

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.REV.P. No. 645/2007**

% Date of reserve: 19.03.2009
Date of decision: 08.04.2009

YOGENDER PRATAP SINGH ...Petitioner
Through: Mr. Ashwin Vaish, Mr. Vinod Kr.
Pandey, advs.

Versus

STATE ...Respondent
Through: Mr. Navin Sharma, APP

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG, J.

1. This order shall dispose of a petition filed under Section 397 read with Section 401 & 402 of the Code of Criminal Procedure (Cr.P.C.) with a prayer that the order dated 17.10.2007 passed by the Court of learned Metropolitan Magistrate, Rohini, Delhi as well as the process issued against the petitioner under Section 82/83 of Cr.P.C. in case FIR No.674/2001 registered at P.S. Uttam Nagar under Section 420 IPC be quashed.

2. Briefly stating the facts giving rise to this petition are:

- i) One Mohinder Singh who was the owner of property bearing No. C-40 measuring 100 sq. yards situated in area of Village Matiala in Nazafgarh Road, New Delhi sold the aforesaid property to Sanjam Singh

wife of the petitioner in the year 1987 who sold this property in favour of Sh. Suraj Prakash on 17.08.2000 for consideration of Rs.2,50,000/- whereas the property was purchased by her only for a consideration of Rs.20,000/-.

- ii) According to the petitioner, fresh documents of the same property were executed by Sh. Mohinder Singh on his asking on 12.04.1999. The petitioner submits that execution of those documents became necessary because on the basis of earlier documents the banks refused to give any loan to the petitioner.
- iii) The petitioner then sold 50 sq. yards of the same property in favour of one Gopal Singh and another 50 sq. yards to one Sunder Singh for a total consideration of Rs.3,00,000/-.
- iv) It appears that Gopal Singh having come to know of the earlier sale of the property in favour of Suraj Prakash at the instance of wife of the petitioner, decided to lodge an FIR against the petitioner under Section 420 IPC on the allegations that he was the owner of plot No. C-40, Sewak Park, Uttam Nagar which had four rooms and which is in an area of 100 sq. yards & that he purchased this property from Sh. Yogender Pratap Singh who had been residing in the said property at the time when the complainant

purchased the same. At that time the said Yogender Pratap Singh sold 50 sq. yards to Gopal Singh and another 50 sq. yards to one Surinder Singh, the son of the petitioner and thereafter Yogender Pratap vacated the said property and handed over the possession thereof to the complainant. At that time Sh. Suraj Prakash, met the complainant and started claiming that he was the owner of the property and that he had purchased this property from the wife of Sh. Yogender Pratap Singh, namely, Smt. Sanjam Singh. It is with these allegations the complainant lodged a complaint against the petitioner and his wife on 04.09.2001 & on the basis of the said complaint an FIR was registered at P.S. Uttam Nagar, West vide FIR NO.674/2001 on 04.09.2009.

3. During the course of investigation the Police wanted to interrogate the petitioner and, thus, had been making efforts to trace the petitioner who in the facts and circumstances was also liable to be arrested by the Police at their discretion. However, as the petitioner was not traceable at the instance of the Police non-bailable warrants were also issued against him as well as his wife. However, even non-bailable warrants could not be served upon the petitioner and his wife they could not be arrested. Accordingly proceedings were initiated against them under Section 82/83 Cr.P.C. vide order dated 02.06.2007.

4. It appears that the petitioner was aware of these proceedings & wanted the order of the Magistrate dated 02.06.2000 to be set aside, and thus he moved an application before the Metropolitan Magistrate to recall the aforesaid order by pleading that the petitioner could not appear in the Court as he was unwell and that his treatment was still going on. However, he did not cause his appearance before the Court and moved this application through his counsel praying for cancellation of warrants issued against them but without appearance in Court.

