

(2023) 09 OHC CK 0060

In the Orissa High Court

Case No : CRLMC Nos. 3753, 3755, 3757, 3758 Of 2023

Durga Prasad Mishra

APPELLANT

Vs

Union Of India (Enforcement Directorate) & Another

RESPONDENT

Date of Decision : 11-09-2023

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 227
Code of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 34, 120B, 406, 420, 467, 468, 471
Prize Chits and Money Circulation (Banning) Act, 1978 — Section 4, 5, 6
Prevention of Money Laundering Act, 2002 — Section 3, 4, 44

Citation : (2023) 09 OHC CK 0060

Hon'ble Judges : Sashikanta Mishra, J

Bench : Single Bench

Advocate : S.C. Mohapatra, Pratik Dash, S. Anuvav, S.C. Nayak, S. Pattanaik, S. Mohapatra, Gopal Agarwal

Final Decision : Allowed

Judgement

Sashikanta Mishra, J

1. All the four applications filed under Section 482 of Cr.P.C. are directed against the same order and were hence heard together and are being disposed of by this common judgment.

2. All these four petitioners have been arrayed as accused persons in CMC(PMLA) No. 84 of 2020 in the Court of learned Sessions Judge, Khurdha at Bhubaneswar which is a complaint instituted under Section 44 of the Prevention of Money Laundering Act, 2002 (in short "PML Act") for the alleged commission of the offence punishable under Section 4 of the said Act. Said case has arisen out of an FIR bearing No. RC/46/S/2014-KOL dated 05.06.2014 lodged by CBI, SPE ACB, Kolkata under Section 120-B/406/420/467/468/471/34 of IPC read with Sections 4,5 and 6 of Prize Chits and Money Circulation (Banning) Act, 1978. It has been alleged that the accused persons entered into criminal conspiracy and committed

criminal breach of trust, cheating, forgery etc. and invested the proceeds of crime generated thereby in assets standing in their names, which is an offence punishable under Section 3 of the PML Act. By order dated 02.03.2021 the Court below took cognizance of the offences and issued summons to the accused persons for their appearance. Pursuant to such summons the accused persons entered appearance through counsel. On 26.12.2022 a supplementary complaint was filed by the Enforcement Directorate against some more accused persons and cognizance was also taken. In the meantime, the proceeding was stalled for various reasons including abstention of work by the lawyers as per resolutions passed by the local Bar Association. Thereafter, the accused persons sought for and were granted adjournment to appear. Again the matter was stalled for some dates because of resolution passed by the local Bar Association. The present petitioners sought for time to appear on 05.01.2023, which was allowed, and again 02.02.2023, which was also allowed. On the next two dates that is, on 23.02.2023 and 23.03.2023, the accused persons were absent. On 20.04.2023 no steps were taken on behalf of the accused persons including the present petitioners for which the Court below directed issuance of NBW/A against them. Said order is impugned in the present applications.

3. Heard Mr. S.C. Mohapatra, learned Senior Counsel assisted by Mr. Pratik Dash, learned counsel for the petitioners and Mr. Gopal Agarwal, learned counsel appearing for the Enforcement Directorate.

4. Learned Senior counsel, Mr. Mohapatra has forcefully argued that the accused persons being absent on the date fixed, the Court below ought to have issued a bailable warrant to procure their attendance instead of straightaway issuing NBW, since the petitioners were never arrested during investigation and only summons had been issued for their appearance. It is further submitted that the petitioners had engaged a counsel to represent them in the case but for reasons best known to him he did not take necessary steps on the date fixed nor informed the next date of the posting of the case to the petitioners, for which they remained completely ignorant of the proceedings. Since there no further communication from such counsel, the petitioners having come to know about issuance of the NBW as per the impugned order have engaged a new counsel, for which the case record was advanced to 01.08.2023. In any event, steps had been taken earlier on most of the dates on behalf of the petitioners and therefore, the Court below should not have taken the drastic step of issuing NBW. Mr. Mohapatra has relied upon some case laws to buttress his argument which shall be discussed at the appropriate place.

5. Mr. G. Agarwal, learned counsel appearing for E.D. on the other hand would argue that the order sheet of the case would reveal that the Court below had granted enough liberty to the petitioners to appear but they failed to do so. Moreover, they did not comply with the summons issued by the Court below but appeared through counsel, who went on seeking adjournments for their appearance. Since the allegations against the petitioners of money laundering

are grave in nature and involve huge amount, the petitioners should not be shown any leniency. Mr. Agarwal has relied upon some case laws which will be discussed later.

6. The facts of these cases being as discussed above, the only question that falls for consideration of this Court is, the justifiability of the issuance of NBW against the petitioners by the Court below. As is evident, the petitioners were not arrested earlier and on a complaint being filed, the Court below took cognizance of the offence under Section 4 of PML Act and issued summons to the accused persons including the present petitioners requiring their attendance. The petitioners appeared through counsel and sought adjournments for their physical appearance. It is also evident, from perusal of the entire order sheet of the case that the case was adjourned on some occasions on the prayer made on behalf of the petitioners but the proceedings were also stalled on most of the dates because of abstention of work by members of the Bar Association. Be that as it may, having received the summons, it was obligatory for the petitioners to physically appear before the Court below in obedience thereto. On 20.04.2023 neither the petitioners appeared nor any steps were taken on their behalf for which the Court below issued NBW.

