

IN THE HIGH COURT OF DELHI

Crl.M.C. No.2473/2007 & Crl.M.A. Nos.8644/2007 & 13533/2007

Date of decision: 17th July, 2009

Suresh Kumar Petitioner
through: Mr. Jagat Rana, Adv. with Mr. Akhilesh
Arora, Adv.

VERSUS

Govt. of NCT of Delhi & Anr. Respondents
through: Mr. Hitender K. Nahta, Adv. for
Respondent No.2/Datson
Investment Limited.
Ms. Fizani Husain, APP for the State.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

GITA MITTAL, J(Oral)

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1. The present petition has been filed by Shri Suresh Kumar under Section 482 of the Code of Criminal Procedure praying for quashing of an order dated 25th July, 2007 passed by Shri Balwant Rai Bansal, Metropolitan Magistrate in a case arising out of FIR No.646/1997 registered by the police station Moti Nagar. It appears that in view of an accident in which a truck no.DL-IG-1168 was involved. Police station Moti Nagar had registered FIR No.646/1997 under Section 279/ 304A of the Indian Penal Code.

2. The investigation was conducted by the police and the vehicle no.DL-1G-1168 was also recovered. One Shri Manish Kumar was reported to be the driver of the vehicle who was implicated in the case.

3. An application was made by Shri Suresh Kumar for releasing the said truck on superdari to him. A direction was made on 22nd December, 1997 by the trial court ordering release of the truck on superdari to Shri Suresh Kumar with the direction that he would produce the vehicle in court as and when required during its pendency. Shri Suresh Kumar is stated to have furnished the superdaginama dated 22nd December, 1997 on the same date claiming to be the true, absolute and lawful owner of the said truck. It may be noted that Shri Suresh Kumar also undertook not to sell or transfer the vehicle without permission of the court and produce the vehicle as and when required. On these undertakings, the court directed release of the vehicle to Shri Suresh Kumar on supurdiginama of Rs.4,00,000/-.

4. The petitioner made an endorsement on the same to the effect that he had received the same in good condition.

5. It appears that subsequently an application was made by Major K.S. Verma, Managing Director of M/s Datson Investment Limited for cancellation of the supurdiginama of truck no.DL-1G-1168. The company claimed ownership of the vehicle in question

and informed the court that the subject vehicle as well as another truck bearing no.DL-1G-1167 was given to Shri Suresh Kumar under an agreement dated 15th March, 1995 against periodic payments. The petitioner also obtained a general power of attorney dated 20th April, 1995 from the company relating to the vehicle. It was also stated that Manish Kumar who was driving the truck, was an employee of the petitioner at the time of the accident. The reason for filing the application was disclosed that in the motor accident claim filed by the legal heirs of the person who died in the accident and the injured person, an award had been passed requiring the company as owner of the vehicle to make payment of Rs.5.15 lakhs. As Suresh Kumar, the present petitioner had not followed the terms and conditions of the lease and caused loss to the company by not keeping the same insured, it was necessary to have the vehicle restored to the applicant. Service of a legal notice was also made and it was stated that the present petitioner had surreptitiously sold the vehicle.

6. This application was contested by the present petitioner who contended that the supurdiginama was furnished to this court only as an attorney of the applicant M/s Datson Investment Limited and that he was only an agent of the principal owner.

7. The respondent no.2 has placed a copy of the reply dated 29th June, 2007 which was filed by the present petitioner before the learned Metropolitan Magistrate. Interestingly, the petitioner challenged the sale/rent deed dated 15th March, 1995 as a forged document. At the same time, he took the shelter of the general power of attorney dated 16th December, 1997 to contend that he was only an agent of the principal owner. There is no explanation anywhere on record or before this court as to where was the occasion of appointing the petitioner as an attorney of the company if there was no agreement or relationship with the company.

8. A further plea was taken by the petitioner that the physical custody of the vehicle was taken by M/s Datson Investment Limited, the owner of the vehicles without any disclosure of the date or particulars thereof. It was urged that the owner is in custody of the vehicle. Such a plea fails to take into consideration the obligation of the executant of the supurdiginama whereby the petitioner herein has specifically undertaken to the court that it would be his responsibility to produce the vehicle as and when required and that he would not sell/transfer the vehicle without the permission of the court.

