

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2961 OF 2019

HEMENDA HARIDAS MAPARA

)...PETITIONER

V/s.

THE STATE OF MAHARASHTRA & ANR.

)...RESPONDENTS

Mr.Nitin Sejpal with Mr.Ashish Sharma i/b. Mr.Sanjay Prabhala,
Advocate for the Petitioner.

Mr.S.V.Gavand, APP for the Respondent – State.

Mr.Sunil Kale, Senior Police Inspector and Mr.Satyavan Bile, Police
Sub-Inspector of Tilak Nagar Police Station, Mumbai, present in
the court.

CORAM : A. M. BADAR, J.

DATE : 5th MARCH 2020

ORAL JUDGMENT :

1 Heard. Rule. Rule made returnable forthwith. Heard
finally by consent of parties.

2 By this petition, petitioner who is an accused in Crime No.435 of 2018 registered with Tilak Nagar Police Station, Mumbai, for offences punishable under Sections 304(2), 336, 337, 341, 465, 467, 438, 406, 427 read with 34 of the Indian Penal Code at the instance of Vivekanand Waingankar (First Informant) is challenging the order dated 30th March 2019 passed by the learned Metropolitan Magistrate, 72nd Court, Vikhroli, Mumbai, issuing proclamation against the petitioner. The prayer is to quash the proclamation issued against the petitioner/accused.

3 Facts, in brief, are thus :

(a) On 27th December 2018, fire erupted at the apartments of Sargam Co-operative Housing Society, Tilak Nagar, Chembur. As a result of engulfment in the fire, five residents of that apartment lost their lives and two of them were severely injured. The petitioner herein and the co-accused were developers of that building. Allegations against them are to the effect that while erecting that building, they failed to install fire fighting system and allied systems in that building.

They had not obtained “No Objection” certificate from the Fire Brigade Department of the Municipal Corporation. It is further averred against them that refuge area was not kept on 8th and 15th floor of that building. On the contrary, it was converted into “B” Wing of the building and the accused persons had illegally sold refuge area which was to be kept on 15th floor of the building. It is further averred against them that they had close the area between “B” and “C” Wings of the building, by constructing it not according to the sanctioned plan. The prosecution averred that after registration of the subject crime in question on 28th December 2018 at the instance of Vivekanand Waingankar, the petitioner/accused absconded and his whereabouts were not known.

- (b) According to the prosecution case, after registration of the crime in question, the petitioner/accused was never available to the Investigating Officer as he remained absconded. The Investigating Officer, therefore, applied to the learned

Metropolitan Magistrate under Section 73 of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C. for the sake of brevity) for issuance of non-bailable warrant against the petitioner, by moving an appropriate application on 14th March 2019. After considering that application, on 15th March 2019, the learned Metropolitan Magistrate, 72nd Court, Vikhroli, Mumbai, was pleased to pass the following order :

“Accused are wanted in the offence as per case diary. They are evading the arrest. Hence issue arrest warrant against them to be produced on 28th March 2019.”

Accordingly, non-bailable warrant dated 15th March 2019 came to be issued against the present petitioner as well as the co-accused.

- (c) According to the prosecution case, the petitioner/accused was not available at the usual place of his residence. His usual place of residence was visited by the Police Sub-Inspector Ambavne and Officer of the Crime Detection Branch on 16th March 2019 but he was not found present at his house.

According to the prosecution, Police Inspector Sunil Kale of Tilak Nagar Police Station had also visited the house of the petitioner/accused on 18th March 2019 and 26th March 2019. Similarly, squad of Police Inspector Ambavne had also tried to search the petitioner/accused. However, the petitioner as well as the co-accused were not found. Therefore, Police Inspector of Tilak Nagar Police Station submitted an application dated 28th March 2019 in the court of the learned Metropolitan Magistrate, 72nd Court, Vikhroli, Mumbai, praying for issuance of proclamation under Section 82 of the Cr.P.C.

- (d) It is case of the prosecution that considering the application dated 28th March 2019, the learned Metropolitan Magistrate was pleased to pass the following order on the said application :

“Today I.O. is present before court and submitted that accused is absconding. Ld. APP submitted that he is concealing himself. Hence, proclamation u/s. 82 is required. After considering the facts brought before and

from record it appears that accused is absconding.
Hence issue proclamation u/s. 82 of the crpc.

Sd/-
(Illegible)
28.3.2019”

That is how, according to the prosecution case, proclamation under Section 82 of the Cr.P.C. came to be issued on 30th March 2019 directing the petitioner/accused to appear before the court on 13th May 2019.

- (e) The prosecution alleged that as directed, proclamation came to be published by intimating daily newspaper Lokmat, Times of India (English), Janmabhumi (Gujarati) and Maharashtra Times (Marathi). It is further averred that intimation of issuance of proclamation was also given to several channels of the Television. However, the petitioner/accused could not be arrested. The report to that effect was accordingly furnished to the learned Metropolitan Magistrate on 21st May 2019.

