

2009 CRLJ 523 . 2009 AIR JHAR R 2 203 . 2009 PLJR 2 260 . 2008 SCC ONLINE PAT 254 . 2009 CRI LJ 523 .

Sandeep Kumar Tekriwal v. State Of Bihar & Anr.

Patna High Court (Sep 9, 2008)

CASE NO.

Cri. W.J.C No. 699 of 2008

JUDGES

Samarendra Pratap Singh, J.

IMPORTANT PARAS

1. 18. Section 446A, Cr. P.C has been inserted in the Code of Criminal Procedure by Act No. 63 of 1980, and it relates to cancellation of bail and bail bond. Section 446A, Cr. P.C reads as follows:—

SUMMARY

1. 2. In the instant writ petition, the petitioner has prayed for quashing the order dated 28-6-2008: passed by Judicial Magistrate, 1st class.
2. Pursuant to order dated 27-9-2000; passed by the Apex Court in S.L.A (Cri) No. 3079 of 2000, the petitioner surrendered in the Court below and was released on bail.
3. 7. Learned counsel for the State submits that the petitioner has alternative remedy and could have filed quashing application instead of rushing to this Court in writ jurisdiction.
4. 8. In case of Hari Vishnu Kamath (supra), the Apex Court laid down the circumstances in which writ of Certiorari can be issued.
5. "According to the common law of England 'certiorari' is a high prerogative writ issued by the Court of the King's Bench or Chancery to inferior Courts or tribunals in the exercise of supervisory jurisdiction with a view to ensure that they acted within the bounds of their jurisdiction.

6. The Court issuing certiorari to quash could not substitute its own decision on the merits, or give directions to be complied with by the Court or the tribunal.
7. The informant Ravi Prakash moved the High Court for setting aside the judgment of Appellate Court and restoring that of trial Court which relief the High Court granted.
8. In the such circumstances, the Apex Court observed that the High Court while exercising jurisdiction under Articles 226 and 227 of the Constitution of India cannot act like an Appellate Court is.
9. 13. Having heard the learned counsel for the parties, there cannot be any dispute to the proposition that while exercising jurisdiction under Sections 226 and 227 of the Constitution of India, the High Court cannot act like an Appellate Court.
10. Article 227 of the Constitution is for keeping the subordinate Courts within the bounds of jurisdiction.
11. When the subordinate Court has jurisdiction which it does not have, or has failed to exercise the jurisdiction, or exercises jurisdiction in a manner not permitted by law and thereby has occasioned, a failure of justice, the High Court would step in to exercise its supervisory jurisdiction.
12. While issuing writ of certiorari the High Court may annul or set aside the act, order or proceeding but cannot substitute its own decision in place thereof.

1. Heard learned counsel for the parties.

2. In the instant writ petition, the petitioner has prayed for quashing the order dated 28-6-2008: passed by Judicial Magistrate, 1st class. Bhagalpur, in connection with Tr. No. 2853 of 2008, arising out of Kotwali PS Case No. 0152 of 2000, for offences under **Sections 406, 419, 420, 467, 468, 120B** of the I.P.C, whereby his representation under **Section 317, Cr. P.C** was not accepted and as such his bail bond was cancelled, and non-bailable warrant (NBW) for arrest was also issued against him. The facts of the case in short is as follows:—

Pursuant to order dated 27-9-2000; passed by the Apex Court in S.L.A (Cri) No. 3079 of 2000, the petitioner surrendered in the Court below and was released on bail. After taking of cognizance, the matter was transferred to the Court of Md. Sahid Khan, Judicial Magistrate, 1st class, Bhagalpur for disposal. The petitioner duly appeared before the trial Court on transfer of case, who vide his order dated 5-3-2000 allowed

the petitioner to remain on previous bail. However, the case remained pending, awaiting appearance of accused Prem Prakash Trivedi. Learned counsel submits that the aforesaid fact would also transpire from orders of the trial Court including order dated 31-10-2005.

3. On 28-6-2008, the date fixed in the case, three out of four accused including the petitioner were represented under Section 317 of the Cr. P.C The other accused Prem Prakash Trivedi was as usual absent. The learned magistrate did not accept the representation under **Section 317, Cr. P.C** and cancelled bail bond and issued NBW against the petitioner and others.

4. Learned counsel for the petitioner submits that the rejection of representation under **Section 317, Cr. P.C** and cancellation of bail bond and issuance of NBW by a composite order dated 28-6-2008, is in violation of provision of Section 317 of the Cr. P.C itself.

5. Learned counsel for the State submits that instant writ application is not maintainable. Furthermore, forfeiture of bond under **Section 446, Cr. P.C** is appeal able under **Section 449, Cr. P.C** He further submits that under **Section 317, Cr. P.C** the magistrate by one composite order can cancel the representation, bail bond and can issue NBW also.

