

Court No. - 11

Case :- APPLICATION U/S 482 No. - 2218 of 2024

Applicant :- Pradeep Agnihotri

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Deptt.
Lko. And Another

Counsel for Applicant :- Shishir Pradhan

Counsel for Opposite Party :- G.A.

Hon'ble Rajesh Singh Chauhan,J.

1. Heard Sri Shishir Pradhan, learned counsel for the petitioner and Sri Bishwa Nath Nishad, learned Additional Government Advocate for the State.

2. In view of the proposed order, the notice to opposite party No.2 is hereby dispensed with.

3. By means of this petition filed under Section 482 Cr.P.C., the petitioner has prayed for the following reliefs:-

(i) Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to allow this petition under Section 482 Cr.P.C. and quash the impugned summoning order dated 28.03.2023 and N.B.W. order dated 15.02.2024 passed by the court of learned Third Additional Civil Judge (Junior Division)/ Judicial Magistrate, Raebareli in Complaint Case No.4645 of 2023 (Sarika Shukla vs. Pradeep Agnihotri), under Section 138 of Negotiable Instruments Act, Police Station-Kotwali, District-Raebareli, as contained in Annexure Nos.1 and 2 respectively to the affidavit.

(ii) Further, it is most humbly prayed from this Hon'ble Court that to stay the proceedings as pending against the present applicant in the learned court of Third Additional Civil Judge (Junior Division)/ Judicial Magistrate, Raebareli, during the pendency of present petition as under Section 482 Cr.P.C."

4. Sri Pradhan has assailed the aforesaid orders and the proceedings on the ground that the complaint in question has been filed in violation of Section 138 (c) of Negotiable Instruments Act (in short "N.I. Act") inasmuch as the private opposite party has preferred a legal notice on 06.01.2023 but the complaint has been filed on 10.02.2023, whereas after giving the legal notice and expiry of thirty days period the complainant will have to wait for fifteen days to get the payment which has been demanded by him and if such payment

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is not received within the aforesaid period, the complaint under Section 138 of N.I. Act may be filed. The aforesaid period would be expiring on 21.02.2023. Sri Pradhan has taken second ground by submitting that the legal notice has not been preferred on the correct address of the petitioner as the petitioner is a resident of Bhimganj, Police Station-Dalmau, District-Raebareli but on the tracking report it has been mentioned that the aforesaid legal notice has been delivered at Banapar BO though the petitioner is not residing at that place.

5. Sri Pradhan has therefore stated that since the legal notice has not been served upon the petitioner, hence, he could not contact the complainant. Not only the above, when the complainant has filed the complaint before the court concerned. Further, the notice must have been issued to the petitioner on such address where he is residing, however, the notice has been issued at the address where the petitioner is not residing, resultant thereof, the notice could not be served upon the petitioner and he could not participate in the proceedings and the summons, bailable warrant and non-bailable warrant have been issued against him. However, when the proclamation under Section 82 Cr.P.C. has been issued against the petitioner, then the petitioner came to know about the aforesaid proceedings.

6. Sri Pradhan has also stated that before issuing the proclamation under Section 82 Cr.P.C. the court concerned must ensure on the fact as to whether the notice, summon, bailable warrant and non-bailable warrant are served upon the petitioner and as to whether he is deliberately avoiding those process, inasmuch as this is a trite law that the proclamation under Sections 82/83 Cr.P.C. should not be issued in a casual and cursory manner. As per Sri Pradhan, the impugned order dated 15.02.2024 does not reveal that the aforesaid satisfaction has been indicated in the impugned order itself. Therefore, as per Sri Pradhan, the impugned order dated 15.02.2024 issued under Section 82 Cr.P.C. is *per se* illegal and against the settled proposition of law.

7. Sri Pradhan has further submitted that the petitioner is ready to participate in the proceedings so that he could apprise the trial court about his bonafide but the petitioner is having apprehension that if he appears before the court concerned his liberty may be curtailed.