4 On this factual background, according to case of the petitioner/accused, the petitioner/accused, immediately after registration of offences against him, had approached this court by filing an application for anticipatory bail being Anticipatory Bail Application No.82 of 2019 and it was ultimately withdrawn on 15th January 2019 as some additional penal provisions came to be invoked against the petitioner/accused. The learned counsel for the petitioner/ accused argued that the petitioner/accused had again filed an application for anticipatory bail being Anticipatory Bail Application No.214 of 2019 before this court and the same was ultimately withdrawn on 24th January 2019 with a liberty to approach the learned Sessions Court for similar relief. It is pointed out by the learned counsel for the petitioner/accused that after rejection of the application for anticipatory bail being Anticipatory Bail Application No.269 of 2019 by the learned Sessions Judge, Mumbai, on 1st March 2019, the petitioner/accused preferred similar application being Anticipatory Bail No.814 of 2019 which is still pending before this court. On the backdrop of all these developments, it is urged by

the learned counsel for the petitioner/accused that contention of the prosecuting agency in its report submitted to the learned Metropolitan Magistrate on 14th March 2019 and 28th March 2019 that the petitioner/accused is absconding is factually incorrect. The petitioner/accused never absconded and on the contrary he was always before the concerned court seeking relief of anticipatory bail.

5 The learned counsel for the petitioner/accused further argued that mandatory statutory provision of Section 82 of the Cr.P.C. was never followed while issuing the proclamation and this court can examine legality and validity of the proclamation issued under Section 82 of the Cr.P.C. As the proclamation was not duly issued by adhering to the mandatory provisions of the Cr.P.C., the same needs to be quashed and set aside. To buttress this submission, the learned counsel for the petitioner/accused placed reliance on the judgment of the learned Single Judge of Jharkhand High Court in the matter of **Kumar Anubhav vs. The State of Jharkhand and Another**¹.

¹ Anticipatory Bail Application No.3493 of 2015 decided on 6th November 2015

6 In reply, the learned APP drew my attention to the provisions of Section 438 of the Cr.P.C., as applicable to the State of Maharashtra, and argued that there was no necessity to point out pendency of anticipatory bail applications in the reports by the prosecuting agency. If such requirement is held to be mandatory, then provisions of Section 438 of the Cr.P.C. would render redundant. The learned APP further argued that the order dated 7th June 2019 passed by the learned Metropolitan Magistrate demonstrates compliance of mandatory provisions of Section 82 of the Cr.P.C.

7 I have considered the submissions so advanced and also perused the material placed before me so also the judgment relied by the learned counsel for the petitioner/accused.

8 It is not in dispute that way back on 28th December 2018, Crime No.435 of 2018 came to be registered against the petitioner/accused and the co-accused for offences punishable under Sections 304(2), 336, 337, 341, 465, 467, 438, 406, 427 read with 34 of the Indian Penal Code with the Police Station Tilak

Nagar, Mumbai. It is also not in dispute that on 15th January 2019, first application for anticipatory bail being Anticipatory Bail Application No.82 of 2019 came to be withdrawn by the petitioner/accused. Subsequent Anticipatory Bail Application No.214 of 2019 was also got withdrawn by him on 24th January 2019 with liberty to apply to the Sessions Court with similar relief. Then, further Anticipatory Bail Application No.269 of 2019 filed by the petitioner/accused came to be rejected by the Sessions Court on 1st March 2019. Now, application for anticipatory bail of the petitioner in the subject crime being Anticipatory Bail Application No.814 of 2019 is reportedly pending before this court. It is not in dispute that right from the beginning, no order granting ad-interim anticipatory bail was ever issued in favour of the petitioner/accused, at any point of time.

9 According to the prosecuting agency, the petitioner/accused had absconded and had not co-operated with the Investigating Officer. In common parlance, absconding means departing in a sudden and secret manner, especially to avoid

capture and legal prosecution. I have perused the case diary of the subject crime. Perusal of the case diary of the subject crime makes it clear that the Investigating Officer as well as Police Officers had visited usual place of abode of the petitioner/accused on several occasions including 16th March 2019, 8th March 2019 and 26th March 2019. The petitioner/accused was never found present at his usual place of residence where his family was residing. Inquiry was made with Darshana Hemanda Mapara - wife of the petitioner and she had informed the Investigating Officer that the petitioner/accused had not been coming to the house. The case diary further reveals that inquiry in respect of whereabouts of the petitioner/accused was made from his employees such as Alpesh Shah, Manoj and Paresh apart from Darshana - wife of the petitioner/accused so also from brother of the petitioner/accused. They all said that they are unaware about whereabouts of the petitioner/accused. The material reflected from the case diary, as such, shows that the petitioner/accused was not found at the usual place where he was supposed to be there, after registration of the subject crime.

10 At this juncture, it is apposite to quote sub-section (1) of Section 73 which reads thus :

“**73(1)** The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non- bailable, offence and is evading arrest.”