5. Vide detailed order dated 17.10.2007 the Magistrate dismissed the application by holding that any such application filed by the petitioner could not be entertained in absence of the petitioner having come to the Court. It may be observed here that proclamation for the appearance of the petitioners was issued on 13.07.2007 to the following effect:

Extract From the News Paper, namely, Dainik Jagran,
Dated 13.07.2007, circulated in Gorakhpur

DELHI POLICE

Proclamation under Section 82 Cr.P.C.

It is hereby informed that Shri Digvijay Singh, MM, Rohini Court, Delhi in case FIR No.674/2001 dated 04.09.2001 under Section 420/34 IPC P.S. Uttam Nagar, New Delhi has initiated proceedings against two accused person, namely, Yoginder Pratap Singh, S/o Shri Hari Narayan Singh and Smt. Sanjam Singh, W/o Yoginder Pratap Singh, R/o Village Shahpur, Post Officer Uruwa Bazar, Dhuria Par, Thana Belghat, Distt. Gorakhpur, Uttar Pradesh under Section 82 Cr.P.C.

The said accused persons, namely, Yoginder Pratap Singh and Smt. Sanjam Singh should appear on or before 25.09.07 in the Hon'ble Court.

6. The petitioner then approached this Court under Section 397 Cr.P.C. with the following prayers:

- a) Calling for the trial Court record and quashing/ setting aside of the order dated 17.10.07 passed by the Court of Shri Vinod Yadav, Metropolitan Magistrate, Rohini Court, Delhi and further quashing of the process issued under Section 82, 83 of the Code of Criminal Procedure in case FIR No. 674/01 under Section 420 of the Indian Penal Code, Police Station Uttam Nagar, Delhi; and/or
- b) Granting an ad-interim ex-parte stay in terms of prayer (a); and/or
- c) As it may deem fit, in the interest of justice.

7. Some of the facts mentioned in the petition requires consideration i.e.:

- a) That Mohinder Singh befriended the Petitioner and sold him the property in question, i.e., No.C-41, Sewak Park, Uttam Nagar, New Delhi in the year 1987. ***(This sale was in the name of petitioner's wife).***
- b) The property in question was sold by the wife of the petitioner to Shri Suraj Prakash Singh on 13.08.1987.
- c) The petitioner then again asked fresh papers to be got executed by Mohinder Singh in his name on the pretext that he could not obtain a loan in respect of the property on the basis of the previous documents. These documents were executed on 12.04.1999 but this time in the name of the petitioner. There is no explanation available as to what happened to the original sale

agreement which was executed in the name of the petitioner's wife and what happened to the sale deed which his wife had executed in favour of Shri Suraj Prakash Singh.

- d) It is admitted by the petitioner that thereafter he executed sale deeds in respect of the property in question in favour of Shri Gopal Singh and his son Sunder Singh on 27.07.2001 for 50 sq. yards each.
- e) It is the allegation of the complainant in FIR that it is thereafter when Suraj Prakash Singh approached him and started making ownership of the property, having purchased the same from Sanjam Singh the wife of the petitioner, he filed a complaint which became the basis of the registration of the FIR as aforesaid.
- f) It is apparent from the aforesaid facts that the petitioner & his wife who were living under the same roof have prima facie cheated the complainant inasmuch as firstly the wife of the petitioner executed a sale deed of the same property in favour of Shri Suraj Prakash Singh and thereafter petitioner executed sale deed of the same property in favour of the complainant Gopal Singh and his son.
- g) The petitioner has tried to explain the execution of two sets of different documents one in favour of the petitioner and one in favour of Sanjam Singh his wife by

alleging that there were differences between them. He also alleged that the petitioner and his wife were living under the same roof but like a stranger, however he has not filed any documents to substantiate the aforesaid plea.

