
(2017) 02 PAT CK 0031

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 657 of 2016, (Arising out of P.S. Case No. - 64 Year - 2012 Thana - Simri District - Buxar)

Yamraj Kunwar

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 16-02-2017

Acts Referred:

Constitution of India, 1950 — Article 21, Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 73, Section 82, Section 83

Citation : (2017) 2 ECrC 281

Hon'ble Judges : Mr. Birendra Kumar, J.

Bench : Single Bench

Advocate : Mr. Digvijay Kumar Ojha, Advocate, for the Petitioners (in both these cases); Mr. Birju Prasad, G.P.-13, for the Respondents

Final Decision : Dismissed

Judgement

Mr. Birendra Kumar, J. (Oral)—Cr.W.J.C. No. 657 of 2016 has been filed under Articles 226 and 227 of the Constitution of India for issuance of a mandamus commanding the respondents to conduct fair and unbiased investigation of Simri P.S. Case No. 64 of 2012 lodged on 04.05.2012, for offences under Sections 406/420 of the Indian Penal Code, against respondent No. 10 Abha Devi. Further prayer is to direct the respondents to arrest the accused-respondent No. 10. The respondents are doing their official duty casually inasmuch as after issuance of warrant of arrest against respondent No. 10 in the aforesaid case the processes under Sections 82 and 83 Cr.P.C. have also been issued. Moreover, the respondent No. 10 appeared before the police for giving her specimen signature to be sent for forensic examination but she was not arrested.

2. The petitioner is informant of the aforesaid case.

3. Submission of the petitioner is that the respondents are not fairly investigating the case inasmuch as the accused Abha Devi is not being deliberately arrested in

spite of rejection of her prayer for anticipatory bail by this Court in Cr. Misc. No. 50359 of 2013 on 21.03.2014 and issuance of process under Section 82 Cr.P.C. on 02.03.2014 and process under Section 83 on 03.03.2014. The conduct of the investigating agency shows that it is in collusion with the accused and not fair in discharge of their official duty. The inaction of the police violates fundamental right of the petitioner guaranteed under Article 21 of the Constitution of India.

4. All the respondents have filed their counter affidavits. Some of the respondents have filed their show-cause in pursuance of order dated 29.08.2016.

5. To counter the aforesaid submission, contention of the respondent No. 10 is that in the facts and circumstances of the present case issuance of warrant of arrest under Section 73(1) of the Cr.P.C. or issuance of proclamation under Section 82(1) Cr.P.C. or issuance of order of attachment under Section 83(1) Cr.P.C. are against the mandate of law and suffers from abuse of the process of the law as the respondent No. 10 was pursuing her legal rights to seek for pre-arrest bail under Section 438 Cr.P.C. and was fully cooperative in the investigation of the case.

6. Submission is that the material available in the case-diary paragraphs 42, 47, 52, 57 and 82 would reveal that claim of only eight beneficiaries regarding non-receipt of money was found true and another co-accused was granted anticipatory bail by this Court for the reason that he had filed undertaking to refund back the remaining amount. His next contention is that the facts of this case is covered by the case of M.C. Abraham and another v. State of Maharashtra and others reported in (2003) 2 SCC 649, wherein the Hon"ble Apex Court held that arrest of the accused is discretionary power of the investigating agency and judicial interference under Article 226 of the Constitution would amount to exceeding the jurisdiction.

7. For proper appreciation of the rival contention it would be apt to refer to the provisions of Section 73(1) Cr.P.C. which reads as follows :

"73(1). 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."

A perusal of the aforesaid provision would reveal that the warrant of arrest can be directed only against escaped convict, proclaimed offender, which is not the present case and/or against any person, who is an accused of a non-bailable offence and is evading arrest. In the present case respondent No. 10 is an accused of non-bailable offence, however, she was not evading her arrest as she was pursuing bona fide her right to seek pre-arrest bail in Cr. Misc. 50359 of 2013 before this Court and prior to that before the learned Sessions Judge. This Court rejected the prayer only on 21.03.2014. Thus, it is clear that the learned Magistrate was not conscious of the exercise of his jurisdiction in issuing the warrant of arrest against respondent No. 10, without satisfying or recording a

finding in the order dated 23.08.2013 vide Annexure-5 that the respondent No. 10 was evading her arrest.

8. Section 82(1) of the Cr.P.C. reads as follows :

"82(1). Proclamation for person absconding.- 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."

