

Rajasthan High Court - Jodhpur

Bhavin Tanwar vs State Of Rajasthan on 24 May, 2022

Bench: Dinesh Mehta

HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR S.B. Criminal Misc(Pet.) No. 3072/2022 Bhavin Tanwar S/o Radheshyam, Aged About 28 Years, R/o J- 51, Parshavnath City, Jodhpur, Rajasthan.

----Petitioner Versus

1. State Of Rajasthan, Through PP

2. Nidhika Singh Rathore D/o Sh. Ranvijay Singh, Aged About 31 Years, R/o Happy Hours School, Ajit Bhawan, Circuit House Road, Jodhpur.

--- Respondents

| | | |
|-------------------|---|---------------------------------------|
| For Petitioner(s) | : | Mr. C.S. Kotwani Ms. Swati Shekhat |
| For Respondent(s) | : | Mr. Mahipal Bishnoi, PP |

JUSTICE DINESH MEHTA

Order

24/05/2022

1. Instant petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'), involves challenge to the order dated 16.05.2022, passed by learned Special Metropolitan Magistrate, No.10 (N.I. Act Cases), Jodhpur Metropolitan (hereinafter referred to as 'the trial Court') whereby the petitioner has been declared absconder and proceedings under Sections 82 and 83 of the Code have been initiated.

2. Mr. Kotwani, learned counsel for the petitioner, invited Court's attention towards the proceedings of the trial Court and contended that the petitioner has never received any summons issued by the trial Court. He submitted that the fact that he never received any summons can be deciphered from a simple (2 of 9) [CRLMP-3072/2022] reading of the order impugned dated 16.05.2022, inasmuch as the trial Court itself has proceeded on conjectures, without recording any finding as to when the petitioner was served with the summons.

3. It was argued that without recording its satisfaction about petitioner's intention to avoid the proceedings or to abscond, the trial Court has initiated proceedings under Sections 82 and 83 of the Code and issued standing warrant against the petitioner, ignoring the facts and law involved in the present case.

4. Mr. Bishnoi, learned Public Prosecutor submitted that the petitioner, despite residing in Jodhpur, has intentionally avoided the service of the summons and, therefore, the order passed by the trial Court is perfectly just and valid.

5. Heard. Perused the material available on record.

6. Having heard learned counsel for the petitioner and upon perusal of the order-sheets, which have been placed on record by the petitioner and the impugned order dated 16.05.2022, this Court is of the considered view that the trial Court has erred in issuing standing warrant to the petitioner and initiating proceedings under Sections 82 and 83 of the Code.

7. The court below firstly issued summon against the present petitioner making it returnable on 05.02.2020. On 05.02.2020, the Presiding Officer was on leave and the case was adjourned to 05.03.2020. On 05.03.2020, noticing that despite summons having been served, the petitioner has not appeared, the Court below issued bailable warrant. On 03.09.2020 the court below noted that the bailable warrant dated 05.03.2020 had not even been issued, thus directed the office to do the needful immediately.

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8. Surprisingly, on 02.11.2020 the court below noted that the bailable warrant dated 05.03.2020 has not been served (thereby implying that the same has been issued) however, on 04.01.2021 it once again, noted that the bailable warrant dated 05.03.2020 has not been issued so far and observed that the needful be done immediately. On 02.03.2021 the court below noted that the bailable warrant dated 05.03.2020 has been returned unserved/unexecuted and the same be served immediately. On 14.09.2021 the court below adjourned the case awaiting appearance of the accused till the next date of hearing (26.11.2021). On 26.11.2021 and 08.03.2022, same orders (as 14.09.2021) were passed. And, finally on 16.05.2022 the trial Court issued a standing warrant against the petitioner while noting that the petitioner appears to be an absconder who has been dodging the bailable warrant and in the immediate future there is no possibility of securing his presence. The court simultaneously ordered that proceedings under sections 82 and 83 of the Code be initiated against him.

9. It is pertinent to note that the court below passed the order dated 16.05.2022 simply because it observed/found that the petitioner has not appeared on the dates fixed by it, without even examining or recording as to whether bailable warrant has been served or not. At this stage it would be relevant to discuss the diligence required of the court before proceeding under sections 82 and 83 of the Code.

10. Section 82 and 83 of the Code read thus:

"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 (4 of 9) [CRLMP-3072/2022] 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).

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 (5 of 9) [CRLMP-3072/2022] 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.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate. (3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made--

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases--

(a) by taking possession; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908)."