8. It is a matter of record that despite registration of the FIR and the Police having a power to arrest the petitioner in view of the FIR disclosing non-bailable offence, he has avoided his arrest and even failed to join the investigation. Despite issuance of non-bailable warrants against him he could not be arrested. Knowing full well about the initiation of proceedings under Section 82/83 Cr.P.C. the petitioner even though moved an application through a counsel for cancellation of the proceedings but have not cared to appear before the Court concerned. However, in the present petition he has tried to put a brave face by submitting that they had been residing in Ghaziabad (written in hand in sub para 'F' and 'G') without any further details of their whereabouts. It is only when proclamation was issued against them that they filed an application through counsel for cancellation of the proceedings under Sections 82/83 Cr.P.C. without appearing in Court.

9. Interestingly, the application filed on behalf of the petitioner was not even supported by the wife of the petitioner who admittedly purchased the property in question earlier from Mohinder Singh and sold the same to Suraj Prakash. There is also

no explanation as to what was the necessity of Mohinder Singh executing fresh documents that also after 12 years in favour of Yogender Pratap Singh which property had been sold by him to Smt. Sanjam Singh, wife of the petitioner on 13.08.1987 and later sold by her to Suraj Prakash on 17.08.2000.

10. In these circumstances, when the case came up before this Court, by a detailed order dated 10.12.2007, interim orders were passed to stay the process under Section 82/83 Cr.P.C. subject to the condition that before 16.01.2008 the petitioner would appear before the trial Court.

11. On 21.01.2008 a learned predecessor of this Court after hearing an application for clarification of the order dated 10.12.2007 also passed the following order

The application was mentioned by the counsel stating that there is urgency in the matter inasmuch as inadvertently the interim orders operating in the present proceedings had not been continued when the matter came up on 16.01.2008 and could not be taken up in view of the Full Court reference. It was on such representation, after repeatedly asking the counsel as to whether there was existence of interim orders to which the answer was repeatedly in the affirmative that the present file was called.

On perusal of the file, it is found that the petitioner has challenged the impugned order dated 17.10.2007, vide the revision petition under Section 397 r/w Sections 401 and 482 of the Code of Civil Procedure, 1908 ('the said Code' for short), whereby the request of the petitioner for cancellation of the NBWs and proceedings under Section 82/83 of the said Code was not acceded to.

The present petition was taken up by my predecessor on 10.12.2007 when the said petition came to be disposed of. The order records that keeping the facts and circumstances of the case, execution of the process under Section 82/83 of the said Code against the petitioner is stayed till 16.01.2008 provided the petitioner appears before the Trial Court on or before that date. The petitioner was also burdened with costs of Rs.2,500/- for seeking adjournments before the Trial Court and was directed to join investigation as and when directed.

The petitioner thereafter filed an application seeking clarification of the Order dated 10.12.2007. In the application, a case was sought to be made that the petition raised substantial question of law of public importance and counsel for the petitioner did not understand that the petition was being finally disposed of. It was further sought to be pleaded that the purport of the Order was that there would be stay of the arrest till the next date of 16.01.2008 provided the condition therein was met.

On the said application, only notice was issued on 20.12.2007 till 16.01.2008

Learned counsel for the petitioner sought to emphasize that the main petition itself stood revived in view of the Order passed on 20.12.2007.

In my considered view this plea on the face of it is fallacious for the reason that all that has been done is to issue notice on the application of the petitioner.

I am also unable to accept the plea of the learned counsel for the petitioner that in case immediately some orders are not passed, it would result in the petitioner being required to appear before the trial Court. In fact, the purport of the order dated 10.12.2007 is clear that the petitioner who was not earlier appearing and was seeking adjournments must bear the costs of adjournments and must appear before the Trial Court on or before 16.01.2008. Thus, there is no question of the petitioner not being required to appear before the Trial Court.

This is of course apart from the fact that it was the bounden duty of the counsel to have put the correct facts before the Court when the matter was mentioned and not to keep on emphasizing that there was an interim order which had not been continued inadvertently even though there was no such interim order on the record. In fact, the application is not supported by an affidavit of the petitioner but the counsel.

