

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

134 (3)

CRM-M-15728-2021

Date of decision: 09.04.2021

DAVINDER SINGH CHAWLA AND ANOTHERPetitioners

Versus

STATE OF HARYANA AND ANOTHERRespondent

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Kunal Dawar, Advocate
for the petitioners.

ARUN KUMAR TYAGI, J (ORAL)

(The case has been taken up for hearing through video conferencing.)

Petitioners-Davinder Singh Chawla and Raman Preet

Kaur have filed present petition under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') for quashing of order dated 09.11.2017 passed by learned Judicial Magistrate First Class, Gurugram in complaint case NACT No. 5564 of 2016 titled as 'Indiabulls Housing Finance Ltd. vs Kirat Hotels Pvt. Ltd.' under Section 25 the Payment and Settlement Systems Act, 2007 read with Section 357 of the Cr. P.C. (whereby the petitioners were declared proclaimed persons under Section 82 of the Cr.P.C.) and all consequential proceedings arising out of the same.

Briefly stated that the facts giving rise to filing of the present petition are that respondent No.2 filed complaint under section 25 of the Payment and Settlement Systems Act, 2007 as amended upto date read with Section 357 of the Cr.P.C. The petitioners were summoned to face trial for commission of the above said offence. On failure to appear in the case, the petitioners were declared proclaimed

persons vide order dated 09.11.2017.

Feeling aggrieved from the above-said order the petitioners have filed the present petition for quashing of the same along with all consequential proceedings.

Pursuant to supply of advance copy of the petition, Mr. Ranvir Singh Arya, Addl. A.G. Haryana has appeared and accepted notice on behalf of respondent No.1-State.

In view of nature of relief sought issuance of notice to respondent No.2 is considered to be unnecessary.

I have heard learned Counsel for the petitioners and learned State Counsel and have gone through the record.

Learned Counsel for the petitioners has submitted that the petitioners were wrongly declared proclaimed person vide order dated 09.11.2017 in breach of the prescribed procedure as the petitioners were not given thirty days time for his appearance before the Court from the date of publication of proclamation till the date fixed for appearance. Therefore, the impugned order suffers from material illegality and the impugned order and all subsequent proceedings arising out of the same may be quashed.

On the other hand, learned State Counsel has submitted that the petitioners absconded and were declared proclaimed persons vide order dated 09.11.2017 after expiry of the period of 30 days from publication of the proclamation. The impugned order does not suffer from any illegality and the petition may be dismissed.

On consideration of the submissions made by learned Counsel for the petitioners and learned State Counsel and on perusal of

the relevant record, I am of the considered view that the impugned order dated 09.11.2017 suffers from material illegality and is liable to be quashed with all subsequent proceedings arising out of the same.

Section 82 of the Cr.P.C., which provides for publication of proclamation against person absconding, reads as under:-

“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.

(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).”

The essential requirements of Section 82 of the Cr.P.C. for issuance and publication of proclamation against an absconder and declaring him as proclaimed person/offender may be summarized as under:-

- (i) Prior issuance of warrant of arrest by the Court is *sine qua non* for issuance and publication of the proclamation and the Court has to first issue warrant of arrest against the person concerned. (See ***Rohit Kumar Vs. State of Delhi : 2008 CrL J. 2561***).
- (ii) There must be a report before the Court that the person against whom warrant was issued had absconded or had been concealing himself so that the warrant of arrest could not be executed against him. However, the Court is not bound to take evidence in this regard before issuing a Proclamation under Section 82 (1) of the Cr.P.C.. (See ***Rohit Kumar Vs. State of Delhi : 2008 CrL J. 2561***).
- (iii) The Court cannot issue the Proclamation as a matter of course because the Police is asking for it. The Court must be *prima facie* satisfied that the person has absconded or is concealing himself so that the warrant of arrest, previously issued, *cannot* be executed, despite reasonable diligence. (See ***Bishundayal Mahton and others Vs. Emperor : AIR 1943 Patna 366 and Devender Singh Negi Vs. State of U.P. : 1994 CrL LJ (Allahabad HC) 1783***).
- (iv) The requisite date and place for appearance must be specified in the proclamation requiring such person to appear on such date at the specified place. Such date must not be less than 30 clear days from the date of issuance and publication of the proclamation. (See ***Gurappa Gugal and others Vs. State of Mysore : 1969 CriLJ 826 and Shokat Ali Vs. State of Haryana : 2020(2) RCR (Criminal) 339***).
- (V) Where the period between issuance and publication of the proclamation and the specified date of hearing is less than thirty days, the accused cannot be declared a proclaimed person/offender and the proclamation has to be issued and published again. (See ***Dilbagh Singh Vs. State of Punjab (P&H) :***

