

**(2014) 03 CAL CK 0016**

**Calcutta High Court**

**Case No:** C.R.R. No. 3554 of 2013

Nanki Bhayna

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** March 21, 2014

**Acts Referred:**

- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 71, 73, 82, 83
- Dowry Prohibition Act, 1961 - Section 3, 4
- Penal Code, 1860 (IPC) - Section 302, 304, 304B, 34, 364

**Citation:** (2014) 3 Crimes 586 : (2014) 3 RCR(Criminal) 504

**Hon'ble Judges:** Asim Kumar Roy, J

**Bench:** Single Bench

**Advocate:** Atanu Biswas and Sudipta Bera, Advocate for the Appellant; Manjit Singh, Ld. P.P. and Ayan Bhattacharyya, Advocate for the Respondent

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**Judgement**

Ashim Kumar Roy, J.

The subject matter of challenge in this criminal revision is an order whereby the learned Additional Chief Judicial Magistrate, Kalna issued warrant of arrest and proclamation of attachment against the petitioners in connection with Kalna P.S. Case No. 165/2013 under Sections 498A/304B/34 of the Indian Penal Code read with Sections 3/4 of the D.P. Act. It appears that the impugned order was passed nearly 2 months after the registration of the FIR and on the prayer of the investigating officer of the case. The issue arises for consideration whether a court can issue both warrant of arrest and proclamation of attachment simultaneously. As also whether the court below was justified on the prayer of the Investigating officer of the case to make the impugned order by merely recording seen the prayer of the Investigating officer and the prayer stands allowed

2. The core issues involved are centered around the interpretation of the provisions of Section 73, 82 and 83 of the Code of Criminal Procedure. While the first provision prescribes against whom and under what circumstances warrant of arrest can be issued, the remaining two prescribe the procedure for proclamation and attachment. Which are quoted below, for better application of the case.

Section 73 Cr.P.C. Warrants 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.

(2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken u/s 71.

Section 82 Cr.P.C. 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 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 u/s 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 provision 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 (I).

Section 83 Attachment of property of person absconding.-

(1) The Court issuing a proclamation u/s 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 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 with out 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 of 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 livestock 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).

3. Now from a plain reading of the aforesaid provisions, it is abundantly clear the steps provided thereunder to secure the presence of an accused cannot be taken recourse to simultaneously and coincidentally. A warrant can be issued against any person, amongst other, in a case where such person accused of a nonbailable offence is evading arrest. Whereas the proclamation may be published against an accused, where it is found that such accused against whom already a warrant of arrest has been issued, is absconding or concealing himself so that the warrant of arrest cannot be executed. In this regard a statement in writing by the court issuing the proclamation to the effect that proclamation was duly published on a specified day and in the manner prescribed thereunder shall be conclusive evidence that the proclamation was published in compliance with the provision of law. Even after publication of proclamation under sub-section (1) is in respect of a person accused of an offence punishable u/s 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.

In case of attachment of property, the court issuing proclamation for reasons to be recorded in writing, at any time after the issuance of proclamation, order the attachment of any property movable or immovable or both, belonging to the proclaimed person.

4. In this regard the decision of the Hon'ble Apex Court in the case of [Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others, Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others](#), would be of much relevance. The observation made by the Apex Court from Paragraph 50 to 57 are quoted below:

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 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 restored to. Personal liberty is paramount, thereof, 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.

57. The court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant.

5. Therefore having regard to the facts issuance of warrant of arrest ensue extremely serious consequences and ramification involving interference with personal liberty, a very precious right of an individual, such steps can only be taken in very exceptional cases, where court has come to a definite conclusion that without resorting to such coercive measures the presence of the accused could not be obtained. No order can be passed without proper scrutiny of the facts and complete application of mind.

6. Now, coming to the impugned order I find the same goes like this.....seen the prayer of the S.I. Subhas Chandra Pal who praying for issuing W/A and P/A against the accused

1. Ratan Vina son of late Ramprasad Vina.

2. Tapas Vina son of late Ratan Vina all of village Haspukur, P.S. Kalna, District Burdwan.

Prayer is allowed.

7. In the case in hand the approach of the court below is completely erroneous and without any authority of law. The learned court below committed a gross illegality in passing an order of proclamation and attachment simultaneously with the order of issuance of arrest. No order of warrant of arrest can be passed without first coming to a prima facie conclusion on the basis of police report that the accused person is evading arrest and to ensure his presence such order is needed to be passed. Similarly issuance of proclamation against an accused presupposes the court concerned has reason to believe that the person against whom warrant of arrest has been issued, is absconding or concealing himself so that warrant of arrest cannot be executed. The order of attachment of property, movable or immovable or both, of an accused against whom warrant of arrest has been issued can be made only in case he is a proclaimed offender and not otherwise. As provided in Section 83 Cr.P.C. the order of attachment of property can be made for reasons to be recorded in writing.

Furthermore the order impugned on the face of it is a nonspeaking and laconic order. The learned court below made the order merely on the prayer of the Investigating officer of the case without scrutinising the facts of the case and any application of mind. The order impugned is glaring example of misusing the judicial

discretion.

In the result this criminal revision is allowed and the order impugned is quashed.

However, I make it clear that this order will not preclude the investigating officer of the case to renew his prayer in accordance with law and in such a situation court below shall have the liberty to pass appropriate order in the light of the observation made by the Hon"ble Supreme Court in the case of Inder Mohon Goswami v. State of Uttaranchal (supra) and herein above. Office is directed to communicate this order to the court below.

Urgent Photostat certified copy of this order, if applied for, be given to the petitioner at an early date.

(Latter)

Having regard to the facts, it has been brought to the notice of this court by the learned Public Prosecutor that it has now become a regular feature of making this kind of orders by the courts below. The learned Registrar General is directed to circulate this order among all the courts below so that in future they may not repeat the same mistake. This be done through the learned Sessions Judge of all the concerned District.