The application is misconceived and is dismissed with costs of Rs.7,500/- to be paid to the Delhi High Court Legal Services Committee.

12. It appears that the petitioner was not willing to comply with the aforesaid orders and again moved an application which was allowed vide order dated 07.05.2008 when the costs were reduced to Rs.5,000/- instead of Rs.7,500/-. However on the same date by another application moved by the petitioner, i.e., Crl.M.A.14713/2007 the revision petition was restored and the

same was directed to be heard on 24.09.2008 and in the meanwhile the proceedings under Sections 82/83 Cr.P.C. were stayed.

13. It is thereafter this matter has come up for hearing before this Court. Arguments were heard on 19.03.2009. The petitioner has also filed written submissions.

14. Having gone through the same and the record of this case I find that the petitioner was fully aware of the proceedings pending before the Trial Court regarding issuance of the proceeding under Section 82/83 Cr.P.C. against the petitioner as he could not be arrested earlier despite issuance of non-bailable warrants. He moved an application for the first time for cancellation of NBW and staying the process under Section 82/83 Cr.P.C. only on 10.10.2007 i.e. after a period of 6 years of the registration of FIR. The only averment made in the said application was that he does not dispute identity but alleged that he was involved in a false case. He never moved an application for grant of bail including grant of anticipatory bail nor disclosed his correct address. As stated above, the application was dismissed by the Magistrate for the reason that the petitioner did not appear in the matter personally.

15. A perusal of the record of the trial Court goes to show that despite registration of the FIR for a period of six years no effective proceedings could be taken as the petitioner and his wife were absconding and could not be arrested. On 02.06.2007

on a request was made by Inspector Nafe Singh to issue NBWs against the petitioner.

16. The contents of the FIR goes to show that both the petitioner and his wife executed two different sale deeds of the same property on two different occasions claiming to have purchased the same property on two different occasions from the same owner, namely, Mohinder Singh & that despite best efforts of prosecution to apprehend, that they were absconding and could not be arrested. Accordingly, non-bailable warrants were issued against the petitioner.

17. Since the non-bailable warrants also could not be executed, proceedings were initiated against the petitioner under Section 82/83 of Cr.P.C. It is only thereafter that the petitioner approached the trial Court for seeking revocation of the orders passed under Sections 82/83 Cr.P.C. but at that time also he did not appear personally before the concerned Court and appeared through counsel. On 17.10.2007 also an effort was made on behalf of the petitioner for recalling the proceedings under Section 82 Cr.P.C. on the ground that he could not appear earlier as he was unwell. However, the Court having come to a conclusion that the petitioner was intentionally avoiding the process of the Court dismissed the said application.

18. It is a matter of record that after approaching this Court despite specific directions vide order dated 10.12.2007 giving an opportunity to the petitioner to appear before the trial Court on or

before 16.01.2008 he has not cared to cause appearance in the trial Court. The only course open for the petitioner was to appear in the trial Court and to make appropriate application after surrendering before the trial Court. If any bail application would have made, the trial Court could have considered the same on the basis of the facts of this case.

19. It may be observed here that as per the scheme of Criminal Procedure Code once an FIR disclosing non-bailable offences is registered against an accused the Police is empowered to interrogate the accused and in that connection even to arrest him. However, if an accused tries to evade the arrest Police can also ask for issuance of non-bailable warrants. However, when non-bailable warrants are also not executed because of avoidance of his arrest by the petitioner, then the Court is empowered to issue process under Section 82/83 of Cr.P.C. which is a process only to ensure appearance of the petitioner before the Court so that the investigating agency can complete the investigation by interrogating the accused.

