

(2020) 08 JH CK 0064

Jharkhand High Court

Case No: Criminal Miscellaneous Petition No. 4155 Of 2019

Sheela Kumari And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision: Aug. 11, 2020**Acts Referred:**

- Code Of Criminal Procedure, 1973 - Section 41A , 73, 73(1), 82, 167, 167(3), 439, 482
- Constitution Of India, 1950 - Article 21

Citation: (2020) 08 JH CK 0064**Hon'ble Judges:** Anil Kumar Choudhary, J**Bench:** Single Bench**Advocate:** Pandey Neeraj Rai, T.N. Verma**Final Decision:** Disposed Of

Judgement

1. Heard the parties through video conferencing.

2. This criminal miscellaneous petition has been filed invoking jurisdiction of this Court under Section 482 Cr.P.C. with a prayer to quash the order

dated 05.09.2019 passed by the Special Judge, C.B.I., Ranchi in Vigilance Case No.80 of 2015 whereby and whereunder, the learned court below has

issued warrants of arrest against the petitioners. As during the pendency of this criminal miscellaneous petition vide order dated 25.11.2019 in the said

case, on the prayer of the I.O. process under Section 82 Cr.P.C. against the petitioners have also been issued hence, I.A. No.501 of 2020 has been

filed by the petitioners with a prayer to amend the prayer portion of this criminal miscellaneous petition by incorporating the additional prayer to quash

the order dated 25.11.2019 (Annexure-6 of the said interlocutory application) by which the process under Section 82 Cr.P.C. has been issued in respect of the petitioners.

3. It is submitted by Mr. Pandey Neeraj Rai, the learned counsel for the petitioners that during the pendency of this criminal miscellaneous petition

vide order dated 19.02.2020, the petitioners were directed to appear before the I.O. of the case on 02.03.2020 at 10:30 a.m. and it was also directed

by the predecessor Bench that no coercive steps be taken against the petitioners till 17.03.2020 and vide order dated 17.03.2020 the interim relief

granted to the petitioners was extended till 07.04.2020. It is next submitted that the petitioners, in compliance of the said order, appeared before the

I.O. of the case and their statements have been recorded by the I.O.. Drawing attention of this Court to Section 73(1) Cr.P.C., which reads as under :

73.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.(Emphasis Supplied) It is submitted by the learned counsel for the petitioners that the discretion to direct a warrant to any person within

his local jurisdiction for the arrest is vested with the Chief Judicial Magistrate or a Magistrate of the first class in three eventualities

(i) for the arrest of any escaped convict;

(ii) for the arrest of proclaimed offender;

(iii) for the arrest of any person who is accused of a non-bailable offence and is evading arrest.

It is further submitted by the learned counsel for the petitioners that in this case admittedly, the petitioners are neither escaped convicts nor proclaimed

offenders, hence, the only way the warrant of arrest could have been directed against them is by recording a satisfaction that the petitioners are

accused of any non-bailable offence and also they are evading arrest by the learned Magistrate. Drawing attention of this Court to Annexure-3 at

page nos. 49-53 of the brief which is the requisition with annexures thereof, submitted by the Investigating Officer with a prayer for direction for

warrant for the arrest of the petitioners, it is submitted that there is no materials or averments made in those documents, basing upon which the

learned Magistrate has passed impugned order dated 05.09.2019, that the petitioners are evading arrest. It is next submitted that only because a

superior authority of the I.O. has called for an explanation from the I.O. as to why he did not obtain warrant of arrest, so merely on that basis without

making any effort to or approaching the petitioners to appear before him the I.O. without fulfilling the essential ingredient that the petitioners are

evading the arrest, submitted the said requisition for direction of warrant for the arrest of the petitioners and the learned Magistrate also without

recording his satisfaction in respect of the petitioners evading arrest has passed the said impugned order. Hence, it is submitted that the impugned

order is illegal and is liable to be quashed. In support of his contention, learned counsel for the petitioners relied upon the judgment of Hon'ble Supreme

Court of India in the case of State through C.B.I. vs. Dawood Ibrahim Kaskar and others reported in AIR 1997 SC 249, 4paragraph-23 of which

reads as under:-

23. Now that we have found that Section 73 of the Code is of general application and that in course of the investigation a Court can issue a warrant

in exercise of power thereunder to apprehend, inter alia, a person who is accused of a non-bailable offence and, is evading arrest, we need answer the

related question as to whether such issuance of warrant can be for his production before the police in aid of investigation. It cannot be gainsaid that a

Magistrate plays, not infrequently, a role during investigation, in that on the prayer of the Investigating Agency he holds a test identification parade,

records the confession of an accused or the statement of a witness, or takes or witnesses the taking of specimen handwritings etc. However, in

performing such or similar functions the Magistrate does not exercise judicial discretion like while dealing with an accused of a non-bailable offence

who is produced before him pursuant to a warrant of arrest issued under Section 73. On such production, the Court may either release him on bail

under Section 439 or authorise his detention in custody (either police or judicial) under Section 167 of the Code. Whether the Magistrate, on being

moved by the Investigating Agency, will entertain its prayer for police custody will be at his sole discretion which has to be judicially exercised in

accordance with Section 167(3) of the Code. Since warrant is and can be issued for appearance before the Court only and not before the police and

since authorisation for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after

exercise of judicial discretion based on materials placed before him, Mr. Desai was not absolutely right in his submission that warrant of arrest under

