

(1995) 08 MAD CK 0018
In the Madras High Court
Case No : Criminal O.P. No. 5312 of 1995

Sundaram and 3 others

APPELLANT

Vs

State of Tamilnadu

RESPONDENT

Date of Decision : 04-08-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438
Penal Code, 1860 (IPC) — Section 149

Citation : (1995) 2 LW(Cri) 564

Hon'ble Judges : Janarthanam, J

Bench : Single Bench

Advocate : C. Selvaraju, for the Appellant; S. Shanmughavelayutham, Additional Public Prosecutor for State, for the Respondent

Final Decision : Dismissed

Judgement

Janarthanam, J.—The present action is one resorted to under Sec.438 of the Code of Criminal Procedure, praying for the release of the petitioners on anticipatory bail.

2. The circumstances leading to the filing of this petition arise this way.

a) In respect of a transaction that took place on 23.2.1994 at 20.45 hours at Ottarpalayam, Sub Inspector of Police, Bangalapudur Police Station,

Periyar District (respondent) registered a case in CrI. No. 89/94 and took up investigation. In the said transaction, eight persons were arrayed as

accused. Of them, petitioners 1 to 4 are respectively accused 1,3,4, and 5. It appears that petitioners/accused 1, 3, 4 and 5 were not at all

arrested during the course of investigation. However, the respondent arrested the rest of the accused namely, A-2, A-6, A-7 and A-8 during the

course of investigation and all of them, it is said, had been released subsequently

on bail. After completing the formalities, the respondent filed a final report under Sec. 173(2) of the Code of Criminal Procedure against all the eight accused, for alleged offences under Sections 147, 148, 324, 325, 326 and 427 r/w. 149 I.P.C., which was taken on file as C.C.No.216 of 1994 on the file of Judicial Magistrate-I, Gobichettipalayam, on 5-9.1994.

b) After taking the case on file, the Court below, it is said, issued summons only to four accused, viz., Accused 2,6,7 and 8 for their appearance before Court and as respects Accused 1,3,4 and 5 issued non-bailable warrant for their arrest and production before Court, without issuance of any summons for their appearance at the first instance. Accused 2,6,7 and 8 alone, it is said, appeared before the Court below, pursuant to the summons issued, on 4.1.1995.

c) Petitioners/accused, 1,3,4 and 5 aggrieved by the issuance of a non-bailable warrant, without issuing summons at the first instance, came forward with the present action.

3. Liberty of a citizen is sacrosanct and such liberty cannot at all be snatched away by just caprice or whims and fancies of law enforcing authority, inclusive of magistracies unless compelling or impelling circumstances are in existence warranting of such snatching away of liberty of a citizen in the manner allowed by law. It is not at all the case of the prosecution that the petitioners were arrested at any point of time and subsequently released on bail. It must be understood here that arrest is not a condition precedent in all eventualities or situation before ever a final report under Sec.

173(2) of the Code is filed. Perhaps the investigating agency, in the case on hand, thought that there was no necessity at all for the apprehension of the petitioners before ever a final report under Sec. 173(2) of the Code had been filed. On the filing of such report, it behoves upon the Court below to inform the petitioners/accused 1,3,4 and 5 that the case against them had been taken on file and the hearing had been fixed on a particular day by the issuance of summons, requiring their presence in court on the hearing date fixed.

4. Chapter VI of the Code of Criminal Procedure contains a procedure relatable to service of summons and issuance of warrant of arrest. Certain provisions relevant for our present purpose may be referred to.

a) Sec.61 dealing with Form of Summons, prescribes that every summons issued by a Court under the Code shall be in writing, in duplicate, signed

by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of

the Court.

b) Sec.62 deals with the manner and methodology of service of summons. Under this Section, every summons shall be served by a public officer,

or subject to such rules as the State Government may make in this behalf, be an officer of the Court issuing it or other public servant. The summons

shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicate of the summons. Every

person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

c) Section 63 prescribes procedure for service of summons on corporate bodies and societies, with which we are not concerned.

d) Sec.64 deals with a situation when persons summoned cannot be found. It prescribed that when the person summoned cannot, by the exercise

of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing

with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the

other duplicate.

e) Section 65 deals with the procedure to be followed when service cannot be effected as has been provided u/s 64. It prescribes that if the

service cannot, by the exercise of due diligence, be effected as provided in Section 62, Section 63 or Section 64, the serving officer shall affix one

of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides, and there

upon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such

manner as it considers proper.

5.a) Sec.70 prescribes form of warrant of arrest and duration. Every warrant of arrest issued by a Court under -this Code shall be in writing,

signed by the presiding officer of such Court and shall bear the seal of the Court. It further prescribes that every such warrant shall remain in force

until it is cancelled by the Court which issued it or until it is executed.

b). Section 71 gives power to the Court, issuing warrant, to direct security to be taken. sub-Section (1) of Sec.71 prescribes that any Court

issuing a warrant for the arrest of any person may, in its discretion, direct by endorsement on the warrant that, if such person executes a bond with

sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the Officer, to whom

the warrant is directed, shall take such security and shall release such person from custody. Sub-Section (3) thereof prescribes that whenever

security is taken the section, the officer to whom the warrant is directed shall forward the bond to the Court.

c) Section 87 deals with issue of warrant in lieu, or in addition to, summons. It provides that a Court may, in any case in which it is empowered by

this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest...(a) if, either

before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that

he had absconded or will not obey the summons; or (b) if at such time he fails to appear and the summons is proved to have been duly served in

time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

6. One another section which occurs in Chapter XVI namely Sec.204 may be referred to here, which deals with issue of summons as well as

issuance of warrant. This section takes cognizance of an offence, in the sense of there being sufficient ground for proceeding, process is required to

be issued, either in the form of summons or warrant to the accused, depending upon the nature of the case and the fulfilment of certain

requirements. If a case is a summons case, summons shall ordinarily be issued for the attendance of an accused. Similarly, a warrant shall be issued

in a warrant case for his appearance or production. However, neither a summons, nor a warrant shall be issued against an accused, unless a list of

the prosecution witnesses had been filed. The provisions of this Section shall not, however, be deemed to affect the provisions of Section 87 of the

Code, wherein the Court's power for issuance of a warrant, in lieu of or in addition to summons is preserved in tact and such power may be

exercised, after recording its reasons in writing.

7. In the case on hand, as adverted to earlier, the Court below did not at all issue summons to the petitioners/accused 1,3,4 and 5. Yet another

fact, about which there is no dispute, is that no reason had been penned down by the court below for the issuance of a warrant, as mandated by

Section 87 of the Code, before ever a warrant had been issued to the petitioners/accused 1,3,4 and 5, for their arrest and production before

Court. The procedure adopted by the Court below is unwarranted and by the issuance of such a warrant, petitioners/accused 1,3,4 and 5 had

been put to tantalising and tormenting situation of running pillar to posts and moving this Court for the grant of anticipatory bail. I am of the view

that knocking at the doors of this Court under Sec.438 of the Code in such a situation is not a remedy at all. The proper procedure for the

petitioners/accused 1,3,4 and 5 is to approach the court below and file an application for the cancellation of the warrant so issued against them

under sub-section (2) of Sec.70 of the Code. One such an application is filed, it is, but, the duty of the Court below to strictly observe the

procedure as indicated by this Court in P.A. Saleem vs. State of Madras (1994 (2) L.W. (Crl.) 402).

8. With these observations, as above, this petition is dismissed.