

**Ananda Rao Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/382779](http://sooperkanoon.com/382779)

**Court :** Karnataka

**Decided On :** Jan-17-1992

**Reported in :** ILR1992KAR1786; 1992(2)KarLJ97

**Judge :** N.D.V. Bhat, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 64, 65, 87 and 397(2)

**Appeal No. :** Crl. Petn. No. 112 of 1992

**Appellant :** Ananda Rao

**Respondent :** State

**Advocate for Def. :** H. Kantharaj, HCGP

**Advocate for Pet/Ap. :** B. Rudregowda, Adv.

**Disposition :** Criminal petition allowed

**Judgement :**

ORDER

**N.D.V. Bhat, J.**

1. This Petition is directed against the order dated 1.1.1991 passed by the Addl. Judicial Magistrate First Class, Sagar in C.C.No. 1182/89 and the order dated 9.7.1991 passed by the Sessions Judge, Shimoga in Cr.R.P.No:5/91.

2. By the order dated 1.1.1991, the learned Judicial Magistrate First Class ('JMFC' for short), directed the issue of bailable warrants to charge sheet witnesses 1 to 3. By the order dated 7.1.1991, the learned JMFC directed the issue of non-bailable warrants to charge sheet witnesses 1 to 3. When these two orders were challenged before the learned Sessions Judge, Shimoga in the aforesaid Criminal Revision Petition, the Sessions Judge passed the order referred to hereinabove, dismissing the application on the count that the order in question would amount to Interlocutory Order and that therefore, is not revisable having regard to provisions of Section 397(2) Cr.P.C. Thus, these orders are challenged before this Court.

3. I have heard Sri. Rudregowda, Counsel for the petitioners and Sri. H.Kantharaj, Government Pleader for respondent.

4. The point for consideration is as to whether the orders challenged are sustainable. The order passed by the JMFC on 1.1.1991 reads as under :

' State by APP

Accused by Sri KNS

S.S. to CW's 1 to 3 issued.

S.S. to CW's 1 & 2 served on their house.

C.W.3 unserved.

All the accused are present.

Issue B.W to 1 to 3 for Rs. 300/- and S.S. to C.W.4.

Call on : 7.1.1991.'

Then again, it is seen that on 7.1.1991, the learned JMFC is shown to have passed an order which reads as under :

' State by APP

Accused by Sri KNS.

BW to CS's 1 to 3 returned unexecuted prays for time. S.S. to CW 4 served personally.

All the accused are present. CW.4 present.

B/o.CW's 1 to 3 are absent.

B.W issued to CW's 1 to 3 have returned with the shara that the CW's are out of station. Counsels for the accused Sri KNS and DHN submits before this Court that the CW's are at Sagar only and they are willfully avoiding the process of this Court. Since 3,6.89 accused are regularly attending this Court, there is room to believe the submission made by Sri KNS and DHN as CW's are the residents of Sagar.

Hence issue N.B.W. to CW's 1 to 3, N.B.W to CW.2 executed with the help of a W.P.C.

Call on : 16-1-91.'

The dismissal of the Petition before the learned Sessions Judge is only on the count that the order was not revisable in the context of the provisions of Section 397(2), Cr.P.C.

5. A careful perusal of the orders passed by the learned JMFC would go to show that the JMFC, before issuing the order dated 1.1.1991 or for that matter, the order dated 7.1.1991, did not follow the procedure which is required to be followed in the context of the provisions relevant for consideration and incorporated in Chapter 6 of the Code of Criminal Procedure, 1973. Section 61 deals with the form of summons; Section 62 provides as to how summons are required to be served; Section 63 refers to the service of summons on corporate bodies and societies; Section 64 provides as to how summons should be served when the person summoned cannot be found; Section 65 provides the procedure when service cannot be effected in the way and manner as provided for in the preceeding Sections. Section 87, Cr.P.C. empowers the Court in any case in which it is empowered by the Cr.P.C., to issue summons to the appearance of any person, to issue, after recording its reasons in writing, a warrant for his arrest under the circumstances as reflected therein. It is therefore clear that the power to issue

summons and the power to issue warrant under the Cr.P.C. will have to be exercised in accordance with the procedure laid down and not dehors the provisions.

