IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(1) Writ Petition (Criminal) No.2066 of 2017

Mohan Kumar Mittal .....Petitioner

Versus

State of Uttarakhand & Ors. ..... Respondents

AND

(2) Writ Petition (Criminal) No.2067 of 2017

Dr. Vishnu Sahai .....Petitioner

Versus

State of Uttarakhand & Ors. ..... Respondents

Mr. Rakesh Thapliyal, Advocate for the petitioners
Mr. Sandeep Tandon, Deputy Advocate General with Mr. P.S. Bohara and Ms. Manisha Rana Singh, Assistant Government Advocates for the State
Ms. Manisha Bhandari, Advocate along with Mr. Shiv Pande, Advocate for respondent no.4.

Hon'ble Lok Pal Singh, J.

Since the controversy involved in above-titled writ petitions are same and the order under challenge is also the same, these writ petitions are being decided by this common judgment and order.

2. Present writ petitions have been filed for the following reliefs, among others:

i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 16.12.2017 passed by learned Judicial Magistrate/Second Additional Civil Judge (Senior Division) Rudrapur, Udham Singh Nagar, whereby

non-bailable warrants have been issued against the petitioner on the request of investigating officer of F.I.R. No.191 and 192 of 2012.

ii) Issue a writ, order or direction in the nature of mandamus commanding the respondent nos.2 and 3 not to take any coercive measures against petitioner pursuant to impugned order dated 16.12.2017 and the F.I.R. No.191 and 192 of 2012 and to conclude the investigation without arresting the petitioner.

3. Facts leading to filing of present writ petitions are that initially writ petitions being WPCRL No.760 of 2012 and WPCRL No.761 of 2012 were filed by the petitioners and some others for quashing of F.I.R. Nos.191 and 192 of 2012 under Sections 405, 420, 463, 464, 465, 468, 473 read with section 120-B IPC, P.S. Kichha, District Udham Singh Nagar, which were allowed vide judgment and order dated 11.10.2012. Subsequently, on the recall application moved by the complainant in the said writ petitions, judgment and order dated 11.10.2012 was recalled and the I.O. was directed to investigate the matter afresh, it was also directed that the arrest of the petitioners will be effected only after collection of sufficient material evidence against them and not before that. Pursuant to such order, the Investigating Officer investigated the matter afresh. After collecting credible evidence against the petitioners, he moved an application before Judicial Magistrate, Rudrapur, District Udham Singh Nagar, stating that on completion of investigation, he has

found sufficient material against the petitioners in respect of offence punishable under Sections 405, 420, 463, 464, 465, 468, 471 read with section 120-B IPC, hence, he prayed to issue non-bailable warrants against the petitioners. Judicial Magistrate, upon perusal of the case diary and other relevant documents, allowed the application and issued non-bailable warrants against the petitioners.

4. Learned counsel for the petitioners would submit that offences complained of against the petitioner entails the maximum punishment of seven years thus it is not necessary for the I.O. to have the custody of the petitioners at the time of filing the charge sheet, even without arrest of the petitioners, the I.O. may submit the charge sheet. Learned counsel would further submit that the petitioner is cooperating in the investigation and he had also appeared before the I.O. pursuant to a notice issued u/s 91 Cr.P.C., thus, there was no occasion either for the I.O. to move an application before the Magistrate for a direction to issue N.B.W. against the petitioners or for the C.J.M. to issue such N.B.W. against the petitioners. According to him, the impugned order dated 16.12.2017 is wholly unsustainable on such grounds.

5. Learned counsel for the petitioners would place reliance upon a judgment of Hon'ble Apex Court in the case of *State of Uttar Pradesh and others vs. Anil Kumar Sharma and others, reported in (2015) 6 SCC 716*. Para-24 of the judgment reads hereunder:

