRSCW 624 : (2014) CriLJ 1107 : (2014) 2 JT 26 : (2014) 1 SCALE 342 : (2014) 4 SCC 453 while dealing with almost a similar situation by referring Section 41-A of the Code, held as follows:--

"The abovementioned provisions make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under Clause (b) of sub-section (1) of the amended Section 41. But, all the same, unwillingness of a person, who has not been arrested to identify himself and to whom a notice has been issued under Section 41-A could be a ground for his arrest."

10. The Hon"ble Supreme Court in another case *Arnesh Kumar Vs. State of Bihar*, AIR 2014 SC 2756 : (2014) AIRSCW 3930 : (2014) 7 JT 527 : (2014) 8 SCALE 250 : (2014) 8 SCC 273 while explaining Section 41-A of the Code has also observed as follows:--

"The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) Cr.P.C., the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.P.C. has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid."

11. In the instant case, after the warrant of arrest was set aside, the Investigating Officer, as mandated by the Hon'ble Supreme Court, issued notice under Section 41(A) of the Code to the petitioner. Two other notices were also issued to the petitioner before issuance of the above notice to appear before the Investigating Officer and explain his defence but the petitioner preferred not to appear before the Investigating Officer rather in course of argument, a very unusual prayer was made by the learned counsel for the petitioner to provide interim protection by way of grant of anticipatory bail to the petitioner as he has every apprehension that the moment he appears before the Investigating Officer in pursuance to the notice issued under Section 41(A) of the Code, he will be arrested.

12. Undoubtedly, High Court has very wide power under Article 226 but the very vastness of the power imposes on it the responsibility to use them with circumspection and in accordance with judicial consideration and circumstances so much so that while entertaining writ petitions, Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision when the anticipatory bail application filed by the accused has already been rejected up to the Apex Court. In such circumstances, no such relief can be granted to the petitioner at this stage. Obviously the unusual prayer of the petitioner accounts to circumventing the earlier orders of rejection of anticipatory bail up to the Apex Court.

13. So far as the conduct of the petitioner is concerned, it appears that he has availed almost all remedies available in the Code - (i) by filing writ questioning the lodging of the first information report but later on after some submission, the same was withdrawn at the instance of the petitioner; (ii) by filing anticipatory bail applications, which were rejected up to the Hon'ble Apex Court; and (iii) for setting aside the order issuing non-bailable warrant which was allowed on his submission that no notice under Section 41-A of the Code has been issued before issuance of non-bailable warrant of arrest. Thereafter, the present notice was issued for the appearance of the petitioner before the Investigating Officer, which is the subject matter of this writ application. Thus, in the light of above circumstances coupled with the complete chain of events as discussed above, I find no plausible ground to interfere and even I find no error in issuance of notice under Section 41-A of the Code. The mere apprehension of the petitioner of his

arrest, in my opinion, is no ground to quash the notice in the circumstances discussed above.

14. Taking the entire case in its totality, I do not find any merit in this writ application requiring any interference. Resultantly, the Writ Petition (Cr.) is dismissed.