6. In the instant case, it is seen from the order passed by the learned JMFC on 1.1.1991 that summons issued to CW's 1 to 3 are not served and summons issued to CW 1 and 2 were served on their house. After having observed as such, the learned JMFC chose to issue bailable warrant. Thereafter, on 7.1.1991, it is seen from the order passed by the learned JMFC that the bailable warrants issued to CW's 1 to 3 were returned with the shara that they were out of station. The learned JMFC after having made the observation reflected in his order dated 7.1.1991, chose to issue non-bailable warrants to CW's 1 to 3. As pointed out earlier, the different provisions reflected in Chapter 6 of Cr.P.C. would go to show the modus-operandi required to be adopted by the Court concerned with reference to the service of summons. At this juncture, the Sections relevant for consideration in this case are Sections 64 and 65 of Cr.P.C. Section 64 of Cr.P.C which corresponds to Section 70 of 1898 Cr.P.C., - reads as under :

' Section 64: Where the person summoned cannot by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.'

Section 65 of Cr.P.C which corresponds to Section 71 of the 1898 Cr.P.C., reads as under :

' If service cannot by the exercise of due diligence be effected as provided in Section 62, Section 63 or Section 64, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such manner as it considers proper.'

A careful perusal of the provision reflected in Section 65 would indeed go to show that the application of Section 65 will come into being only if and if the mode referred to in Section 64 is exhausted. In other words, unless there is something to show that the provisions reflected in Section 64 of Cr.P.C. are exhausted, it is not at all permissible for the Court to have recourse to the provisions of Section 65, Cr.P.C. A perusal of the provisions reflected in Section 64 would go to show that if a person summoned cannot be found by the exercise of due diligence, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt thereof on the back of i the other duplicate.

7. In the instant case the records do not even mostly indicate that this procedure was exhausted by learned JMFC. In that view of the matter, the occasion to have recourse to Section 65 Cr.P.C., did not arise at all. As a matter of fact, this very aspect was considered by this Court of course, with reference to provisions of Cr.P.C., 1898. This Court in the Decision in *STATE OF MYSORE v. BHIMARAO & ANR.*, 1963(1) Mys.L.J. 148 has pointed out that when the records of the Court do not disclose that the method of serving summons prescribed in Section 70, Cr.P.C. was ever attempted or was found to be impossible to give effect to, the service of summons by affixing a copy, will be bad in law because Section 71 can be resorted to only after the methods prescribed in Sections 69 and 70 are found to be ineffective after the exercise of due diligence on the part of the process server. It is necessary to notice here that Section 71 of the 1898 Cr.P.C. corresponds to Section 65 of the present Code and Section 70 of the old Code corresponds to Section 64 of the present Code. Under these circumstances, it is clear that the ratio laid down in the aforesaid case will apply on all fours to the facts of this case.

8. In this view of the matter, I am clearly of the view that the learned JMFC has erred in passing the bailable warrant in the first instance and in passing the non-bailable warrants thereafter. It is also necessary to notice here that Section 87 of the Cr.P.C. can be invoked only under the circumstances reflected either in Clause (a) or under Clause (b) of the said Section. Before these clauses are resorted to, it is absolutely necessary for the Magistrate to be satisfied about the conditions

reflected in Clause (a) or the Magistrate will have to be satisfied that the summons are duly served. I have shown earlier as to how the summons cannot be said to have been duly served at all having regard to the fact that the mode of service with reference to Section 64, Cr.P.C. was not exhausted at all. Further, there is also nothing to show that the conditions referable to Clause (a) in Section 87, Cr.P.C. were not in existence. Looked at from any point of view therefore, it is quite clear that the issue of warrant by the learned JMFC was not at all warranted in the facts and circumstances of the case.

9. The learned Sessions Judge took the view that the Revision Petition filed before him is not maintainable since according to him, the Petition was hit by the mischief of Section 397(2) Cr.P.C. It is necessary to notice here that the order challenged was by the witnesses with ; reference to the non-bailable warrants issued against them. It is therefore clear that if that order was not challenged by these witnesses it was not possible for them to have challenged it at any time at a later date. Under these circumstances, it is not possible to agree with the view taken by the learned Sessions Judge that the order passed by the learned JMFC issuing non-bailable warrant to the witnesses was an Interlocutory Order. In that view of the matter, I am clearly of the view that the order passed by the learned Sessions Judge also is wrong.

10. For the reasons stated hereinabove, the Criminal Petition is allowed. The orders dated 1.1.1991 and 7.1.1991 passed by the Addl. Judicial Magistrate First Class, Sagar in C.C.No : 1182/89 and the order dated 9.7.1991 passed by the Sessions Judge, Shimoga in Cr.R.P.No: 5/91 are hereby set aside. The matter is remitted back to the learned Addl. Judicial Magistrate First Class, Sagar for disposal of the case according to law. He shall issue fresh summons to the witnesses concerned, if the witnesses are required in the case.