Again the provision aforesaid requires that there must be reason for the Court issuing proclamation to believe that the person against whom warrant was issued is absconding or concealing himself to avoid the execution of warrant of arrest. In the present case proclamation was issued on 02.11.2013, when the prayer for anticipatory bail of this petitioner was pending. The order dated 02.11.2013 does not disclose that the Court has recorded that it has reason to believe that respondent No. 10 is evading or concealing herself from the process of law. Therefore, again the Court-below wrongly exercised its jurisdiction in issuing process under Section 82 Cr.P.C. If the process under Section 82 Cr.P.C. was not valid, subsequent process of attachment by order dated 03.03.2014 was bad in-law. Furthermore, the record would reveal that respondent No. 10, on being asked to give her signature, appeared before the authorities to give her signature for examination by Forensic Science Laboratory as such assisted in the further progress of the investigation. The conduct of respondent No. 10 does not show that this is a fit case wherein this Court should exercise the extra-ordinary jurisdiction to compel her to be arrested in the case.

9. The Hon"ble Apex Court in M.C. Abraham's case (supra) considered the identical question and observed in paragraphs 14 and 15 of the judgment which reads as follows :

"14 Arrest of an accused is a part of the investigation and is within the discretion of the investigating officer. Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognisable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he 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 appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the Court has no role to play. Since the power is discretionary, a police

officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognisable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognisable offence. Obviously, the power has to be exercised with caution and circumspection.

15. In the instant case the appellants had not been arrested. It appears that the result of the investigation showed that no amount had been defalcated. We are here not concerned with the correctness of the conclusion that the investigating officer may have reached. What is, however, significant is that the investigation officer did not consider it necessary, having regard to all the facts and circumstances of the case, to arrest the accused. In such a case there was no justification for the High Court to direct the State to arrest the appellants against whom the first information report was lodged, as it amounted to unjustified interference in the investigation of the case. The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest. In the very nature of things, a person may move the Court on mere apprehension that he may be arrested. The Court may nor may not grant anticipatory bail depending upon the facts and circumstances of the case and the material placed before the Court. There may, however, be cases where the application for grant of anticipatory bail may be rejected and ultimately, after investigation, the said person may not be put up for trial as no material is disclosed against him in the course of investigation. The High Court proceeded on the assumption that since petitions for anticipatory bail had been rejected, there was no option open for the State but to arrest those persons. This assumption, to our mind, is erroneous. A person whose petition for grant of anticipatory bail has been rejected may or may not be arrested by the investigating officer depending upon the facts and circumstances of the case, nature of the offence, the background of the accused, the facts disclosed in the course of investigation and other relevant considerations".

10. Considering the facts and circumstances of the this cases, as discussed above, as well as the decision of the Hon"ble Supreme Court above which is squarely applicable in the present facts and circumstances of this case, I am of the view that there is no merit in this criminal writ application, accordingly, it stands dismissed.

Cr. W.J.C. No. 974 of 2016 :

11. Respondent No. 10 Abha Devi of the aforesaid writ application has filed this criminal writ for quashing the orders dated 23.08.2013, 02.11.2013 and 03.03.2014 passed by the learned Chief Judicial Magistrate, Buxar, in Simri P.S. Case No. 64 of 2012 whereby warrant of arrest, process of proclamation and order of attachment respectively were issued against the petitioner. The grounds for challenge and prayer for quashment is mentioned while discussing the above

Cr.W.J.C. No. 657 of 2016. Further prayer is to issue mandamus to the respondent Nos.3 and 4 to not to arrest the petitioner till F.S.L. report regarding her specimen signature is received and the report substantiates a case of forgery as alleged in the F.I.R. The grounds for challenge are that the processes of warrant of arrest, proclamation and attachment have been issued without application of judicial mind inasmuch as in spite of the fact that the requirement of law was not complete to the extent that there was no material to conclude that the petitioner was evading her arrest. The prayer is for direction for non-arrest of the petitioner is on the ground that the petitioner is fully cooperative in the investigation and no substantial material has been collected against the petitioner up till now. Hence, arrest of the petitioner without material violates the fundamental right of the petitioner under Article 21 of the Constitution.

12. The contention of the respondents especially respondent No. 5 Yamraj Kunwar, who is petitioner of Cr.W.J.C. No. 657 of 2016 aforesaid is that since prayer for anticipatory bail has already been refused to the petitioner by this Court in Cr. Misc. No. 50359 of 2013 and that order has attained finality, this Court cannot exercise this extra-ordinary jurisdiction to stay the arrest of the petitioner, which would amount to negate its own order of rejection of anticipatory bail application. Now, it is at the discretion of the police to arrest the petitioner or the petitioner may surrender before the learned Court-below and pray for regular bail. Further no purpose would be served by quashing the order of issuance of warrant of arrests and other processes especially in view of the fact that the process of attachment had already been executed against the petitioner.

13. After hearing the parties, in my view the process of attachment has already been executed. Hence, the prayer to set aside the order of issuance of warrant of arrest dated 23.08.2013 and the order of issuance of order of attachment dated 03.03.2014 are infructuous now. Similarly, in view of the judgment in M.C. Abraham's case aforesaid as well as the fact that this Court has already refused the prayer for anticipatory bail to the petitioner, no mandamus can be issued to prevent the arrest of the petitioner. Accordingly, this application stands dismissed.