> *"24. In view of the law laid down by this Court, as discussed above, we are of the view*

that the High Court has clearly erred in law in treating the writ petition which was filed for quashing of the FIR, and had become infructuous, as public interest litigation, and issued sweeping directions, without there being sufficient date and material before it to pass directions. There is no requirement under Section 173 CRPC for the investigating officer to produce the accused along with the charge-sheet. The High Court has not cared to see that where there are several accused and only some of them could be arrested and remanded to judicial custody, and others are on bail, how all of them can be produced together by the police. The High Court should have realized that trial of the under trial prisoners cannot be allowed to be delayed, for want of presence of the accused absconding in the case. The learned Advocate General has argued before us that several thousand charge-sheets got stuck up because of sweeping directions of the High Court from being filed in the courts. However, the learned Advocate General for the State submitted that all arrangements have been made for preparation of copies of the papers before the charge-sheet is filed so that they can be served on the accused persons. It is also accepted by him that all efforts have to be made to apprehend the accused persons so that the trial can be expedited. As there is a concession by the learned Advocate General before us which is in consonance with the law and that the State shall comply with the same so that the delay does not occur on these grounds.

6. Learned counsel for the petitioners would further place reliance upon a judgment of Hon'ble Gauhati High Court rendered in the case of *Pradip Dutta Bhowmik and Ors. Vs. State of Tripura and Anr, reported in (2005) 1 Gauhati Law Reports 513*. Para-9 of the Judgment has been referred by the counsel, which reads as under:

> *"9. However, there is one aspect of the case which disturbs this Court. Admittedly the complaint petition of the O.P. No.2 has been treated as F.I.R. by the Police under Section 156(3) of the Code that being so, once a case has been registered, it must be followed by investigation in accordance with the provisions of the Code. Once an investigation has been completed, the law enjoins the officer-in-charge of the police station to forward a final report to a Magistrate empowered to take cognizance of an offence on a police report – see Section 173 of the Code. The police report under Section 173 of the Code includes both the final report under Section 169 of the Code and a charge sheet under Section 170 of the Code. In other words, the completion of the investigation must culminate in filing either a charge sheet under Section 170 or a final report under Section 169 of the Code. Even though investigation appears to have been done by the police by treating the complaint petition of the O.P. No.2 as F.I.R. the contents of the Annexure – H is neither a final report nor a charge sheet. It is not understood as to under what provisions of law the concerned Inspector of Police has submitted the said letter. From the contents of the Annexure – H, it also appears that investigation of the case*

> *has been done haphazardly and in a casual manner. Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. The concerned Inspector of Police must either submit a final report or charge sheet against the petitioners before the learned C.J.M. once he has completed the investigation of the case. The contents of Annexure – H has obviously prevented the learned C.J.M. from proceeding in a manner prescribed by law. In that view of the mater, the concerned Inspector of Police has acted illegally.*

7. Learned counsel for the petitioner would further place reliance upon the judgment of Hon'ble Delhi High Court rendered in the case of *Court on its Own Motion vs. Central Bureau of Investigation, reported in 109 (2003) DLT 494*. Learned counsel refers to para-4 of the judgment, which reads as under:

> *"20. Rather the law is otherwise. In normal and ordinary course the police should always avoid arresting a person and sending him to jail, if it is possible for the police to complete the investigation without his arrest and if every kind of co-operation is provided by the accused to the Investigating Officer in completing the investigation. It is only in cases of utmost necessity, where the investigation cannot be completed without arresting the person, for instance, a person may be required for recovery of incriminating articles or weapon of offence or for eliciting some information or clue as to his accomplices or any circumstantial evidence, that his arrest may be necessary. Such an arrest may also be necessary if the concerned*

Investigating Officer or Officer-in-charge of the Police Station thinks that presence of accused will be difficult to procure because of grave and serious nature of crime as the possibility of his absconding or disobeying the process or fleeing from justice cannot be ruled out.

8. Learned counsel for the petitioner would submit that the arrest of the petitioner in the matter will affect his personal liberty as guaranteed under Article 21 of Constitution of India. To buttress his arguments, learned counsel for the petitioner would place reliance upon a judgment of Hon'ble Apex Court in the case of Joginder Kumar vs. State of U.P., AIR 1994 SC 1349. Para-24 has been cited by the counsel, which is extracted hereunder:

"24. The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the

> *genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."*

9. I have heard learned counsel for the parties and perused the record.

10. Admittedly, writ petitions were filed by the petitioners for quashing of the FIR, wherein the Court was pleased to quash the FIR, but thereafter on a recall application moved on behalf of the complainant, the Coordinate Bench, recalled its earlier order and directed for fresh investigation in the matter. However, the Court also observed that the arrest of the petitioners will be effected only after collection of sufficient material evidence against them and not before that. It is, under these circumstances, that the I.O. investigated the matter afresh and after collecting sufficient material evidence against the petitioners, moved an application before the Magistrate concerned

for issuance of Non Bailable Warrants against the petitioners.

