

GAHC010004142024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./24/2024

TAYEB ALI
S/O BAHARUDDIN
R/O VILL- NO. 1 JAMADAHA, P.S. MANIKPUR, DIST. BONGAIGAON, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE PP, ASSAM

2:UBC-135 JANAK BARMAN
S/O LATE BHUMIDHAR BARMAN
GERUKABARI P.P. VILL- RAKHALDUBI
DIST. BONGAIGAON
ASSA

Advocate for the Petitioner : MR. D J Neog

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

ORDER

11.01.2024

Heard Mr. D.J. Neog, learned counsel for the petitioner and also heard Mr. B. Sarma, learned Additional Public Prosecutor, Assam, appearing for the State respondent.

2. In In this petition, under Section 482 Cr.P.C., the petitioner, namely, Tayeb Ali has put to challenge the correctness or otherwise of the order dated 14.07.2023 and subsequent orders passed by the learned Special Judge, Bongaigaon, in Special (P) Case No.88(M)/2023, under Section 376 IPC, read with Section 6/17 of the POCSO Act, read with Section 9/10/11(i) of the Prohibition of Child Marriage Act, 2006.

3. It is to be noted here that vide impugned order dated 14.07.2023, and subsequent orders passed by the learned Court below, the learned Court below has issued non-bailable warrant of arrest against the petitioner for being shown him as absconder in the charge-sheet by the I.O.

4. Mr. Neog, learned counsel for the petitioner submits that the learned Court below, while taking cognizance of the offence under Section 376 IPC, read with Section 6 of the POCSO Act, read with Section 9 of the Prohibition of Child Marriage Act, 2006, read with Section 75 of the Juvenile Justice Act, against the accused, namely, Abdur Rofikul @ Rafik Ali Mandal and also taken cognizance against the petitioner, namely, Tayab Ali, and other accused, namely, Jahir Ali Mandal and Chapar Mandal @ Safat Ali Mandal, under Section 17/21 of the POCSO Act, read with Section 11 of the Prohibition of Child Marriage Act, and since the petitioner has been shown as absconder in the charge-sheet, the learned Court below has directed to issue warrant of arrest against the petitioner and thereafter, vide orders dated 28.08.2023, 11.09.2023, 22.09.2023 and 04.12.2023 the learned Court below continued to issue non-bailable warrant of arrest against the petitioner and that the petitioner is ready to face trial and during investigation he was all along available in his house and though he has been shown as absconder in the charge-sheet he was never absconding and therefore, it is contended to allow the petition.

5. Mr. B. Sarma, learned Additional Public Prosecutor, Assam, has fairly submitted that the learned Court below, at the very first instance, ought not to have issued warrant of arrest against the petitioner though he has been shown as absconder in the charge-sheet.

6. Having heard the submission of learned Advocates of both sides, I have gone through the petition and the documents placed on record.

7. It appears that on the basis of one FIR lodged by one Janak Barman, UBC of Manikpur P.S., Manikpur P.S. Case No.23/2023 under Section 9/10/11(i) of the Prohibition of Child Marriage Act was registered and thereafter, investigation was carried out and the investigation culminated in submission of charge-sheet dated 28.02.2023 under Section 376 IPC, read with Section 6/17 of the POCSO Act, read with Section 9/10/11(i) of the Prohibition of Child Marriage Act. In the said charge-sheet, the present petitioner has been shown as absconder. Thereafter, the learned Court below vide impugned order dated 14.07.2023 has taken cognizance of the offence against the petitioner under Section 17/21 of the POCSO Act, read with Section 11 of the Prohibition of Child Marriage Act and showing him as an absconder in the charge-sheet and therefore, the learned Court below has ordered for issuing warrant of arrest against the petitioner and continued to issue warrant of arrest against the petitioner in all subsequent orders dated 28.08.2023, 11.09.2023, 22.09.2023 and 04.12.2023.

8. It is now well established by Hon'ble Supreme Court in a catena of decisions that non-bailable warrant of arrest should not be issued against the accused persons at the very instance without availing the other tools, such as, summon, bailable warrant of arrest etc. for procuring his attendance. Reference in this context can be made to a decision of Hon'ble Supreme Court in **Inder Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors.** reported in **(2007) 12 SCC 1**, where it has been held as under:-

"Personal liberty and the interest of the State

50. Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human 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.

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.”

9. In the instant case, as stated in the foregoing paragraph, the learned Court below at the very first instance has issued non-bailable warrant of arrest against the petitioner without using the other tools, such as summons and bailable warrant to secure the attendance of the petitioner.

10. Having tested the impugned order, on the touchstone of the principles discussed herein above, this Court is unable to derive its satisfaction that while issuing non-bailable warrant of arrest against the petitioner, the learned court below has exercised such care and caution as indicated in the case referred herein . The impugned order is silent in this regard. In that view of the matter, that the impugned order, dated 14.07.2023, and all subsequent orders failed to withstand the test of legal scrutiny and therefore, this Court is inclined to set aside the same.

11. Considering the nature of relief, being sought for in this petition, this Court is of the view that hearing the respondent No.2 is not at all necessary. And therefore this Court is not inclined to keep the matter pending. Accordingly, this petition stands allowed and the impugned order dated 14.07.2023 and all subsequent orders, are set aside and quashed.

12. The petitioner is directed to appear before the learned Court below on or before 30.01.2024 and to apply for regular bail, and in the event of filing such an application, the learned Court below shall consider the same.

13. In terms of above, this criminal petition stands disposed of.

Sd/- Robin Phukan
JUDGE

Comparing Assistant