

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Writ Petition No. 6107 / 2019

Alongwith

Writ Petition No. 6104 / 2019

and

Writ Petition No. 6105 / 2019

and

Writ Petition No. 6106 / 2019

1. M/s. J.B.D. Finance and Investment Ltd.
Having its Office at B-41, Boolani Estate,
Opp. City Mall, New Link Road, Veera Desai
Road, Andheri (West), Mumbai – 400 053.
Through Director Dinesh Singh Lakra

2. J.B.D. Marketing
Having its Office at B-41, Boolani Estate,
Opp. City Mall, New Link Road, Veera Desai
Road, Andheri (West), Mumbai – 400 053.
Through Director Dinesh Singh Lakra
(Registered Office : Khasra No.109/110,
Rajinder Lakra Marg, Village & Post Office
Mundka, New Delhi – 400 041.

3. Mr. Dinesh Singh Lakra
Adult, Indian Inhabitant, aged about 44 years,
Permanent resident of WZ, Galli No.1,
Room No. 68, 3rd Floor, Gurunanak Tilak Nagar,
Delhi. Presently at Mumbai.

.. Petitioners

Versus.

1. State of Maharashtra
2. Sampark Marketing Advertising Pvt. Ltd.
A Company incorporated under the Provisions of
Companies Act, having its Office situated
at Ama House, 2nd Floor, Near Strand
Cinema, Colaba, Mumbai – 400 005.

.. Respondents

Mr. Ashok M. Saraogi, Advocate for Petitioners in All Matters.

Mr. A.R. Patil, APP for State/ Respondent No.1.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : 07th SEPTEMBER, 2021.
PRONOUNCED ON : 16th NOVEMBER, 2021.

Judgment : -

1. Rule.
2. Rule made returnable forthwith. Heard, finally with the consent of the parties.
3. These petitions under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973, are

directed against the order dated 21st November, 2019 (a common order) by which the Petitioners' application, for release and the restoration of property attached under Section 83 of the Code of Criminal Procedure, 1973, has been rejected by the Metropolitan Magistrate 28th Court at Esplanade Mumbai.

4. Background facts are ;

The Respondent No.2 – M/s Sampark Marketing Advertising Solution Pvt. Ltd. filed complaints under Section 138 of the Negotiable Instruments Act against the Petitioner Company, being Case Nos. CC/447/SS/2005; CC/448/SS/2005; CC/449/SS/2005; CC/450/SS/2005; CC/451/SS/2005; CC/27/SS/2013. In these complaints proclamation was issued against Dinesh Singh Lakra, director of the Petitioner Company, followed by order attachment under Section 83 of Cr.P.C. of the property, being Flat No.302, at Golden Empire Co.Op. Housing Society Ltd., Mira Road, Dist. Thane ('Property' for short). Pursuant thereto, on 28th January, 2008, a District Collector, Thane was authorized to attach the property in the manner specified in Clause (a) or Clause (b) or both of Subsection (4) of Section 83 of

the Cr.P.C. The order was acted upon by taking possession of the property. Be that as it may, pending attachment, the Respondent No.2 (Complainant) instituted a summary suit in the City Civil Court, Mumbai against the Petitioners, seeking money decree in the sum of Rs. 45,74,716/-. Pending suit and the attachment (under Section 83 of Cr.P.C.), accused – Dinesh Singh Lakra executed a registered agreement in respect of the said property in favour of his wife Mrs. Sonia Rajpal Singh. Whereafter Mrs. Sonia Sing moved an application, seeking release and restoration of the said property. Her application was rejected and the revision against that order also met with the same fate. Both the Courts concurrently held that Mrs. Sonia Singh had no locus to seek release and restoration of the said property. It may be stated that in the summary suit instituted by the Respondent No.2 in Notice of Motion No. 3537/2012, said property was attached in before judgment.

5. Pending Civil and Criminal Proceedings, Complainant and the Petitioners compromised the dispute. Whereafter, the Complainant sought permission to withdraw the complaints on the ground that the

accused have settled all matters including the proceedings in the summary suit instituted by him. The learned Metropolitan Magistrate upon verifying the applications permitted the Complainant to withdraw the complaints and disposed of the same. In consequence, vide order dated 19th October, 2019, Petitioners-accused were acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act in all aforesaid complaints. Well before withdrawing the complaints, the Complainant and the Petitioners had also filed the consent terms in the summary suit on 10th October, 2019. Whereafter, the attachment was lifted by the City Civil Court and directed the Registrar, to hand over possession of the said property to Dinesh Lakra, director of the Petitioners-Company.