11. Before going any further, it would be apt to reproduce here Section 173 of Cr.P.C, which reads as under:

> ***"173. Report of police officer on completion of investigation***. *-(1) Every investigation under this Chapter shall be completed without unnecessary delay.*
>
> *(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-*
>
> *(a) the names of the parties;*
>
> *(b) the nature of the information;*
>
> *(c) the names of the persons who appear to be acquainted with the circumstances of the case;*
>
> *(d) whether any offence appears to have been committed and, if so, by whom;*
>
> *(e) whether the accused has been arrested;*
>
> *(f) whether he has been released on his bond and, if so, whether with or without sureties;*
>
> *(g) whether he has been forwarded in custody under section 170.*
>
> *(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.*
>
> *(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation,*
>
> *(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order- for the discharge of such bond or otherwise as he thinks fit.*
>
> *(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate alongwith the report-*
>
> *(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than*

those already sent to the Magistrate during investigation;
(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub- section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).”

12. A plain language of Section 173 Cr.P.C. makes it amply clear that the submission of police report is mandatory. At the time of submission of police report before the Magistrate, in case of filing the final report u/s 169 Cr.P.C., there is no requirement to arrest the applicant, but when after collecting material evidence, the I.O. is inclined to submit charge sheet u/s 170 as per the provisions of Section 173 of Cr.P.C., then he has to mention the names of the parties; the nature of the information; the names of the persons who appear to be acquainted with the circumstances of the case; whether any offence appears to have been committed and, if so, by whom; whether the accused

has been arrested; whether he has been released on his bond and, if so, whether with or without sureties, as prescribed u/s 173 Cr.P.C. Thus, on conjoint reading of Section 170 and 173 of Cr.P.C., it is clear that the aforesaid section casts a duty upon the Investigating Officer to arrest the accused person, after sufficient material evidence is collected and in case, accused has been released on his bond or sureties, it is mandatory for him to mention as to whether he has been released on his bond with sureties or without sureties. It is well settled principle of law that when a statute prescribes to do a particular thing in a particular manner, then it has to be done in that manner alone and no other manner. This principle has been conclusively settled in a catena of judgments.

13. Admittedly, the petitioners have not been released on personal bonds and sureties as per Sub-section 2(f) of Section 173 of Cr.P.C. Therefore, as per the provisions of Sub-section 2(e) of Section 173 of Cr.P.C., I.O. has to mention whether the petitioners have been arrested, or not? Since the petitioners have not been released on personal bonds and sureties, therefore, at the time of submission of charge sheet, arrest of the petitioners is mandatory. The case laws cited by the petitioners are not applicable in the facts and circumstances of the present case.

14. The question before this Court is - when the Investigating Officer has collected sufficient material against the petitioners and is inclined to submit the charge sheet following the provisions of Section 170 Cr.P.C., would he be supposed to submit the police

report under Section 173 of Cr.P.C? However, if the petitioners are not released on bonds or sureties, in that case, arrest of the petitioners is mandatory. The object of Section 173 of Cr.P.C., in case of submission of police report in the form of charge sheet, is either to release an accused on personal bond or sureties so his presence may be secured to appear before the Magistrate concerned after submission of charge sheet. In case, an accused is not released on bail, personal bond or sureties then his arrest is necessary and mandatory at the time of submission of charge sheet so there may not be delay in proceedings further with the trial after submission of charge sheet. The provisions of sub-sections 2(e) and 2(f) of Section 173 of Cr.P.C. are unambiguous and plain reading of this provision would suggest that the arrest is mandatory. The provisions of sub-section 2(e) and 2(f) of Section 173 of Cr.P.C. have been enacted for speedy investigation and, after conclusion of investigation, on submission of charge sheet for speedy trail of the case.

