

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 4551 OF 2021

**VINAY RAMNARAYAN SINGH @
BABLU**

) PETITIONER

V/S.

THE STATE OF MAHARASHTRA

) RESPONDENT

* * * *

Mr. Aniket Nikam i/by. Mr. Girish Jain, Advocate for the petitioner.

Mr. Shekhar Jagtap, Special Public Prosecutor a/w. Mr. Y.M. Nakhawa, APP for State.

Coram : Sandeep K. Shinde, J.

Wednesday, 1st December, 2021.

P.C. :

1. This petition under Article 227 of the Constitution of India, read with Section 482 of the Criminal Procedure Code, 1973, assails the order dated 17th November, 2021 in Crime No.71/2021 and a proclamation requiring the appearance of the petitioner issued in exercise of powers

under Section 82 of the Criminal Procedure Code.

2. Heard Mr. Nikam, learned Counsel for the petitioner and learned APP for State.

3. Applicant is accused in Crime No.71/2021 dated 20th August, 2021 registered for the offences punishable under Sections 384, 385, 388 and 389 of the Indian Penal Code. On 21st August, 2021 a notice under Section 41A of the Criminal Procedure Code, was issued. However, it was not responded by the applicant. Instead, applicant sought pre-arrest protection. It was declined by the learned Sessions Court, Mumbai on 27th September, 2021. Whereafter the applicant, moved this Court on 20th October, 2021 seeking pre-arrest protection. On 15th November, 2021 intimation was posted to the Investigating Officer that the pre-arrest protection application was filed on 20th October, 2021 in the High Court. On the same day i.e. on 15th November, 2021 Investigating Officer moved the trial Court to seek issue of proclamation under Section 82 of the Criminal Procedure Code, against the applicant. It

appears, the applicant sought circulation of Anticipatory Bail Application on 16th November, 2021. Application was listed on 17th November, 2021. None appeared for the applicant on that date. On the same day i.e. on 17th November, 2021 another application was moved seeking issuance of proclamation against applicant and two co-accused. The learned Additional Chief Metropolitan Magistrate upon perusing the application, record and Affidavit of the Investigating Officer passed the following order :

“1. Application is allowed.

2. Issue written proclamation for appearance of accused Vinay Ramnarayan Singh @ Babaloo, Riyaz Siraj Bhati and accused Parambir Singh before this court as per Section 82 and FORM No.4 of the Code of Criminal Procedure.”

4. Pursuant thereto, the learned Additional Chief Metropolitan Magistrate issued a proclamation on 18th November, 2021, in FORM No.4, requiring applicant to appear before the Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Mumbai or before the Investigation Officer to answer the said complaint within 30 days from the date of publishing such proclamation. Mr.

Nikam, learned Counsel for the applicant submitted that, requiring the accused to appear 'within 30 days' was contrary to the mandate of Section 82, by which, the Court may require the accused to appear at a specified date and a specified time, not less than 30 days from the date of publication of such proclamation. (emphasis supplied)

5. To appreciate the contention of Mr. Nikam, let me reproduce the provisions of Section 82 of the Criminal Procedure Code.

"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 specified 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 homestead 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.

[(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender, and make a declaration to that effect. (Ins.by Act 25 of 2005, sec.12 (w.e.f.23-6-2006))

[(5)The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1).] (Ins.by Act 25 of 2005, sec.12 (w.e.f.23-6-2006))”

6. In terms of Section 73 of the Criminal Procedure Code, the Magistrate has jurisdiction and powers to issue warrant of arrest against any; (i)proclaimed offender, (ii)escaped convict or (iii)against any person, who is an accused of a non-bailable offence and is evading arrest. Thus, process under Section 82 cannot be issued, unless it is shown that, a warrant had already been issued against the person wanted and that person was evading arrest. Therefore, prior to issuance of proclamation, issuance of warrant of arrest by the Magistrate is *sine-qua-non*.

7. In the case in hand, before passing the order dated 17th October, 2021 directing to issue proclamation,

the learned Magistrate has recorded the satisfaction that warrant had already been issued and the applicant was evading his arrest and therefore it cannot be faulted with.

8. Yet, since Section 82 is a penal clause making the accused susceptible to punishment under Section 174A of the Indian Penal Code, the procedure enacted under Section 82 is to be strictly followed and it cannot be relaxed. It is settled law that, where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. In the case of **Auto Cars V/s. Trimurti Cargo Movers Pvt. Ltd. And Ors. , (2018) 15 SCC 166**, the Apex Court has held that, non-compliance with the statutory requirements regarding mentioning of specific “day, date, year or time” would amount to material infirmity rendering summons, as well as, their service bad in law and consequently it cannot be held to be duly served.

9. In the case in hand, Section 82 of the Criminal Procedure Code, mandates that the period specified in the

proclamation, requiring a person to appear at a specified place and time, shall 'not be less than thirty days'. As against, herein, proclamation published on 18th November, 2021, required the applicant to appear at a specified place within 30 days (emphasis supplied). Thus, period specified was not in accordance with the provisions of Section 82. There lies difference between "NOT LESS THAN THIRTY DAYS" and "WITHIN THIRTY DAYS". Therefore, as stated above, Section 82 being penal clause, making the accused susceptible to punishment under Section 174-A of the Indian Penal Code, the procedure enacted under Section 82 has to be followed strictly, which has not been followed in the case in hand.

10. This Court in the case of **Rammi Paramjeetsingh Rajput V/s. State of Maharashtra (Through Gangapur Police Station, Nashik City) and Others (2021) SCC Online Bombay 2059**, has held in para-8 as under :

"8. Sub-section (1) of Section 82 makes it clear that the proclamation has to be published in accordance with sub-section (2) of Section 82 and that the accused is supposed to appear at a specified place and at a specified time, within not less than 30 days from the date of publishing such proclamation. Thus,

Section 82 mandates that a clear period of 30 days is required to be afforded to an absconding accused to cause appearance after publication is effected.”

11. Thus for the foregoing reasons, in my view, though the order dated 17th November, 2021 directing to issue written proclamation under Section 82 in FORM No.4 of the Criminal Procedure Code, cannot be faulted with, yet the proclamation issued in FORM No.4 being contrary to the mandate of Section 82, it is to be quashed and set aside. Thus, in view of the facts of the case and for the reasons aforesaid, the order publishing the proclamation against the applicant being Proclamation No.02/2021 in C.R. No.71/2021, is quashed and set aside.

12. Mr. Nikam, on instructions, seeks to delete Ground No.(h) of his application. Leave granted. Amendment to be carried out forthwith.

13. It is made clear that observations made in this order are in context of the facts of this case only.

14. At this stage, Mr. Jagtap, on instructions, seeks stay to the operation of this order. The request is rejected.

15. Application is allowed in the aforesaid terms and disposed of.

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(Sandeep K. Shinde, J.)