Md. Nazrul Islam v. State Of Assam, 2008 PLRonline 0202 (Gau.)

2008 PLRonline 0202 (Gau.)

Gauhati High Court

JUDGES H.N Sarma, J.

Md. Nazrul Islam v. State Of Assam

Criminal Revision (P) No. 9 of 2008

CrPC, Sections 82 and 83 – Issuance of proclamation and attachment under Sections 82 and 83 of the Cr.P.C. is not an automatic or casual exercise – Before issuance of such proclamation and attachment, the court must apply its judicial mind and arrive at a decision disclosing the reasons to believe that a simultaneous action needs to be taken for proclamation and attachment – Mere return of warrant of arrest without execution would not authorise the Magistrate to issue an order for proclamation and attachment.

"22. The aforesaid provisions of law, particularly sections 82 and 83, Cr.PC makes it abundantly clear that the court must record its reasons to believe for taking such action and it must also satisfy about the abscondance of the accused as well as about the dealing with his property as contained under section 83, Cr.PC and without such compliance, the issuance of such order for proclamation and attachment cannot be said to have done in valid exercise of power." [Para 22]

None appeared for the petitioner. Mr. B.B Gogoi for the respondent.

****

1. Challenging the legality and validity of the impugned order dated 27.11.2007 passed in G.R Case No. 1721/04 by the learned Judicial Magistrate, 1st Class, Guwahati by which P/A was directed to be issued against the petitioner, the present revision petition has been filed.

2. To put in short the relevant facts, necessary for the purpose of adjudication of the point involved and having relevance to the present case, are that the accused/petitioner is on the basis of an FIR of the Dispur P.S Case No. 352/04 was registered against the police. After investigation of the case, the investigating officer having found prima-facie case submitted the charge sheet against him under section 143/447/323/506, IPC along with another co-accused.

3. On receipt of the charge sheet the learned trial court, directed to issue summon to the accused person vide order dated 10.1.2007 fixing 15.3.2007 for appearance. On 15.3.2007 prayer for adjournment of the case having been made on behalf of the accused, the court fixed the case on 20.4.2007 allowing the prayer. On that date also the such prayer for adjournment was repeated on 8.5.2007 On 16.5.2007, the other co-accused appeared and was allowed to go on bail. The present petitioner neither appeared nor took any steps in the case and accordingly the learned trial court directed to issue non-bailable warrant of arrest against him fixing 21.6.2007 to secure his appearance. On that date also another order of NBWA was issued to the petitioner fixing 27.7.2007 without recording the fate of the earlier warrant. On 27.7.2007 the learned trial court passed the following order:

“Accused Mantu Ahmed is absent with steps. Other accused is absent. Issue NBWA and P/A against the accused. Refix 20.9.2007 for app.”

4. On 20.9.2007 an application was filed on behalf of the accused/petitioner by his Advocate praying for dispensing with the personal attendance of the accused and to recall the warrant of arrest so issued against him. The learned trial court rejected the said prayer as the accused was not personally present in the court, and fixed 27.11.2007 for appearance. On 27.11.2007 the learned trial court passed the impugned order which reads as follows:

“T.M is on deputation in conn. With in service training at G.H Court, Accd. Mintu Ahmed is present. Other accd. Is absent. Issue P/A against the other accd. Fix. 9-1-08 for app.”

5. Although the instant petition is filed challenging the order dated 27.11.2007 with a view to scrutiny the legality and validity of the impugned order, the power and jurisdiction of the learned Magistrate to issue P/A against the absentee accused in the manner as exercised in this case requires to be considered. For this purpose, the various provisions relating to issue of process including power and jurisdiction of the court to issue P/A as provided in the Code needs to be examined.

6. Chapter VI of the Cr. P.C deals with the process to compel appearance.

7. Section 61, Cr. P.C provides that every summons issued by a court 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.

8. Section 62 prescribes the procedure as to how a summon is to be served. It provides that every summon should be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the court issuing it or other public servant. Sub-section 2 of section 62 provides that summon shall be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons, if practicable. section 64, Cr. P.C provides, inter alia, that where 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 therefore on the back of the other duplicate.

9. In the event, the service of summon cannot be affected as per procedure prescribed under section 62, 63 or 64, Cr. P.C, the same shall be served by affixing one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon 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 as provided under section 65, Cr. P.C

10. Section 69 authorises for service of summon upon the witness by post also. In case of necessity for issuance of warrant of arrest such warrant shall ordinarily be directed to one or more police officer but in case of non-availability of such police officer, immediately the court may direct any other persons or persons to execute the warrant. The warrant may be bailable or non-bailable considering the gravity of offence alleged.

11. section 82, Cr. P.C empowers any court, if it has reason to believe, that any person against whom 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 specific place and at a specified time within a period not less than thirty days from the date of publishing such proclamation. The manner and method of publication of such written proclamation is provided in Section 82(2), Cr. P.C 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 the published in a daily newspaper circulating in the place in which such persons ordinarily resides.

12. After making such proclamation, the court is required to pass an order that such proclamation has been done in the manner as aforesaid which shall be conclusive evidence that the requirement of the Sections has been complied with.