6. In the backdrop of aforestated facts, the Petitioners herein, moved an application under Section 85 of the Cr. P. C. in CC/447/SS/2005; CC/448/SS/2005; CC/449/SS/2005; CC/450/SS/2005; CC/451/SS/2005; CC/27/SS/2013, to lift the attachment, release and restore the said property to them. The Complainant (Respondent No. 2 herein), recorded his no objection for releasing and restoring the

said property to the Petitioners. These applications were heard and rejected by order dated 21st November, 2019 on the following grounds;

- (i) On previous occasion, identical application was rejected and the order was upheld in revision.
- (ii) the Court has no power to review earlier order.
- (iii) the Court has no jurisdiction to restore the property after lapse of two years.

7. Feeling aggrieved by the order dated 21st November, 2019, these petitions are preferred under Article 227 of the Constitution of India read with Section 482 of Cr.P.C.

8. Heard. Mr. Saraogi, learned Counsel for the Petitioners and Mr. A.R. Patil, learned Prosecutor for the State.

9. It may be stated that besides the challenge to order dated 21st November, 2019 (impugned order), Petitioners are also seeking directions to Collector, Thane to remove seal put on the flat no. 302 situated at Golden Empire Co.Op. Housing Society Ltd., Mira Road, Dist. Thane (property in question) and directions to hand over the

possession to them. Although these petitions were filed in 2019, the State has neither filed the reply, nor informed the Court, about the status of the said property. In the circumstances, Mr. Patil and learned Prosecutor, when called upon to apprise as to State of property in question, Mr. Patil informed as under;

“that property in question is under lock and key since 2008. It was under owned by Ms. Soniya Singh. She died in pandemic. Her husband Dinesh Lakra (Petitioner No.2) stays in the flat No.202 on rental basis in the same building. It means property has not been disposed of by the State and it is in their possession.”

10. In so far as the impugned order is concerned, it may be stated that pending suit and attachment under Section 83 of Cr.P.C., Petitioner No.2 (accused) Dinesh Lakra sold the property to his wife Ms. Soniya Rajpal Singh. Thereafter Ms. Soniya moved an application seeking release and restoration of the property. Soniyas' application was rejected by the learned Magistrate on 8th October, 2013. This order was confirmed in Revision Application No.1827/2013. Both the Courts declined to entertain the application

of Soniya on the ground that agreement for sale executed did not create interest in her favour and thus she had proved her title in the said property. Additionally both the Courts held that Soniya had no locus to file the application. It may noted that Soniyas' claim and objection to the attachment was under Section 84 of Cr.P.C. and not under Section 85. Therefore it is to be stated that Petitioners had not moved the Court earlier but for the first time, they moved an application on 22nd October, 2019 under Section 85 of Cr.P.C. In view of this, one of the reason for rejecting the application of the Petitioners, that earlier application was rejected and order passed therein, cannot be reviewed was incorrect. The next ground for rejection was that the Petitioners did not approach the Court for release and restoration of the said property, within two years from the date of attachment.

11. In the backdrop of the facts aforesaid, the question for the determination is;

“ whether the right of the Petitioners to seek release of property

under Section 85 of Cr.P.C. beyond two years from the date of its attachment stands extinguished?”

12. Section 85 of Cr.P.C. reads as under;

“ Release, sale and restoration of attached property.

(1) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment.

(2) If the proclaimed person does not appear within the time specified in the proclamation, the property under the attachment shall be at the disposal of the State Government; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under section 84 has been disposed under that section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner; in either of which cases the Court may cause it to be sold whenever it thinks fit.

(3) If, within two years from the date of the attachment, any person whose property is or has been at the disposal of the State Government, under sub- section (2), appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the net proceeds of the sale, or, if part only thereof has been sold, the net proceeds of the sale and the residue of the property, shall, after satisfying therefrom all costs incurred in consequence of the attachment, be delivered to him.”