6. As maintainability of the writ petition has also been raised by learned State counsel, this Court proceeds to examine the same also.

7. Learned counsel for the State submits that the petitioner has alternative remedy and could have filed quashing application instead of rushing to this Court in writ jurisdiction. In this respect, he relied upon decisions of the Apex Court in cases of Hari Vishnu Kamath v. Ahmad Ishaque, reported in **AIR 1955 SC 233**, Surya Dev Rai v. Ram Chander Rai, reported in (2003) 6 SCC 675 : AIR 2003 SC 3044, as well as **Ranjit Singh v. Ravi Prakash**, reported in (2004) 3 SCC 682 : AIR 2004 SC 3892.

8. In case of Hari Vishnu Kamath (supra), the Apex Court laid down the circumstances in which writ of Certiorari can be issued. Extract of the judgment laid down in para 10 is quoted herein as follows:—

“According to the common law of England ‘certiorari’ is a high prerogative writ issued by the Court of the King's Bench or Chancery to inferior Courts or tribunals in the exercise of supervisory jurisdiction with a view to ensure that they acted within the bounds of their jurisdiction. To this end, they were commanded to transmit the records of a cause or matter pending with them to the superior Court to be dealt with

there, and if the order was found to be without jurisdiction, it was quashed. The Court issuing certiorari to quash, however, could not substitute its own decision on the merits, or give directions to be complied with by the Court or the tribunal. Its work was destructive; it simply wiped out the order passed without jurisdiction and left the matter there.”

9. In the case of **Surya Deo Rai v. Ram Chander Rai**, ((2003) 6 SCC 675 : AIR 2003 SC 3044) (supra), the Apex Court in sub-paras (3) and (8) of para 38 extensively laid down scope, limits and circumstances in which writ of certiorari can be issued. These sub-paras are as follows:—

(3) Certiorari, under **Article 226 of the Constitution**, is issued for correcting gross errors of jurisdiction, i.e, when a subordinate Court is found to have acted (i) without jurisdiction by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice whether there is no procedure specified, and thereby occasioning failure of justice.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

10. The Apex Court further observed that when there is manifest error apparent on the face of proceedings and based on clear ignorance or disregard of provision of law, the writ would be maintainable.

11. In the case of **Ranjit Singh** ((2004) 3 SCC 682 : AIR 2004 SC 3892) (supra) there was a dispute regarding landlord and tenant, in respect of suit premises; The learned Sessions Court was persuaded to form an opinion that the shop was an old construction which was needed to be demolished as it was in bad condition. The informant Ravi Prakash moved the High Court for setting aside the judgment of Appellate Court and restoring that of trial Court which relief the High Court granted. The High Court observed that considering the evidence, on record, the order of Session's Court was not sustainable. In these such circumstances, the Apex Court observed that the High Court while exercising jurisdiction under **Articles 226 and 227 of the Constitution of India** cannot act like an Appellate Court is.

12. On the other hand, learned counsel for the petitioner submits that it is well

established by Judicial pronouncements that High Court under **Articles 226 and 227 of the Constitution of India** can interfere in the following circumstances which are enumerated herein below—

- (a) Erroneous assumption or excess of jurisdiction.
- (b) Refusal to exercise jurisdiction.
- (c) Error of law apparent on the face of the record, as distinguished from a mere mistake of law or error of law relating to jurisdiction.
- (d) Violation of the principles of natural justice.
- (e) Arbitrary or capricious exercise of authority, or discretion.
- (f) Arriving at a finding which is perverse or based on no material.
- (g) A patent or flagrant error in procedure.
- (h) Order resulting in manifest injustice.

13. Having heard the learned counsel for the parties, there cannot be any dispute to the proposition that while exercising jurisdiction under **Sections 226 and 227 of the Constitution of India**, the High Court cannot act like an Appellate Court. The jurisdiction is supervisory in nature. **Article 227 of the Constitution** is for keeping the subordinate Courts within the bounds of jurisdiction. When the subordinate Court has jurisdiction which it does not have, or has failed to exercise the jurisdiction, or exercises jurisdiction in a manner not permitted by law and thereby has occasioned, a failure of justice, the High Court would step in to exercise its supervisory jurisdiction. However, the distinction between exercise of jurisdiction, for issuance of writ of certiorari under **Article 226 of the Constitution** and that of supervisory jurisdiction has obliterated to quite an extent over the years. While issuing writ of certiorari the High Court may annul or set aside the act, order or proceeding but cannot substitute its own decision in place thereof. In appropriate cases, the jurisdiction of the High Court may not be limited to giving suitable direction, but can pass order in suppression or substitution of the order of the subordinate Court as the Court could have made in the facts and circumstances of the case.