20. The aforesaid process nowhere takes away the right of the petitioner to file any application for bail. It is a different matter as to whether such kind of an accused can be allowed to apply by way of anticipatory bail or not. The said right would always depend upon the facts of each case and the conduct of the petitioner. It may be observed here that no right is vested in any accused to get the bail as a matter of right whether it is a regular

bail or it is an anticipatory bail. Thus, issuance of process under Section 82/83 Cr.P.C. in no way can be considered to have caused any prejudice to the petitioner. The proclamation issued under Section 82/83 itself enables the accused to appear in the Court within 1 month of the proclamation for avoiding the process under Section 83 Cr.P.C. which permits the Court to even attach the property of the accused.

21. Even under Section 83 Cr.P.C. once an attachment takes place the attachment can be recalled once the accused appears and submits himself to the process of the Court.

22. At this stage it would be appropriate to take note of the provisions contained under Section 82/83 Cr.P.C.:

82. Proclamation for person absconding.

(1) If Any court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such court may publish a written proclamation requiring him to appear at a specific place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows-

(i)

(a) It shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) It shall be affixed to some conspicuous part of the house or home-stead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) A copy thereof shall be affixed to some conspicuous part of the Court house,

(ii) The court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in Clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the

proclamation was published on such day.

83 - Attachment of property of person absconding

(1) The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person:

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court, it may order the attachment simultaneously with the issue of the proclamation.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(a) by taking possession; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908).

23. A bare perusal of these provisions goes to show that once a proclamation is issued against a person who could not be arrested despite issuance of NBW may be because of non-

availability of the correct address, he can cause appearance within 30 days from the date of publishing such proclamation and if such an appearance is caused, the proceedings under Section 82 and 83 would come to an end.

24. However, in the present case, taking into consideration that the petitioner was fully aware of the proceedings and is not in a mood even to disclose the correct address, as is apparent from his petition, where Ghaziabad is written by him in hand as his address without giving complete address, it is apparent that the petitioner is only trying to avoid the process of the Court and are misusing the liberty. In fact, the present petition is a misuse of process of Court and cannot be termed as bonafide.

25. The question of any conflict between the rights of the petitioner in terms of Section 438 does not arise in this case, because an application under the aforesaid provision can only be filed only when the accused can show that the FIR does not disclose any offence against him or that he is sought to be implicated in a case which is false and he needs protection of the Court under those provisions. Such an application can be entertained even when a process under Section 82/83 Cr.P.C. has been issued in a case where the Court is satisfied that the issuance of the process under Section 82/83 is not bona-fide or handy-work of the complainant only to implicate an accused in a false case.

26. In the present case, no such application was ever filed by

the petitioner under Section 438 Cr.P.C. In fact, after issuance of the proclamation under Section 82 Cr.P.C. also he had tried to appear in the Court without appearing physically but through an advocate and without making any application for bail. The said application was dismissed by the Magistrate. After filing of this revision petition, petitioner rightly was allowed to appear before the Trial Court and proceedings under Section 82 and 83 were stayed, yet the petitioner has not cared to cause appearance. He also failed to avail the opportunity of causing appearance in the Court despite the directions of this Court protecting him even from the process issued under Section 82/83 Cr.P.C. which was stayed at the relevant time.

27. Taking into consideration all these facts, the petition filed by the petitioner is liable to be dismissed. However in the interest of justice the same is disposed of by giving the petitioner one more opportunity to cause appearance before the trial Court on 01.05.2009 when he can also move an appropriate application for surrender and if he wishes to apply for bail then he can also do so which shall be dealt with by the trial Court in accordance with law. No other relief can be granted to the petitioner in these proceedings. Till then proceedings under Sections 82 and 83 Cr.P.C. would remain stayed. However, if the petitioner fails to cause appearance on or before 01.05.2009 then the trial Court will be free to proceed with the proceedings under Sections 82 and 83 Cr.P.C. which will be in addition to all rights available to

the prosecution in accordance with law.

28. With these observations the petition is disposed of.

MOOL CHAND GARG, J.

APRIL 08, 2009
anb