9. The petitioner submits that he was put to notice as directed by the court to produce the vehicle.

10. On the 7th of June, 2007, it was noted that the supardar had not brought the case property and his only reason for not doing was that he was not directed to do so. The matter was considered by the learned Metropolitan Magistrate on 25th July, 2007 when it was argued by the petitioner that he had got the release of the vehicle in a limited capacity being a general attorney of the owner – M/s Datson Investment Limited and the vehicle is no more in his possession. The court held this contention of the present petitioner to be a lame excuse and rejected the same. For the failure to produce the case property, the court directed forfeiture of his sapurdiginama and imposed a penalty of Rs.4,00,000/- on the petitioner. At the same time, a warrant of attachment was issued against the present petitioner for realization of Rs.4,00,000/- through the concerned subdivisional magistrate as arrears of land revenue. The directions imposing penalty and directing issuance of the warrant are the subject matter of challenge in these proceedings.

11. Before this court, it has been submitted by learned counsel for the petitioner that he does not dispute that a valid notice to produce the vehicle was given having regard to the facts and circumstances of the case. He submits that the petitioner challenges the order dated 25th July, 2007 only to the extent that it proceeds to forfeit his superdaginama and imposed a penalty

of Rs.4,00,000/- and directs issuance of warrants of attachment against the petitioner for realisation of the penalty amount.

12. Learned counsel for the petitioner further submits that in view of the statutory provisions under sub-section 1 of Section 446 of the Code of Criminal Procedure and the judicial pronouncements reported at **2004 Crl.Law Journal 728 Smt. Kanta Theeng Vs. State of Sikkim** and **54 (1994) DLT 637 Yashodha Vs. State**, issuance of notice before passing of the order forfeiting the sapurdiginama and imposition of penalty was mandatory.

13. Ms. Fizani Hussain, learned APP has vehemently opposed the petition submitting that the representation made by the petitioner in his application for release of the vehicle, the undertaking in the superdiginama executed by him and his actions after he secured release of the vehicle disentitle him to any relief herein.

14. Mr. Jagat Rana, learned counsel for the petitioner submits that the petitioner is raising only a limited challenge by way of the present petition. It is contended that only the direction of the trial court imposing penalty and directing its recovery is being challenged.

15. Mr. Hitender K. Nahta, learned counsel appearing for M/s Datson Investment Limited, respondent no.2 herein, has opposed the petition contending that the petition is misconceived and that the

order passed by the learned trial court was justified. Several factual assertions in support of the impugned order have also been made.

16. I have heard learned counsel at length. The petitioner has placed on record a copy of the application dated 22nd December, 1997 filed by Shri Suresh Kumar for release of the vehicle no.DL-IG-1168 to him as the sole applicant. This application contains no reference to any agreement or any attorney. The applicant has submitted in this application that “the vehicle is required by the applicant for performance of day to day duty” and a prayer is made for issuance of orders for the release of the vehicles on superdari basis to the applicant. The applicant has stated in this application that the sapurdiginama on stamp paper has been executed and given with the application. It was clearly stated that the applicant will produce the vehicle in the in the court as and when required during the pendency of the case.

17. The present petitioner has stated in clear and unequivocal terms that he was the absolute, true and lawful owner of the vehicle. Photocopy of the supurdiginama has been filed on record by the petitioner and the same reads as follows:-

“This sapurdiginama is executed at New Delhi on this 22-12-1997 by Shri Suresh Kumar son of Sh. Badan Singh, R/o A-43, Chander Nagar, Janakpuri, New Delhi-110 058. (hereinafter called the `EXECUTANT').

AND WHEREAS the Executant is the absolute, true and lawful owner of Vehicle No.DL-IG-1168 Model 1990 Engine No.2613 Chassis No.0156 Make Tata-1210-s.

AND WHEREAS the said vehicle was involved in an Accident on 26.11.1997 and now it has been lying under the custody of police station Moti Nagar, New Delhi.

AND WHEREAS Now the Executant want to realise the above said vehicle from the custody of police, against the Superdari of Rs.4,00,000/-.

AND WHEREAS the Executant also undertakes not to sell/transfer/take outside the same from Union Territory of Delhi without the permission of this Hon'ble Court, failing which I shall be liable for a sum of Rs.4,00,000/- to the Government of India.

AND THEREFORE the executant hereby requests to the Hon'ble S.H.O./concerned authority to please release the vehicle as early as possible.

AND WHEREAS the executant also assures to the S.H.O. that he shall produce himself and also the vehicle before the concerned authority as and when required.