13. Sub-section 4 of section 82, Cr. P.C (as inserted vide Act No. XXV of 2005) provides that where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under sections 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398. 399, 400, 402, 436, 449, 459 or 460 of the IPC 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 to be a “proclaimed offender” and make a declaration to that effect.

14. Again for non-appearance in response to such proclamation made under section 82, Cr. P.C the accused maybe liable under section 174(a) of the IPC. After issuance of a proclamation under section 82, Cr. P.C the court issuing such proclamation may for reasons

to be recorded in writing order for attachment of any property movable or immovable belonging to the proclaimed persons, provided that the court is satisfied by affidavit or otherwise that the concerned person (a) is about to dispose of the whole or any part of the property; or (b) is about to remove the whole or any part of his property from the local jurisdiction of the court and such attachment may be made simultaneously with the issue of the proclamation, but only after arriving as such satisfaction by affidavit or otherwise as stated above. Any person having any interest over such attached property may raise his claim and objection to such attachment under section 84, Cr. P.C which shall be inquired into and disposed by the court providing with further right to the claimant to file civil suit to establish his right over the attached property.

15. Section 87, Cr. P.C authorizes the court to issue warrant in lieu of, or in addition to, summons after recording its reason in writing—

(a) if, either before the issue of such summons, or alter the issue of the same but before the time fixed for his appearance, the court sees reason to believe that he has 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.

16. The High Court has also framed a set of Rules under article 229 of the Constitution of India for dealing with certain procedures contained in Cr. P.C and other related matters. Criminal Rules and Order, Vol. I Chapter II has dealt with the service of process under section 62 thereof which is quoted as under:

“SECTION 62: SERVICE OF PROCESSES

2. A notice or process shall be served by delivering a copy of it to the person addressed. If the person is literate he shall be required to sign the original as an acknowledgement of receipt. If he is illiterate his thumb impression should be taken on the back of the original process in the presence of at least one person whose name and address should be noted. The serving officer shall then make a report on the back of the original process in the manner directed in rule 12. If the person addressed is temporarily absent from home the serving officer shall, if possible, go again and make every endeavour to serve the process on him personally.

3. If the person refuses to sign or give his thumb impression on the original process but wants to retain the copy, it shall not be made over to him but shall be served in the manner prescribed in rule 5 below.

4. In the case the person is not known to the serving officer the name and address of the person, on whose identification service is effected, shall be stated in the report.

5. If the person refuses to receive the process he shall be informed verbally of its nature, e.g, that it is a summons to appear before a court as a witness or as accused or defendant

and a copy of the process shall be affixed to the door of his residence in the presence of two witnesses whose names and addresses shall be mentioned in the report.

6. If, after due and reasonable enquiry, the person addressed cannot be found, service shall be effected on an adult male member of his family in the manner indicated in rules 2-5.

7. If the person addressed in the process has a place of residence but neither he nor any male member of his family can be found, a copy of the process shall be affixed to the door of his residence in the presence of two witnesses whose names and addresses shall be recorded in the report.

8. If the person addressed has no place of residence and he cannot be found, these facts shall be stated in the report together with the names and addresses of at least two persons from whom the facts are ascertained. If the person addressed has ceased to live at the place, his present address, if procurable, should be reported if he be living in a big town, the name of the street or locality and the number of the house, if any, should be reported.

9. If the person addressed is dead, the date of his death shall be stated in the report and the process should be returned unserved.

10. If the issuing court directs that service shall be effected in any manner other than that described in the foregoing rules, the serving Officer shall comply with the directions of the court and shall state in the report the dale, time, place and manner of service, and the names and addresses of two persons present whose signatures or thumb impressions, as the case may be, should be taken on the back of the original process.

11. If the process is addressed to more than one person, the report shall describe the manner of service on each person.

12. (a) A report of service shall be recorded by the serving officer on the back of the original process stating (1) the date, time and place of service, (2) the manner of service, and (3) the name and address of at least one person present at the time of service.

(b) The dated signature and designation of the serving Officer shall be appended to this report.

13. (a) The serving Officer shall then return the process to the Nazarat from which it was received.

(b) In the case of service through local authority the serving Officer shall return the process to the president of the local authority, who, after examining the report to see that service has been properly effected, shall, after administration of solemn affirmation as required and provided for in rule 14 below, forward the same to the Nazarat.

14. (a) On all processes issued by criminal courts and on other processes which contain a direction that an affidavit of service is required, an affidavit to the effect that the statement in the report is true in all particulars should be solemnly affirmed by the serving officer

before an officer competent to administer such affirmation who shall then sign and seal with the seal of his Office an endorsement to the following effect:—

“Solemnly affirmed before me by that the statement in the above report is true in every respect.”

(b) President of Local authority are authorized to administer oaths or solemn affirmation for this purpose in cases of all processes other than those issued under the Criminal Procedure Code.

(c) Affidavits on criminal processes can be sworn or affirmed only before a Magistrate. When the swearing of an affidavit before a Magistrate would involve serious delay or inconvenience, the processes, after service and necessary endorsement, shall be returned to the Nazarat in the manner laid down in rule 13(a) without any affidavit.

