

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.306 OF 2017

Tarun Chanalal Shah	...Appellant
Versus	
The State of Maharashtra	...Respondent

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Mr. M.K. Kocharekar with Ms Devika Nadar for the Appellant.
Mr. V.V. Gangurde, APP for the Respondent -State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 7th DECEMBER, 2017.

P.C.:-

The Appellant herein has challenged the order dated 2nd August, 2016 whereby the learned Special Judge [under M.C.O.C. Act 1999 and NIA Act 2008] has dismissed the application filed by him under Section 85(3) of the Cr.P.C. r/w Section 20(3) (c) of the Maharashtra Control of Organized Crime Act.

2. The Appellant herein, was one of the accused in C.R. No.112 of 2000 registered at DCB CID Mumbai for offence punishable under Section 3(1)(ii) to 3(2) of the MCOC Act and Sections 120 B, 387 and 506(II) of the IPC. Since the Appellant was absconding, non bailable warrant came to be issued on 4.4.2001 followed by

proclamation on 16.4.2001. Since the Appellant did not appear, his residential premises were attached on 30.1.2002 and the same were sold in auction on 6.1.2003. The Appellant subsequently surrendered before the Court. He was prosecuted and by judgment dated 1st June, 2010 the Appellant has been acquitted of all the alleged offences.

3. In the year 2015 the Appellant filed an application under Section 85(3) of the Cr.P.C. r/w. Section 20(3)(c) of the M.C.O.C Act with a prayer to direct the Respondent to pay to him the sale proceeds of Rs.61,00,000/- alongwith interest @ 18% from 10.7.2012. The learned Special Judge [under MCOC and NIA Act] held that the application under Sub Section 3 of Section 85 of Cr.P.C. had to be filed within a period of two years from the date of adjudication. The learned Special Judge rejected the application mainly on the ground that the application was filed beyond the period of two years from the date of adjudication. Being aggrieved by the said order, the Appellant has filed the present appeal.

4. Mr. M.K. Kocharekar, the learned counsel for the Appellant has submitted that Section 82 of the Cr.P.C. mandates giving of minimum 30 days time from the date of publication for the appearance

of the accused. In the instant case, the period given was less than 30 days. The proclamation was not in accordance with law and this vitiates all subsequent actions including auction and sale of the property.

5. Mr. V.V. Gangurde, the learned APP for the Respondent -State submits that the Appellant has not challenged the order passed under Section 82 of Cr.P.C. and had only asked for sale proceeds by invoking provisions under Section 85(3) of Cr.P.C. He has submitted that the premises were attached in the year 2002 and sold in an auction held in the year 2003 whereas the application under Section 85(3) was filed in the year 2015. The application is beyond the period of limitation prescribed under Section 85(3) of Cr.P.C. and hence the same is not maintainable. He has further submitted that the earlier application filed by the Appellant having been dismissed by this Court, the Appellant cannot re-agitate the issue on the same grounds.

6. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

7. It is not in dispute that the Appellant herein had earlier

filed a Petition No.3086 of 2011 for the following relief:-

“(a) that this Hon'ble Court may be pleased to direct the Respondents to ensure that the Petitioner is restored back to the possession of the same flat, being Flat No.503, Gamdevi Deepak Co-operative Housing Society, 12, Kashibai Navrang Marg, Gamdevi, Mumbai- 400007 which has been auctioned and/or in alternative, he be given compensation in lieu thereof or alternatively, the respondents be directed to hand over another flat in the same area/ vicinity having 1000 sq. ft. area and similarly he be also compensated for the loss of 420.210 grams of gold, 14 kg. of silver and 14.95 Ct. of diamonds as this Hon'ble Court may deem fit and proper.”

8. Said Petition was dismissed by the Division Bench of this Court by judgment dated 10th July, 2012. In paragraph 4 of the judgment, this Court had observed as under :-

4. The second difficulty before the petitioner is that the petitioner has advisedly sought relief only of restitution of possession without challenging the order passed by the trial Court in exercise of powers under Section 82 of the Code nor the petitioner has challenged the proclamation notice published pursuant to the order passed by the trial Court. Moreover, the petitioner has not even challenged the action

of auction conducted consequent to proclamation notice in respect of the subject property nor has he challenged the auction sale confirmation. The argument on behalf of the petitioner, however, is that it is not necessary for the petitioner to challenge any of these actions and it is enough for the petitioner to point out that there was palpable illegality committed by the Court in issuing publication of proclamation notice dated 16th April, 2001. The argument proceeds that the proclamation notice as published on 25th April, 2001 expected the petitioner to report to the Court before 30th April, 2001 – which is within less than 30 days notwithstanding the mandate in subsection (1) of Section 82 of the Code. In support of this submission reliance has been placed on the decisions of the Punjab and Haryana High Court in the case of Pritam Kaur and anr. v. State of Punjab through Secretary Local Self Government 1967 Cri.L.J. 1120, AND Pal Singh Santa Singh v. State 1955 Cr.L.J. 318 (in particular paras 4, 5 & 17 thereof). In our opinion, the dictum in these decisions will be of no avail to the petitioner. Further, the argument is untenable. As aforesaid, firstly, because of laches and unexplained delay and more particularly because the petitioner has not challenged the order of the trial Court directing issuance of proclamation notice and the proclamation notice itself including auction sale conducted in respect of the subject property and confirmation thereof.

9. It is thus, evident that the prayer for recovery of possession of the subject property was based on the same grounds viz. illegality in the order of issuance of proclamation. The said plea was rejected on the ground of laches and unexplained delay and more particularly because there was no challenge to the order of issuance of proclamation, proclamation notice including auction sale conducted in respect of the subject property. After a period of over three years from the date of dismissal of the previous petition, the Appellant filed application under Section 85(3) of the Cr.P.C. and sought delivery of the net proceeds of the sale, on the same ground i.e. illegality in proclamation notice. Suffice it to say that the Appellant having failed in the Petition, cannot seek relief as sought, on the same grounds, without there being challenge to the proclamation notice.

10. It is also to be noted that the proclamation was issued in the year 2001, the subject property was attached in the year 2002 and sold in the year 2003. The previous petition filed in the year 2011 was dismissed in July 2012 on the ground of delay and laches, yet the application under Section 85(3), which is otherwise required to be filed within two years from the date of the attachment, is filed in the month of November, 2015. The application is filed beyond the

prescribed period of two years and suffers from inordinate unexplained delay and hence was otherwise not maintainable.

11. Under the circumstances and in view of discussion supra, there is no merit in the appeal and is accordingly dismissed.

(ANUJA PRABHUDESSAI, J.)