7. Keeping the above facts in the background, the case laws cited by the parties may now be seen. In the case of *Inder Mohan Goswami v. State of Uttaranchal*, reported in (2007) 12 SCC 1 it was held as under

"47. Before parting with this appeal, we would like to discuss an issue which is of great public importance i.e. how and when warrants should be issued by the court? It has come to our notice that in many cases bailable and non-bailable warrants are issued casually and mechanically. In the instant case, the court without properly comprehending the nature of controversy involved and without exhausting the available remedies issued non-bailable warrants. The trial court disregarded the settled legal position clearly enumerated in the following two cases.

48. In *Omwati v. State of U.P.* [(2004) 4 SCC 425 : 2004 SCC (Cri) 1287] this Court dealt with a rather unusual matter wherein the High Court firstly issued bailable warrants against the appellant and thereafter by issuing non-bailable warrants put the complainant of the case behind bars without going through the facts of the case. This Court observed that the unfortunate sequel of such unmindful orders has been that the appellant was taken into custody and had to remain in jail for a few days, but without any justification whatsoever. She suffered because facts of the case were not considered in proper perspective before passing the orders. The Court also observed that some degree of care is supposed to be taken before issuing warrants.

49. In *State of U.P. v. Poosu* [(1976) 3 SCC 1 : 1976 SCC (Cri) 368] at SCC p. 5, para 13 the Court observed:

"13. ... Whether in the circumstances of the case, the attendance of the accused-

respondent can be best secured by issuing a bailable warrant or non-bailable warrant, is a matter which rests entirely in the discretion of the Court. Although, the discretion is exercised judicially, it is not possible to computerise and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the court would take into account the various factors such as, the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, larger interest of the public and State. [See State v. Capt. Jagjit Singh, AIR 1962 SC 253 at p. 255, para 3.] ”

Personal liberty and the interest of the State

50. Civilised countries have recognised that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice—liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law.

51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

When non-bailable warrants should be issued

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.

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 straitjacket 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."

8. The observations made in *Inder Mohan Goswami* (Supra) were again reiterated by the Supreme Court in the case of *Vikas v. State of Rajasthan*, reported in 2013 AIR SCW 6256. Thus the position that emerges is, it is not proper for the Court to issue NBW at the first instance if a summons or bailable warrant is likely to produce the desired result. The drastic step of issuing NBW seeking to curb the liberty of the accused thereby need not be resorted to. Nothing is forthcoming in the impugned order as to why the Court below felt persuaded to issue NBW straightaway without even considering issuance of a bailable warrant. In fact, no reason whatsoever has been cited in the impugned order which makes it all the more vulnerable.

9. Mr. Agarwal has relied upon a decision of the High Court of Rajasthan in the case of *Shyam Sunder Singhvi v. Union of India*, reported in 2020 SCC OnLine Raj 1981, wherein the Court taking note of the gravity of the offence of money laundering did not feel persuaded to interfere with the order issuing NBW by the trial Court relying upon observations made by the Apex Court in the case of *Y.S. Jagan Mohan Reddy v. CBI*, reported in (2013) 7 SCC 439 and the case of *State of Gujarat v. Mohanlal Jitmalji Porwal*, (1987) 2 SCC 364, wherein it was basically held that economic offences should be dealt with seriously and considered as grave offences and therefore refused to interfere with the order issuing NBW. The accused moved the Supreme Court against such judgment in SLP (Crl.) No. 792/2020, which came to be dismissed. Before proceeding further it would be relevant to note that while dismissing the SLP the Supreme Court has not specifically referred to the ratio decided in *Inder Mohan Goswami* (Supra) or overruled the same. It was a *in limine* dismissal and therefore, the point of law involved is open.

10. Coming to the facts of this case, as has already been discussed, no reason whatsoever was cited by the Court below to direct issuance of NBW. The reasons cited by Mr. Agarwal to justify issuance of NBW such as, gravity of the economic offences etc. have not been referred to by the Court below itself. To such extent therefore, the judgment of the Rajasthan High Court cited by Mr. Agarwal would have no application to the peculiar facts and circumstances obtaining in the present case. On the other hand, the principles laid down in Inder Mohan Goswami (supra) can be conveniently applied.

11. From the foregoing narration of the facts and law involved, this Court is of the view that given the absence of the accused persons and non-taking of the steps on their behalf, the Court below ought to have issued a bailable warrant of arrest since there is nothing on record to suggest that the accused persons have been deliberately avoiding to appear before the Court. The impugned order is thus rendered unsustainable in the eye of law warranting interference. Nevertheless, since the NBW rightly or wrongly has been issued it would be proper for the accused persons to physically surrender before the Court below and move for bail and in such event, they shall be released on bail on such terms and conditions as the Court below may deem fit and proper to impose.

12. The CRLMCs are accordingly allowed.

.....