15. Process shall be served and returned as speedily as possible.

16. Presidents of Local authorities shall endeavour to return processes the day receiving them.”

17. The manner and method of service of summons has been adequately provided in Section 62 as well as the aforesaid Rules framed by the High Court. If the persons summoned cannot be found, he can also be served as per procedure laid down in section 64, Cr. P.C by serving with some adult male member of his family residing with him. The court while accepting service of summon upon such member is required to be satisfied to that effect. Before issuing proclamation against an accused, the mandate of section 82 is that the court must have “reasons to believe” that the person against whom warrant has been issued has absconded or concealing himself so that the warrant cannot be executed. Only upon arriving at such a satisfaction, the court is empowered to issue such proclamation under section 82, Cr. P.C Law provides for issue of proclamation against an absconder only. Accordingly it is necessary to examine when an accused can be said to be an absconder.

18. The word absconder has been interpreted by the Apex Court in the case of Kartarey v. The State of U.P, (1976) 1 SCC 172. In the said case, the Apex Court held that to be an ‘absconder’ in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home,

(emphasis supplied)

19. The Full Bench of the Hon’ble Madras High Court in the case of K.T.M.S Abdul Cader v. The Union of India, 1977 Crl. LJ 1708 dealing with the meaning of absconding has held as follows:

“The words ‘absconding debtor’ with reference to Bankruptcy Laws, according to Stroud’s Judicial Dictionary of words and phrases, 3rd edn., means one who departs for distant

countries before the necessary proceedings can be taken to make him bankrupt to remain there with intent to defeat or delay his creditors. The primary meaning of the word ‘abscond’ is to hide and when a person is hiding from his place of residence, he is said to be abscond. A person may hide even in his place of residence or away form it and in either case he would be absconding when he hides himself. In Wharton’s Law Lexicon, 14th edn., ‘abscond’ has been taken to mean to fly the country in order to escape arrest for crime. Therefore, persons who get scent of the action to be taken by the detaining authorities and leave the country in order to escape the arm of the law can be said to abscond. Similarly persons who have already left the country without the knowledge of any action to he taken against them under the Act, but who continue to remain outside the country with a view to avoid any detention order that may be passed under section 3 can also be taken to be absconding. It cannot be disputed that a person committing an offence in a particular country would ordinarily be liable to be tried according to the law of that country. If he leaves the country with a view to avoid or escape the arm of the law, he can be said to abscond so far as that country and its laws are concerned. In Chamber’s Twentieth Century Dictionary, the word ‘abscond’ has been defined as to hide or to quit the country in order to escape a legal process. Therefore, if a person, before the legal process could be issued somehow or other comes to know of the issue of such a process or anticipates the issue of the process and quits the country he can be said to have absconded.”

20. Therefore, in order to issue a proclamation under section 82, Cr. P.C it is sine qua non that court must have reason to believe that the person against whom proclamation has been issued “absconded” or is “concealing himself so that such warrant cannot be executed and only on arriving at such a satisfaction, the court concerned is authorized to publish such proclamation. For attachment of the property of the person absconding it is also a sine-qua-non that the court issuing proclamation must record the reasons in writing that such person is about to dispose of the whole or any part of his property or about to remove the whole or any part of his property from the local jurisdiction of the court and such satisfaction is to be arrived at by affidavit or otherwise. The word “otherwise” here would embrace making of such other enquiry as may be found necessary on the facts and circumstances of a given case taking note of antecedent and conduct of the accused as may be revealed from the record.

21. The issuance of proclamation and attachment as could be visualized from the aforesaid relevant provisions of the Cr. P.C not an automatic and/or casual one. Before issuance of such proclamation and attachment, the court must apply its judicial mind and must arrive at a decision disclosing his reason to believe. Mere return of warrant of arrest without execution without anything more does not authorizes the Magistrate to issue an order for proclamation and attachment. Proclamation and attachment affects certain valuable rights of a person although he might be facing a criminal case as an accused and the same is not to be interfered with in a casual and mechanical manner, but is to be affected by strict adherence to the provision of law, noted above.

22. The aforesaid provisions of law, particularly sections 82 and 83, Cr. P.C makes it abundantly clear that the court must record its reasons to believe for taking such action and it must also satisfy about the abscondance of the accused as well as about the dealing

with his property as contained under section 83, Cr. P.C and without such compliance, the issuance of such order for proclamation and attachment cannot be said to have done in valid exercise of power.

23. The record of the trial court, in the instant case, does not disclose that the aforesaid provisions of law has been duly complied with by the learned Magistrate and no satisfaction has been recorded justifying the impugned action before issuance of the order of attachment and/or P/A. The impugned order does not disclose that proper judicial mind was applied before passing the same. Hence, the impugned orders cannot be sustained in the eye of law and accordingly those are set aside and quashed.

24. The petitioner is directed to appear before the learned trial court on the next date fixed and the learned trial court on such appearance shall consider his prayer for granting him bail, if so made, taking note of the entire facts and circumstances of the case, of course, on such condition as he may think lit and proper to secure his presence.

25. The revision petition stands allowed as indicated above. Send down the LCRs. forthwith.