14. Having noticed the extent and scope of jurisdiction of this Court under **Articles 226 and 227 of the Constitution of India**, I would now examine whether the instant case would fall within the aforesaid ambits. It would be necessary to examine **section 317. Cr. P.C** at the first instance itself which is quoted herein below:—

Provision for inquiries and trial being held in the absence of accused in certain cases.

— (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourns such inquiry or trial, order that the case of such accused be taken up or tried separately.

15. **Section 317, Cr. P.C** provides for inquiries and trial being held in the absence of accused in certain cases. However, if the Magistrate finds that personal appearance of the accused is necessary, he would direct that accused would no longer be represented on the next date by a pleader under **Section 317, Cr. P.C** but would appear in person. If the accused in spite of such order does not appear in person, it would be open for the learned Magistrate to issue warrant of arrest and proceed in accordance with the procedure prescribed in Chapter-VI of the Cr. P.C and may also cancel bail and bail bond and proceed in accordance with Chapter XXXIII of the Cr. P.C It does not appear from the order of the preceding dates i.e 31-1-2008, 26-3-2008 that personal attendance of petitioner would no longer be dispensed with, and he is required to attend in person. The Magistrate in view of **Section 317(1) Cr. P.C** ought to have given an opportunity to an accused to appear in person who was being allowed to be represented through a pleader. The order of preceding dates in the case on the contrary shows that Magistrate in fact accepted the representation under **Section 317, Cr. P.C** The magistrate has to follow the procedure prescribed therein, if it does not dispenses with his personal attendance. A Magistrate while rejecting a representation under **Section 317 Cr. P.C** cannot at the same time cancel bail bond and issue non-bailable warrant of arrest, if on preceding dates has not clearly directed that personal attendance under **Section 317, Cr. P.C** will no longer be dispensed with. The Court ought to provide a reasonable opportunity to the accused to appear in person whose representation was earlier being allowed under **Section 317, Cr. P.C** In this case, it appears that trial lingered as a co-accused Prem Prakash was absconding. Learned counsel for the petitioner has also submitted that there have been no latches on his part.

16. In the instant case, the learned magistrate not only rejected application under **Section 317, Cr. P.C** but also cancelled the bail bond and issued non-bailable warrant of arrest by a composite order dated 28-6-2008, which is impermissible under **Section 317, Cr. P.C** If the Magistrate did not think it appropriate to allow the representation of petitioner under **Section 317 Cr. P.C** any more, it could have directed the petitioner to appear in person on dates next. Even then if petitioner or accused does not appear for reasons which do not seem valid to the Magistrate he may proceed to issue warrants as provided in Chapter VI of Cr. P.C and cancel bail and bail bonds as engrafted in Chapter XXXIII, Cr. P.C as noticed in para 16. The learned magistrate as such exceeded jurisdiction vested in him and exercised the same erroneously.

17. Now, the Court comes to next submission of the petitioner that appeal lies under **Section 449, Cr. P.C** against orders passed under **Section 446, Cr. P.C**, which deals with the procedure, when bond is forfeited. He submits that the impugned order is one which has been substantially passed under **Section 446 Cr. P.C** as such, writ petition is not maintainable. Let us examine whether the impugned order is one which is passed under Section 446 or Section 446A Cr. P.C

18. Section 446A, Cr. P.C has been inserted in the **Code of Criminal Procedure by Act No. 63 of 1980**, and it relates to cancellation of bail and bail bond. Section 446A, Cr. P.C reads as follows:—

(a) the bond executed by such person as well as the bond if any, executed by one or more of his sureties in that case shall stand cancelled; and

(b) thereafter no such person shall be released only on his own bond in that case, if the police officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition.

19. The impugned order as such is one which would come under purview of **Section 446A and not Section 446, Cr. P.C** There is no corresponding amendment in section 449 of the Cr. P.C providing for appeal against order cancelling of bail or against order of issuance of NBW under Section 446A which is an independent provision and not a clause or sub-section of Section 446. In view of aforesaid circumstances, I am not in agreement with the learned counsel for the State that order cancelling bail and bail bond is also appealable under **Section 449, Cr. P.C**

20. In view of aforesaid findings, I find that the learned Magistrate exceeded his jurisdiction by cancelling bail and bail bond and issuing no bailable warrant of arrest

while rejecting the representation under **Section 317, Cr. P.C** vide one composite order dated 28-6-2008, without any prior order on preceding dates directing the personal attendance of petitioner, and as result the same is set aside. The petitioner is directed to appear before the learned magistrate within six weeks from today who would allow him to remain on previous bond. The petitioner would abide by any further direction of magistrate in the proceeding.

21. Order accordingly.