In witness whereof this sapurdiginama is executed at New Delhi on this 22-12-1997 in the presence of the following witnesses."

(Emphasis supplied)

18. The trial court accepted the unequivocal and absolute representation and undertakings of the petitioner. The petitioner is bound by his representation to the court contained in the application filed by him for release of the vehicle and the undertaking to the court in the sapurdiginama. Having given the undertaking, he remains bound by the same and it is his responsibility of the petitioner to produce the vehicle in terms of his binding to the court. It is certainly not open to him to take

the shield of an alleged power of attorney or any other transaction with the respondent no.2 to avoid the representation made to the court in the application dated 2nd December, 2007 or the undertakings in the bond.

19. It now becomes necessary to notice the legal position with regard to the challenge laid herein which would bind adjudication in the matter.

20. In the instant case, the truck was released on execution of a bond by the petitioner. Upon failure to produce the property, the statutory provision which would guide the course of action which the court is required to take is to be found in Section 446 of the Code of Criminal Procedure. This provision reads as follows:-

“446. Procedure when bond has been forfeited:-

(1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

Explanation: A condition in a bond for appearance, or for production of property, before a court shall be construed as including a

condition for appearance, or as the case may be, for production of property before any court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover the same, as if such penalty were a fine imposed by it under this Code:

¹[Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.]

(3) The court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the court by which he was convicted of such offence maybe used as evidence in proceedings under against his surety or sureties, and, if such certified copy is so used, the court shall presume that such offence was committed by him unless the contrary is proved.

21. From a bare reading of the statutory provision, it is apparent that the court is required to record adequate grounds on which the order of forfeiture of the bond is based.

22. However, so far as the imposition of penalty is concerned, the statutory provisions mandate that after recording the grounds of such proof, the court is required to call upon any person who is bound by the bond to pay the penalty thereof or to show cause why it should not be paid. Sub-section 2 of Section 446 of Cr.P.C. provides that if sufficient cause is not shown and the penalty is not paid, the court may proceed to recover the same as if such penalty were a fine imposed by the court under the Code.

23. By the order dated 25th July, 2007, after directing forfeiture of the supurdiginama/bond, the court imposed a penalty of Rs.4,00,000/- which is stated to be the amount of supurdiginama executed by the petitioner. At the same time, the court simultaneously directed issuance of warrants of attachment against the petitioner for realization of this amount.

24. It is evident that the statutory provisions envisage calling upon the person bound by the bond to pay the same or to show cause as to why the penalty amount should not be paid. The petitioner has not been given an opportunity to show cause against the same. Even assuming that the penalty was validly imposed, no opportunity has been given to the petitioner to deposit the same. The court has straightaway proceeded to issue the warrant of attachment.

25. In the judicial pronouncement relied upon by the petitioner reported at **2004 Crl.Law Journal 728 Smt. Kanta Theeng Vs. State of Sikkim**, the court held that before issuance of notice to show cause, the magistrate is required to satisfy himself that there was prima facie material for such forfeiture of the bond and before issuing a distress warrant, an opportunity should be given to the executant of the bond. Similarly in **54 (1994) DLT 637 Yashodha Vs. State**, the court held that under Section 446 of the Code of Criminal Procedure when a bond has been forfeited and before a person becomes liable to pay the penalty, the court is required to give an opportunity to show cause as to why it should not be paid and it is only if the person fails to show sufficient cause that the court can recover the amount of penalty imposed.

26. In the judgment reported at **54 (1994) DLT 637 Yashodha Vs. State**, the court held thus:-

4. Section 446 of the Code of Criminal Procedure which deals with the procedure when a bond has been forfeited clearly lays down that once it is so forfeited, the Court may call upon the person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. It would thus be clear that before any person bound by such bond becomes liable to pay the penalty thereof, it is required of the Court to give notice to him as to why it should not be paid and if he

fails to show sufficient cause only then it can proceed to recover the amount of penalty imposed. Significantly no notice to the surety is contemplated before the forfeiture of the bond. Under the circumstances, Sub-section (1) of Section 446 of the Code which requires issue of the notice to the surety after forfeiture of the bond needs to be complied with strictly, the same being of a penal nature. It was observed by the Supreme Court in Ghulam Mehdi Vs. State of Rajasthan, AIR 1960 SC 1185:

“Before a man can be penalised forms of law have to be observed and an opportunity has to be given to a surety to show cause why he should not be made to pay

Since, in the present case, no show cause notice as required was given, the impugned order cannot be said to be in accordance with law. Consequently, it is set aside.”