15. The Parliament in its wisdom has enacted the provisions of sub-section 2(e) and 2(f) of Section 173 of Cr.P.C. considering the fact that in those cases where charge sheet is filed and the accused is not traceable and on summoning of an accused by the trial court, when the accused avoids the service of summons, then the trial court on coming to the conclusion that service of summons is not possible on the accused, may issue bailable warrants. But again, if the accused avoid the service of bailable warrants, then the trial court will be constrained to issue non-bailable warrants. Again in number of cases, the accused

avoids service of non-bailable warrants, then the trial court initiates the proceedings under Sections 82 and 83 of Cr.P.C., as a last resort. Sometimes this provision is also not sufficient to procure the presence of accused. Thus the provisions of sub-sections 2(e) and 2(f) of Section 173 of Cr.P.C. were made for speedy investigation and trial of the case.

16. In the case at hand, since the Investigating Officer has collected the sufficient material against the petitioners as per provisions of Section 170 of Cr.P.C. and is inclined to submit the charge sheet, thus, the Investigating Officer has to follow the procedure laid down in Section 173 of Cr.P.C. to submit the police report and to follow the provisions of Section 170 of Cr.P.C. Therefore, in view of this Court, the provisions of sub-section 2(e) of Section 173 of Cr.P.C. for arrest of the accused is mandatory. Furthermore, the I.O. in the case, pursuant to order dated 11.03.2014 passed by this Court in review application, after collecting sufficient material, moved the application for issuance of N.B.W. against the petitioners, whereupon the Magistrate has issued N.B.W. against the writ petitioners.

17. Code of Criminal Procedure is a complete Code for investigation and trial. Stages to challenge an order have been provided in the Code of Criminal Procedure. In an event, an order is passed by the Magistrate, it can be recalled on showing sufficient cause, by the Magistrate himself.

18. Section 397 of the Code of Criminal Procedure, deals with calling for records to exercise powers of revision. The same reads as under: –

> *"(1) the High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.*
> *Explanation – All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.*
> *the powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.*
> *If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."*

19. In case, order is not recalled by the Magistrate and if it is an illegal order and without jurisdiction and is a final order, the revision under Sections 397 and 401 of Cr.P.C. would be maintainable. In case, a remedy of revision is not maintainable, only in that contingency to secure the ends of justice, criminal misc. application under Section 482 Cr.P.C. will be maintainable.

20. Both the petitioners have filed separate criminal writ petitions under Article 226 of the Constitution of India challenging the order dated 16.12.2017, whereby non-bailable warrants have been issued against them. Since the provisions have been made by way of revision under Sections 397 / 401 of Cr.P.C. to challenge the order and alternatively, if a revision is not maintainable, the order can be challenged under Section 482 Cr.P.C. before this Court. A criminal writ petition under Article 226 of the Constitution of India would not be maintainable for cancellation of non-bailable warrants during the investigation as already separate criminal writ petitions were filed by the petitioners for quashing of the FIR. Present criminal writ petitions may have been filed for subsequent cause of action but are in respect of same subject matter and it can safely be construed that subsequent writ petitions are second criminal writ petitions, which are not maintainable.

21. Besides this, there appears to be no illegality in the impugned order dated 16.12.2017, whereby non-bailable warrants were issued against the petitioners, as the learned Magistrate has rightly issued non-bailable warrants against the petitioners as per the provisions contained in Sections 170 and 173 of Cr.P.C. Assuming for the sake of argument that the criminal writ petitions are maintainable, even then, the order impugned issuing non-bailable warrants which was passed under the provisions contained in Sections 170 and 173 of Cr.P.C. does not suffer from any illegality, perversity or jurisdictional error. The jurisdiction of criminal writ petition under Articles

226/227 of the Constitution of India is not an appellate jurisdiction, rather it is a jurisdiction akin to revisionsal jurisdiction. While there can be no doubt that the jurisdiction of a High Court under Articles 226 and 227 cannot be curtailed, yet extraordinary situations could arise where it would be advisable for a High Court to decline to interfere.

22. Since no illegality, perversity or jurisdictional error is found in the order under challenge, the relief sought by the petitioners, is not tenable. On account of this, the petitioners are not entitled for any relief claimed by them. Present criminal writ petitions fail and are dismissed.

23. Pending applications, if any, stand disposed of accordingly.

(Lok Pal Singh, J.)
31.07.2018

Rajni