This provision of the Cr.P.C. was considered by the Hon'ble Apex Court in the matter of State through Central Bureau of Investigation vs. Dawood Ibrahim Kaskar and Another². It is held by the Hon'ble Apex Court that this provision can be made use of in a case where a person, who is accused of a non-bailable offence, is found to be evading arrest.

11 By making use of provision of sub-section (1) of Section 73 of the Cr.P.C., it is seen that the Investigating Officer, on 14th March 2019, had applied to the learned Metropolitan Magistrate, 72nd Court, Vikhroli, Mumbai, for issuance of non-bailable warrant of arrest by categorically mentioning in the said

² AIR 1997 Supreme Court 2494

application that in the subject crime, which is cognizable and non-bailable, the petitioner/accused is absconding since last two months. The application mentions the details in respect of the subject crime and the consequential damage and loss causing human life and property because of the happening of the incident in question. It is further stated in the application that despite sufficient attempts to search and trace out the petitioner/accused, he could not be arrested. True it is that in the said application, the fact of filing of application for anticipatory bail by the petitioner/accused is not mentioned by the Investigating Officer, but in my considered opinion, this is totally inconsequential for exercise of powers under Section 73(1) of the Cr.P.C. This subsection (1) of Section 73 does not mandate giving of details of disposed off anticipatory bail applications or pending anticipatory bail applications for issuance of non-bailable warrant of arrest. At the cost of repetition, it needs to be mentioned here that, not a single court including this court, had ever granted any protection to the petitioner/accused from his arrest in the subject crime. Similarly, it is an undisputed fact that the petitioner/accused never

made himself available to the Investigating Officer, at any point of time, after the incident of fire in the residential building erected by the petitioner/accused, in which five precious human lives were lost and two residents were severely injured.

12 Acting on the application dated 14th March 2019, the learned Metropolitan Magistrate, as quoted in foregoing paragraphs, had directed issuance of non-bailable warrant against the petitioner/accused with a direction to produce him on 28th March 2019.

13 The case diary reveals that after issuance of non-bailable warrant of arrest, the police attempted to search and trace out the petitioner/accused. He was not available at the place of his business or residence.

14 On the returnable date of non-bailable warrant i.e. on 28th March 2019, the Investigating Officer had preferred an application before the learned Metropolitan Magistrate, 72nd Court, Vikhroli, Mumbai, mentioning the efforts taken by him to

trace out and apprehend the petitioner/accused. Simultaneously, he prayed for issuance of proclamation against the petitioner/accused under Section 82 of the Cr.P.C. When the factual position, reflected from the case diary, reveals non-availability of the petitioner/accused at the usual place where he is normally expected to be present, non-mentioning of facts relating to pendency and disposal of anticipatory bail applications in this report is of no legal consequence. Considering the application so made, the learned Metropolitan Magistrate, as stated in foregoing paragraphs, was pleased to issue the proclamation under Section 82 of the Cr.P.C. against the petitioner/accused. Perusal of that proclamation dated 30th March 2019 makes it clear that the petitioner/accused was directed to appear before the learned Metropolitan Magistrate on 13th May 2019. Reply filed on affidavit by the prosecuting agency makes it clear that the proclamation was duly published as required by law. The paper cuttings are also annexed to the reply of the State. Panchnamas prepared by the Investigating Officer are also annexed with the reply of the State. I see no reason to disbelieve

the statement made on affidavit by the Investigating Officer regarding publication of the proclamation as well as efforts taken by the Investigating Officer to trace out the petitioner/accused. Though the petitioner/accused was duty bound after issuance of this proclamation dated 30th March 2019, he failed to appear before the learned Metropolitan Magistrate on 13th May 2019. No reasons are assigned as to why, despite issuance of proclamation, the petitioner/accused failed to appear before the learned Metropolitan Magistrate, in response to the said proclamation.

15 Now comes the question of compliance of Section 82 of the Cr.P.C. Sub-section (2) of Section 82 states that a statement in writing by the court issuing proclamation to the effect that the proclamation was duly published on a specific date in the manner specified in Clause (I) of sub-section(2) is a conclusive evidence that requirement of this section has been complied with and that a proclamation was published on such date. Apart from material in reply filed by the State regarding compliance of Section 82 of the Cr.P.C. in publishing the proclamation, the learned APP has drawn

my attention to the order dated 7th June 2019 passed by the learned Metropolitan Magistrate, 72nd Court, Vikhroli, Mumbai. Paragraph 2 of the said order makes it clear that the learned Metropolitan Magistrate had recorded the fact that the proclamation was duly published on the specified date. This order depicts due compliance of Section 82 of the Cr.P.C.

16 In this view of the matter, it cannot be said that there was no compliance of Section 82 of the Cr.P.C. while publishing the proclamation, and as such, judgment of the Jharkhand High Court is of no avail to the petitioner/accused.

17 The petition, as such, is devoid of merit and the same is therefore dismissed.

18 Rule is discharged.

(A. M. BADAR, J.)

Arti V.
Khatate

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