27. In the instant case, certainly the petitioner has had an opportunity to make a representation even before the forfeiture of the bond inasmuch as he has contested the application filed by the respondent no.2.

28. Be that as it may, in view of the legal position, the order imposing the penalty of Rs.4,00,000/- and simultaneously issuance of distress warrant cannot be sustained being in violation of the specific statutory provision.

29. Ms. Fizani Hussain, learned APP for the State has drawn my attention to the order dated 23rd July, 2008 which reads as follows:-

“Mr. Jagat Rana, counsel for the petitioner submits that the petitioner had executed sapurdiginama seeking release of truck bearing registration No.DL-1G-1168 before the SHO of Police Station Moti Nagar in his capacity as Attorney Holder on behalf of the registered owner i.e. the respondent M/s Datson Investment Ltd.

Major K.S. Verma, Managing Director of the company is present in person. He states that the said vehicle has always been in possession of the petitioner. He further submits that in fact the petitioner who happens to be the proprietor of M/s Hanuman Bhatta Co. was the original owner of this truck and the petitioner alone remained in actual possession of the said truck.

He, however, states that the petitioner had taken a loan from respondent no.2 and in consideration of the loan amount as advanced by respondent no.2 to the petitioner, the lease agreement was executed between the parties. He also submits that the petitioner had been making payments towards the lease amount through cheques and some of the original cheques which were returned dishonoured are still in his possession. He also states that the petitioner had also been appearing before the MACT court representing the interest of respondent No.2. The MACT cases were filed by the legal heirs of the deceased and one injured person on account of involvement of the said truck in the accident. He also submits that even at the time of accident the offending driver was in the employment of the petitioner and not of the respondent No.2.

In the above circumstances, let the I.O. who is present in the Court ascertain the fact as to in whose possession the said truck bearing No.DL-1G-1168 is continuing. The I.O. Shall also find as to in whose employment the driver of the said truck is and in which area the said truck is operating.

I.O. Is also directed to take possession of the said truck and after seizing the said truck report the matter to this court within two weeks from the date of seizure of the vehicle.

List this matter on 27.8.2008.

In the meanwhile, operation of the impugned order shall stand stayed till the next date of hearing.

Order dasti.”

30. Pursuant to such directions, an inquiry was conducted by the State and a status report dated 26th September, 2008 has been filed. Learned APP has vehemently urged that for the reasons detailed in the status report, possession of the truck in question could not be taken. As per the status report, it cannot be produced.

31. Learned APP has vehemently contended that in the face of the facts discovered on the inquiry made pursuant to the order dated 20th July, 2008, it would appear that the petitioner has been involved in destruction of case property as despite his specific undertaking to the trial court in the supurdiginama which was accepted by the court resulting in the release of the vehicle to him.

Ms. Fizani Hussain, learned APP submits that as per the status report, the petitioner appears to have committed offence under Section 199 read with Section 193 of the Indian Penal Code.

32. Learned counsel for the petitioner contends that he has filed documents on record to support the contention that the vehicle was in possession of respondent no.2. This is disputed by both learned APP as well as counsel for the respondent no.2. The trial court has recorded observations on this issue which are not assailed before me. Even otherwise, in the light of the undertaking to the court, it was not open to the petitioner to part with the possession of the vehicle in any manner without permission of the court.

33. Having regard to the view I have taken with regard to issuance of notice to show cause to the petitioner, it is directed that the police shall place the status report filed herein and the complete proceedings of its inquiry pursuant to the order dated 23rd July, 2008 before the learned trial judge. Copy of the status report stands given to the petitioner herein. The facts stated in the status report shall be considered by the trial court. If any further inquiry is deemed necessary, the same shall be undertaken. Thereafter, appropriate action in accordance with law with regard to the destruction of case property or any other illegality if found made out shall be taken by the trial court and against the persons found allegedly responsible for the same.

34. In view of the foregoing discussion, the judgment dated 25th July, 2007 shall stand set aside only to the extent that it imposes

a penalty of Rs.4,00,000/- and directs issuance of warrants of attachment. All other directions shall stand.

The matter is serious inasmuch as the case is still pending. The trial court shall proceed to deal expeditiously in the matter.

The case shall be placed before the trial court on 3rd August, 2009 when the petitioner shall remain present.

This petition and all pending applications shall stand disposed of in the above terms.

July 17, 2009

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Gita Mittal, J.