Section 73 of the Code could be issued by the Courts solely for the production of the accused before the police in aid of investigation.""(Emphasis

Supplied) and submits that the power to issue warrant of arrest has not been conferred upon the Magistrate to aid the police in the investigation. The

learned counsel for the petitioners further relied upon the judgment of a coordinate Bench of this court in the case of Niranjana Roy vs. The State of

Jharkhand through Secretary Cabinet (Vigilance) reported in 2013 0 Supreme (JHK) 403 and also reported in 2013 3 East Cr.C. 69, wherein in the

facts of that case where it was never reported to the court that the petitioner is evading arrest the order directing warrant was quashed. The learned

counsel for the petitioner also placed reliance on the order passed by a coordinate bench in the case of Md. Nasimul Hoda vs. The State of Jharkhand

& Ors reported in 2016 0 Supreme (Jhk) 528 which has also been reported in 2016 4 East CrC 310 and 2016 3 JLJR 498, wherein in the facts of that

case when the order directing warrant was passed mechanically merely on the requisition filed by the investigating officer without subjective

satisfaction of the learned Magistrate, the same was quashed.

The learned counsel for the petitioner further relied upon the case of Ashok Singh vs. The State of Jharkhand reported in 2019 0 Supreme (Jhk) 396

which is also reported in 2019 (2) JLJR 439, where in the facts of that case when the order impugned in that case of the learned Magistrate has no

reference of the reasons why the investigating officer has requisitioned issuance of warrant of arrest, a coordinate bench quashed the order by

observing thus in paragraph no.8:-

8. A glance through the proceeding in G.R. Case No.2017 of 2015 would disclose that a copy of the first information report was produced in the

court on 07.07.2015. Thereafter, on a requisition of the investigating officer for warrant of arrest against the petitioner, non-bailable warrant of arrest

has been issued vide order dated 09.02.2016. This order has no reference of the reasons why the investigating officer has requisitioned issuance of

warrant of arrest against the petitioner. It simply records that a notice under Section 41-A Cr.P.C. was issued to the accused-petitioner. The order

dated 09.02.2016 does not disclose that the investigating officer has recorded that being not satisfied with the response of the petitioner and finding

that the petitioner is not co-operating with the investigation a requisition has been made for issuance of warrant of arrest against the petitioner.

Exercise of powers under section 73 Cr.P.C. ensues serious consequence to an accused; it affects the liberty of an accused as guaranteed under

Article 21 of the Constitution of India. The powers under section 73 Cr.P.C. therefore must be exercised by the Magistrate on his subjective

satisfaction having formed on the basis of the materials brought before him. Time and again it has been said that the Magistrate is not a post-office; he

cannot work like a machine. *Mehmood UL Rehman vs. Khazir Mohammad Tunda and Others*, AIR 2015 SC 2195.

It is next submitted by the learned counsel for the petitioners that as the impugned order dated 05.09.2019 by which the warrant of arrest has been

issued is itself bad in law and not sustainable, so the subsequent order dated 25.11.2019 which has been passed basing upon the said order dated

05.09.2019 that too without judicious application of mind by the learned Magistrate is also not sustainable in law as well, hence, it should also be

quashed.

4. Mr. T.N. Verma, learned counsel for the Anti-Corruption Bureau on the other hand defended the impugned order and submits drawing attention of

this Court to the counter affidavit filed on behalf of the Anti-Corruption Bureau in this case, that upon the said orders of this Court dated 19.02.2020,

the petitioners have appeared before the I.O. of the case and the I.O. himself recorded their statements and after scrutinizing evidence, charge sheet

will be submitted soon against the three petitioners and at present further investigation is going on against the petitioners.

5. Having heard the submissions made at the bar and after going through the record, it is pertinent to mention here that as rightly submitted by the

learned counsel for the petitioners, there is no material in the record, neither in the requisition nor in the document annexed therewith, to show that the

petitioners are evading their arrest. In the impugned order dated 05.09.2019 passed by the learned court below, it has not been mentioned that the

petitioners are evading their arrest, which indicates that the, learned court below has not expressed subjective satisfaction regarding the said essential

ingredient for directing warrant for the arrest of the petitioners. It is a settled principle of law that the issuance of non-bailable warrant of arrest

involves interference with the 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 as has been held by the Hon'ble Supreme Court in the case of Inder Mohan

Goswami and Anr. vs. State of Uttaranchal and Ors reported in AIR 2008 SC 251 in paragraph

50. As the learned court below has not recorded any subjective satisfaction regarding existence of the essential ingredients for issuing non-bailable

warrant of arrest, that the petitioners are evading arrest, but without such essential ingredient has ordered issue the same, hence, the impugned order

dated 05.09.2019 is not sustainable in law and the same is quashed and set aside. As the subsequent order dated 25.11.2019 by the learned court

below by which process under Section 82 Cr.P.C. has been issued is based upon the said order dated 05.09.2019 by which non-bailable warrant of

arrest was issued, and as already the said order dated 05.09.2019 has been quashed and set aside, consequently, the order dated 25.11.2019 is also

quashed and set aside.

6. It is made clear that in view of the disposal of this criminal miscellaneous petition, the direction of no coercive steps to be taken against the

petitioners passed in this case vide order dated 19.02.2020 stands vacated.

7. The Anti-corruption Bureau is at liberty to proceed with the investigation of the case in accordance with law.

8. This criminal miscellaneous petition is disposed of accordingly.