

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

Criminal Miscellaneous Application No.109 of 2018
(under Section 482 of Cr.P.C.)

IrfanApplicant

Versus

State of Uttarkhand & another Respondents

Present: Mr. Arvind Kumar Sharma, Advocate for the applicant.,
Mr. J.S. Virk, A.G.A. along with Ms. Mamta Joshi, Brief
Holder for the State.

Hon'ble Sharad Kumar Sharma, J. (Oral)

Present C-482 application has been preferred by the applicant whereby he has challenged the order dated 26.10.2017 passed by Additional District Judge, Laksar in Criminal Revision No.185 of 2017, Suberam vs. State & another as well as the impugned order dated 30.11.2017 whereby Non-Bailable Warrant and under Section 82 has been issued against him. Thus the applicant has sought the following relief:-

“To quash the entire criminal proceeding of Criminal Complaint Case No.1570 of 2011, Suberam vs. Irfan, under Section 420 of IPC & 138 of Negotiable Instrument Act, Police Station Kotwali Laksar, District Haridwar pending in the Court of A.C.J.M. Laksar with the impugned summoning order of cognizance dated 05.3.2008 and the order dated 26.10.2017 passed by the learned A.D.J. Laksar in the Criminal Revision No.185 of 2017, Suberam vs. State & another and impugned order dated 30.11.2017 by which N.B.W. and 82 Cr.P.C., has been issued by the learned A.C.J.M. Laksar”.

2. Brief facts leading to filing of the revision were that the proceedings were drawn by the respondent under Section 138 of Negotiable Instrument Act, against the present applicant, on the ground that the cheque

no.046575 dated 28.7.2007 issued by him for sum of Rs.7,90,000/- in favour of respondent, which he had presented in his account standing in Indian Overseas Bank to be encashed, which had bounced by the bank, as per its report dated 08.8.2007, with a remark that the “funds available”, in the account of the applicant were insufficient. The respondent complaint after giving a legal notice through his counsel on 05.11.2007, a case was lodged by the respondent on 14.2.2008, which was registered as Case No.1570 of 2011, Suberam vs. Irfan, under Section 138 of Negotiable Instrument Act, which remained pending. The Judicial Magistrate had issued a summoning order on 05.3.2008, the steps incompliance of summoning order was taken by the respondent.

3. On account of ailment and age which the respondent was facing he sought an exemption from participation in the proceedings scheduled for 13.11.2016, he filed an application which was allowed and Court fixed 11.1.2017 for considering the application thereafter the date was fixed on 06.2.2017. But respondent could not appear in the Court on the date fixed i.e. 06.2.2017. The applicant despite of several steps taken by the respondent before Trial Court he did not appear and participate in the proceedings. Even before the Revisional Court too after withdrawing adjournment application, the applicant did not argue the case, which speaks volumes about the diligence and conduct of applicant.

4. As per the rival case of parties and as also revealed from records of the Court below is that the Court had issued the summoning order calling upon the applicant to put an appearance in the Complaint Case No.1570 of 2011, and participate in the proceedings, but he had avoided appearance. It happened so that on 06.2.2017 the respondent could not appear, the said complaint was dismissed due to non-compliance of Section 204 Sub-Section (4) of Code of Criminal Procedure and it was said that the respondent had failed to take steps for ensuring the issuance of Non-Bailable Warrants and under Section 82. It was this order which was put to challenge by the respondent in the revision being Criminal Revision no.185 of 2017, Suberam vs. State & another, before the Session Judge, Laksar, which has been allowed by the impugned order dated 26.10.2017. Consequently, the matter before the A.C.J.M. Laksar, has revived and the order dated 30.11.2017 has been issued whereby Non-Bailable Warrant and Section 82 of Cr.P.C., has been drawn against the applicant.

5. According to Sub-section (4) of Section 204 of Code of Criminal Procedure, its implication is dependent upon the opinion which is to be drawn by the Magistrate while taking cognizance to the effects and that whether the sufficient ground and conditions for proceeding under Section 204 (4) of Cr.P.C. are available. When the Magistrate records the satisfaction that after issuance of the summons or the warrant as the case may be its only when the process fee or other fee which are payable and

the applicant had failed to deposit the process fee or take steps thereof, and the process fee has not been paid within a reasonable time. In that eventuality, if the amount is not deposited within a reasonable time, the Magistrate may dismiss the complaint. Section 204 (4) of Code of Criminal Procedure is quoted herein under:-

1. -----
2. -----
3. -----

4. When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

6. In the instant case, apparently the order dismissing the complaint case dated 06.2.2017 has been passed due to non-compliance of Sub-section (4) of Section 204 of Code of Criminal Procedure by the respondent, at the stage when Non-Bailable Warrant and under Section 82 of Cr.P.C., had already been issued.