13. Section 83 of Cr.P.C. empowers the Court, issuing a

proclamation under Section 82 to order the attachment of any property movable or immovable or both belonging to the proclaimed person. Subsection 4 of Section 83 provides that if property ordered to be attached is immovable, the attachment be made through Collector of District, either by taking possession or by appointment of receiver or by an order in writing prohibiting the payment of rent on delivery of property to proclaim person or to anyone on his behalf or by all or any of such methods as the Court thinks fit. Section 84 enables, any person other than the proclaimed person, to make a claim and objection to the attachment on the ground that claimant and objector has an interest in such property, and that such interest is not liable to attachment under Section 83. Such claims and objections if made are to be inquired into by the Court in which it is preferred or made. If a claim or objection is disallowed, such a person has right to institute the suit within the period of one year from the date of such order to establish his right, which he claims in respect of the property in dispute and order of attachment shall be subject to result in such suit. Herein, Soniya had filed an application purportedly under Section 84 and although her claim and objection

to attachment, was not entertained, she did not file the suit to establish her rights in the property. Be that as it may, under Section 85(1), if proclaimed person person appears within the time specified in procolamation order, the Court is empowered to make an order to release the property from attachment. If proclaimed person does not appear within the time specified in the proclamation, the property under the attachment shall be at the disposal of the State of Government. Yet property shall not be sold until any claim preferred or objection made under Section 84 has been disposed of under that Section.

14. The facts in the case are peculiar. Herein, pending attachment under Section 83 of Cr.P.C.; same property was attached before judgment in 2008 in the suit instituted by the Complainant. In the said summary suit, consent terms were filed in October, 2019. Whereafter on 10th October, 2019, the suit was disposed of and consent decree was drawn. Whereafter Registrar of City Civil Court was directed to unseal the property and hand over possession to Dinesh Singh Lakra, director of the Petitioners-Company. Admittedly,

the property in question was under attachment of City Civil Court till October, 2019, and thus after drawing the consent decree in October, 2019, application was moved by the Petitioners under Section 85 of Cr.P.C., which they could not have moved in view of order of attachment passed in Civil Suit.

15. Thus, in consideration of the facts of the case, it may be stated that the Petitioners were prevented by 'sufficient cause' in pursuing the remedy under Section 85 of Cr.P.C. These facts were completely ignored by the learned Metropolitan Magistrate.

16. All the same, the order passed under Section 83 is subject to Sections 84 and 85 of the code. Section 85(3) empowers the Court to decide the application on merits. The underlying scheme and object of attaching property of the absconder is not to punish him, but to compel his appearance and therefore under Section 85 of Cr.P.C., Court is empowered to release and restore the attached property. Thus, although the application is required to be made within a period of two years from the date of attachment, however if made after two, that itself shall not preclude the Court from

exercising the jurisdiction under Section 85 of Cr.P.C., if reasonable cause is shown, for not approaching within the given time. If period of two years envisaged under Section 85(3) is construed literally, it shall frustrate the object of the attachment. Therefore, in my view, the Courts are bound to consider the application filed under Section 85(3) on merits by ascertaining, whether notice of proclamation was properly served on the party and whether application filed beyond two years prescribed under the statute is explained with reasonable cause. In the case of **K. Govindraj Vs. Subbian and Others**, 2017 SCC OnLine Madras 22438, it was held that “the two years period referred for lifting the attachment cannot be read literally to say the belated application are not maintainable, even if there is a justifiable cause for not appearing before the Court or for not seeking relief of raising the attachment after two years. If the Petitioner makes out a justifiable cause for filing application after two years of attachment and able to convince the trial Court that he has not absconded himself wantonly, then, the Court has every right to consider the application and lift the attachment. Procedure is hand maid of justice. The endeavour of the Court should be to render justice by

appropriate interpretation of statute. Therefore if the Court finds that the person could not approach to seek release and restoration of property within two years due to circumstances beyond his control then in such a case propriety rights of such person in the property would not extinguish automatically. Therefore I conclude and hold thus, Subsection 3 of Section 85 empowers the Court to entertain the application for release and restoration of the property beyond two years from the date of attachment, if such a person proves to the satisfaction of the Court that he was prevented by a sufficient cause, from making an application for release and restoration of the property. Thus, to be stated that two years period referred for lifting the attachment cannot be read literally to say the belated application is not maintainable, even if there is a justifiable cause for not seeking release of raising the attachment after two years.

17. In this case, the learned Metropolitan Magistrate did not consider the circumstances, which prevented the Petitioners for making the claim under Section 85(3) of Cr.P.C. within a period of two years. In the circumstances and for the reasons stated, the

impugned order dated 21st November, 2019 is quashed and set aside and the learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai, is directed to decide Petitioners' application on merits, in terms of this judgment.

18. Petitioners shall move an formal application and bring this order to the notice of the learned Metropolitan Magistrate, whereafter within twelve weeks, Petitioners' application under Section 85 of Cr.P.C., shall be decided in accordance with law.

19. Rule is made absolute in the aforesaid terms. All the Writ Petitions are allowed and disposed of.

(SANDEEP K. SHINDE, J.)

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by MOHAMMAD
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