8. On the other hand, learned Additional Government Advocate has tired to defend the impugned order dated 15.02.2024 but could not dispute the aforesaid submission of learned counsel for the petitioner.

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9. Having heard learned counsel for the petitioner and having perused the material available on the record, at the very outset, I must observe that before issuing proclamation under Sections 82/83 Cr.P.C. by any Subordinate Court, at least, satisfaction must be indicated in an order to the effect that despite the service of notice, summon, bailable warrant and non-bailable warrant the person concerned has deliberately avoided the proceedings. Further, any order of proclamation under Sections 82/83 Cr.P.C. must be passed on an application of a person concerned/ Investigating Officer etc. to the effect that after service of notice, summon, bailable warrant and non-bailable warrant upon the person concerned, he/ she is avoiding the proceedings so a proclamation may be issued and on such application, which must be supported with an affidavit, the court concerned may issue proclamation under Sections 82/ 83 Cr.P.C. indicating the subjective satisfaction on the aforesaid aspect in the order itself. If any order issuing proclamation under Sections 82/83 Cr.P.C. lacks the aforesaid procedure, the such order would be nullity in the eyes of law. Sometimes, it has been noted that the Investigating Agency seeks proclamation order from the court concerned so as to exert the pressure upon the person concerned and the court concerned without taking care of specific procedure issues proclamation under Sections 82/83 Cr.P.C. in a cursory and mechanical manner.

10. The Apex Court in the case in re: ***Inder Mohan Goswami and another vs. State of Uttaranchal and others*** reported in ***(2007) 12 SCC 1*** has observed the mechanism as to how the liberty of any person may be curtailed inasmuch as every citizen has got fundamental right of his liberty under Article 21 of the Constitution of India. Such liberty may be curtailed by the court concerned if the court has got specific and cogent reason and that reason must be mentioned while issuing the proclamation order. The relevant paras-53, 54, 55, 56 & 57 of the aforesaid case are being reproduced here under:-

"When non-bailable warrants should be issued.

53. *Non-bailable warrant should be issued to bring a person to court when summons of 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*

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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 courts 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.

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 straight-jacket 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."

11. So far as the other grounds taken by Sri Padhan to the effect that the present complaint has been filed in violation of Section 138 (c) of N.I. Act and the notice has been issued on wrong address of the petitioner is concerned, I am also of the considered opinion that any complaint under Section 138 of the N.I. Act should have been filed strictly in accordance with the mechanism so given under Section 138 of the N.I. Act. In the present case, it appears that the compulsory statutory period has not been taken care of by the complainant itself nor by the Court.

12. Notably, as per Section 143 (3) of N.I. Act, every trial under this Act shall be conducted and concluded expeditiously as possible and may be concluded within a maximum period of six months from the date of filing of such complaint. Therefore, I do not find it proper to keep this petition pending any longer, giving liberty to the petitioner appear before the court concerned on the date fixed i.e. 22.03.2024 and if the petitioner appears/ surrenders before the court concerned on the

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date fixed i.e. 22.03.2024, all coercive steps including the impugned summoning order dated 28.03.2023 and the proclamation order dated 15.02.2024 shall be kept in abeyance and liberty would be given to the petitioner to participate in the proceedings. Thereafter, the petitioner may file appropriate application before the court concerned and such proceedings may be conducted and concluded with expedition by fixing short dates and without giving unnecessary adjournment to any of the parties concerned. It is needless to say that ample opportunity of hearing should be afforded not only the petitioner but the complainant also.

13. It is made clear that if the petitioner does not appear before the court concerned on the date fixed in terms of this order, the benefit of this order would not be made available to him and the learned court below may take appropriate coercive steps, which are permissible under law, against the petitioner.

14. In view of the aforesaid observations and directions, the instant petition is ***disposed of finally.***

[Rajesh Singh Chauhan,J.]

Order Date :- 7.3.2024
Suresh/