7. The ratio has been laid down which provides that when the Court has already issued a Non-Bailable Warrant and Section 82, in that eventuality, in an absence of an applicant the proceedings cannot be dismissed under Section 204 Sub-Section (4) of Code of Criminal Procedure. The decision which has been rendered by the Madras High Court in the case of **Anandha Vadivelu vs. Kannappan**, reported in **2014 ALLMR (Cri) 30**, dealing with an identical situation arising out of the proceedings of Section 138 of

Negotiable Instruments Act, wherein the proceedings were dismissed invoking Sub-section (4) of Section 204 of Cr.P.C. The Madras High Court in its para 7 while placing reliance of the judgment of Kerala High Court as reported in **2007 Crl.L.J., 1143, Tom Thomas vs. Abdul Lathief E. & another**, by referring to para 6 of the said judgment of the Kerala High Court, held that when Non-Bailable Warrant and Section 82 has been issued under Section 204 (4) of Code of Criminal Procedure will not apply and complaint case cannot be dismissed at that stage.

8. The logic, as settled by the Madhya Pradesh High Court in a judgment passed in its Criminal Revision No.289 of 2015, **Bhupendra Singh vs. Saket Kumar** reported in **2016 (1) MPLJ 209**, has held in its para 10 that in an event of failing to pay the process fee and when the complainant is not warned nor any peremptory order has been passed, his complaint cannot be thrown away without being decided on merits. Para 10 of the said judgment is quoted herein under:-

10. In the present case, the complainant was not warned nor any peremptory order was passed. For failing to pay process fee the complainant will be put to inconvenience and the case would be thrown away without being decided on merits.

9. The rational behind it is that under the criminal jurisprudence the process of securing presence of the accused involves issuance of summoning order when despite of issuance of summoning order when the accuse avoids appearance. The Court exercises the

powers of issuing the Bailable Warrants and ultimately thereafter when accused does not appear, the Non-Bailable Warrants are issued. Undoubtedly, the issuance of Non-Bailable Warrants entails an infringement of personal liberty and deprivation of some precious fundamental rights given to an individual under the Constitution. In that eventuality, certain guidelines have been framed by the Hon'ble Apex Court in a judgment reported in **AIR 2008 SCC 251, Inder Mohan Goswami & another vs. State of Uttaranchal & others**; that while issuing Non-Bailable Warrant, the Court should exercise an extreme caution but when at times it becomes imperative to ensure an appearance of an accused to meet the ends of justice, the curtailment of freedom for a certain period could only be done by issuance of Non-Bailable Warrants. Para 52 and 53 is quoted herein below:-

52. 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 Court 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.

53. 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.

10. The stage which was faced by the Court in the instant case for the purposes of issuance of Non-Bailable Warrants is only when the process fee has already been supplied by the complainant on issuance of summoning order and on the orders being passed for issuing Bailable Warrants. Merely, because the steps at the stage of issuance of Non-Bailable Warrants has not been taken in the light of provisions contained under Sub-section (4) of Section 204 of Code of Criminal Procedure, atleast it could be inferred and taken into consideration that the steps for serving the summons had already been taken, when the summons were issued or at the stage when Bailable Warrants were issued. Hence, the Courts have rightly held that at the stage when Non-Bailable Warrants and Section 82, are being invoked and the process fee is not supplied, the complaint ought not to be rejected under Sub-section 4 of Section 204 of Cr.P.C., as same would not be applicable at that stage.

11. It is settled under law by judgments rendered by Madras High Court as well as Madhya Pradesh High Court that in cases where Non-Bailable Warrant and Under Section 82 of Cr.P.C., has been issued and steps for Non-Bailable Warrant and under Section 82 has not been taken, the case cannot be dismissed under Section 204 (4) of Code of Criminal Procedure. As the order of dismissal under Section 204 (4) cannot be treated to be

an acquittal as held by the Kerala High Court too in **Central Bank of India vs. Kerala State**, reported in **2016 (1) DCR 490.**

12. The learned Revisional Court while passing the impugned order has recorded the finding that the respondent who was the complainant of the proceedings have been diligently and consistently participating in the proceedings with all due diligence, but on 06.2.2017 he could not appear before the Court and was unable to take steps for issuance of the Non-Bailable Warrants and under Section 82. Consequently, the A.C.J.M. has dismissed the complaint case by invoking Section 204 Sub-section 4 of Code of Criminal Procedure by the order dated 06.2.2017. The Revisional Court has recorded the finding that the absence of the respondent before the A.C.J.M. Laksar was for only one day i.e. on 06.2.2017 and it is further recorded the finding that ever since the initiation of the proceedings, the applicant herein has not participated in the proceedings before the A.C.J.M. and furthermore even before the Revisional Court too. He had not extended his argument, while opposing the revision, despite opportunity having been granted.

13. The Revisional Court while allowing the revision has taken into consideration the fact that if a complainant fails to take steps for issuance of Non-Bailable Warrants then the proceedings cannot be rejected by invoking under Section 204 (4) of the Code of Criminal Procedure, as the same would not be

applicable at the stage of issuance of Non-Bailable Warrant and Section 82. Accordingly, the revision was allowed.

14. On perusal of the entire record as brought before this Court, I do not find any error in the impugned order dated 26.10.2017 and the consequential action taken therein. Hence, the C-482 application is dismissed.

15. All pending applications also stand disposed of.

16. No order as to costs.

(Sharad Kumar Sharma, J.)
Vacation Judge
30.1.2018

A.kaur