11. Upon perusal of sections 82 and 83 it is clear that action under section 82 is the pre-requisite to proceed under section 83 (6 of 9) [CRLMP-3072/2022] of the Code. Section 82 provides the court power to issue a proclamation upon fulfillment of the following conditions:

1. Court already issued a warrant

2. Court has reason to believe (i) such person has absconded or concealed himself such that warrant can't be executed.

12. The question that arises in the facts of the present case is that, is mere non-appearance on dates fixed by court sufficient to amount to a 'reason to believe' that a person has absconded or concealed himself such that warrant can't be executed? In the opinion of this Court the answer is in the negative. The Delhi High Court in the case of Rohit Kumar vs. State of NCT Delhi reported in 2008 Cri LJ 3561, has held as under:

"17. The sine qua non for an action under Section 82 is the prior issuance of warrant of arrest by the Court. There must be a report before the Magistrate that the person against whom the warrant was issued by him had absconded or had been concealing himself so that such warrant can be issued. An attachment warrant can be issued only after the issuance of proclamation."

13. The Allahabad High Court in the case of Pankaj Singh vs. State of Uttar Pradesh, has held as under:

"10. Section 82 Cr.P.C. pertains to proclamation for person absconding and for provisions of attachment. It clearly states that the court has to record a reason to believe if any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant can not be executed then such court may publish a written proclamation requiring him to appear at specified place and at a specified time not less than 30 days from the date of publishing such proclamation.

11. Upon perusal of provision of Section 82 Cr.P.C., it is evident that prior to issuance of any order under the said provision, the court has to record a reason that the person against whom warrant has been issued has specifically absconded or has concealed himself so that such a warrant can not be executed. As such from reading of the aforesaid provision, it is a mandatory (7 of 9) [CRLMP-3072/2022] duty cast upon the court concerned to record as to how and when the person concerned has absconded or has concealed himself so that the warrant can not be executed. For such purpose, it is the duty of the court concerned to indicate that the person was aware of the proceedings against him particularly also the investigation being conducted against him. Unless and until such a subjective satisfaction is recorded by the court concerned, provisions of Section 82 Cr.P.C. can not be invoked by the court concerned."

14. This Court being guided by the principles of justice and equity in relation to proceedings under section 82 and 83 of the Code, cannot in good conscience uphold the order dated 16.05.2022. Declaration of a 'proclaimed offender' under section 82 of the Code entails severe consequences and hence, the Courts must exercise caution before proceeding against the accused under Section 82 of the Code. At this stage it would be relevant to briefly refer to the ruling of Hon'ble the Supreme Court in the case of Inder Mohan Goswami & Ors. vs. State of Uttaranchal & Ors. reported in (2007)

12 SCC 1, which reads thus:

"51. 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."

15. In the facts of the present case the Court below has initiated action under sections 82 and 83 of the Code in the absence of any cogent reason to show that the accused is absconding such that warrant cannot be served. In the opinion of this Court, mere (8 of 9) [CRLMP-3072/2022] recording a 'it appears (,slk izrhr gksrk gS)' that accused has absconded is insufficient to proceed under section 82 of the Code because of the expression "such warrant cannot be executed".

16. The alleged absconding or concealment must be for the purpose of avoiding the warrant. The expression "such warrant cannot be executed" is extremely important because what is required to be ascertained is, that the accused is absconding despite being aware of the warrant. In the absence of such finding, it cannot be said that the accused is dodging or evading the warrant.

17. The trial Court has firstly, ignored the fact that on most of the occasions even the summons were not issued due to the fault of the office. That apart, during the period in question, entire society including the Government machinery remained standstilled due to spread of I and II wave of COVID. That apart, there was no material to infer let alone conclude that the petitioner has absconded; thirdly, the trial Court has not shown the basis on which it has concluded that the alleged absconding/concealment by the present petitioner was to avoid execution of the warrant.

17. In the opinion of this Court, before issuing standing warrant and initiating proceedings under Sections 82 and 83 of the Code, the trial Court is required to record a categorical finding/satisfaction that in spite of knowledge of the warrant, the petitioner has avoided appearance in the Court or has evaded the warrant. Simply because bailable warrants have been ordered to be issued or as a matter of fact have been issued without report of their service/execution, the trial Court should not and cannot issue (9 of 9) [CRLMP-3072/2022] standing warrant and initiate proceedings under Sections 82 and 83 of the Code, as a matter of course or routine.

18. The trial Court seems to have been swayed by the purported directions issued by Hon'ble the Supreme Court to decide Negotiable Instrument cases expeditiously. Expeditious disposal of cases is necessary but equally necessary is to observe mandate of law including procedural law.

19. In the opinion of this Court, endeavor of a Court should be to ensure proper compliance of the statutory provisions and service of the summons as mandated by law. Service of summons is a bed-rock of principles of natural justice. The Courts should not rush to issue standing warrant and initiating proceedings under Sections 82 and 83 of the Code, unless they are satisfied that the

accused is intentionally evading or circumventing the warrants in order to avoid the prosecution.

20. As an upshot of the discussion foregoing, the present petition is allowed and impugned order dated 16.05.2022 is quashed and set aside.

21. The petitioner shall appear before the trial Court on or before 10.06.2022 and furnish personal bond of Rs.1 lakh and two sureties of Rs.1 lakh each before the trial Court, whereafter the trial Court shall proceed in accordance with law.

22. The stay application also stands disposed of accordingly.

(DINESH MEHTA),J 235-skm/-

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