2015 (8) R.C.R. (criminal) 166 and Ashok Kumar Vs. State of Haryana and another : 2013 (4) RCR (Criminal) 550)

- (vi) The Proclamation has to be published in the manner laid down in Section 82 (2) of the Cr.P.C.. For publication the proclamation has to be first publicly read in some conspicuous place of the town or village in which the accused ordinarily resides; then the same has to be affixed to some conspicuous part of the house or homestead in which the accused ordinarily resides or to some conspicuous place of such town or village and thereafter a copy of the proclamation has to be affixed to some conspicuous part of the Court-house. The three sub-clauses (a)-(c) in Section 82 (2)(i) of the Cr.P.C. are conjunctive and not disjunctive, which means that there would be no valid publication of the proclamation unless all the three modes of publication are proved. (See **Pawan Kumar Gupta Vs. The State of W.B. : 1973 CriLJ 1368**). Where the Court so orders a copy of the proclamation has to be additionally published in a daily newspaper circulating in the place in which the accused ordinarily resides. Advisably, proclamation has to be issued with four copies so that one each of the three copies of the proclamation may be affixed to some conspicuous part of the house or homestead in which the accused ordinarily resides, to some conspicuous place of such town or village and to some conspicuous part of the Court-house and report regarding publication may be made on the fourth copy of the proclamation. Additional copy will be required where the proclamation is also required to be published in the newspaper.
- (vii) Statement of the serving officer has to be recorded by the Court as to the date and mode of publication of the proclamation. (See **Birad Dan Vs. State : 1958 CriLJ 965**).
- (viii) The Court issuing the proclamation has to make a statement in writing in its order that the proclamation was duly published on a specified day in a manner specified in Section 82(2)(i) of the Cr.P.C.. Such statement in writing by the Court is declared to be conclusive evidence that the requirements of Section 82 have been complied with and that the proclamation was published on such day. (See **Birad Dan Vs. State : 1958 CriLJ 965**).
- (xi) The conditions specified in Section 82(2) of the Cr.P.C. for the publication of a Proclamation against an absconder are mandatory. Any non-compliance therewith cannot be cured as an 'irregularity' and renders the Proclamation and proceedings

subsequent thereto a nullity. (See *Devendra Singh Negi alias Debu Vs. State of U.P. and another : 1994 CriLJ 1783* and *Pal Singh Vs. The State : 1955 CriLJ 318*).

In *Dilbagh Singh Vs. State of Punjab (P&H) : 2015 (8)*

R.C.R. (criminal) 166 it was held by this Court that in order to ensure that an accused should have a fair opportunity to appear, 30 days clear notice is necessary and the proclamation should be published in the manner provided by law. In that case, proclamation of the petitioner was issued on 20.08.2014 for 23.08.2014 and vide impugned order dated 25.09.2014 the petitioner was declared proclaimed offender. Clear notice of 30 days as mandated under Section 82 of the Cr.P.C. was not given to the petitioner and the procedure for publication of the proclamation was also not followed. The petitioner was held to have been wrongly declared a proclaimed offender and the impugned order was quashed.

In *Ashok Kumar Vs. State of Haryana and another :*

2013 (4) RCR (Criminal) 550 the case was adjourned by the trial Court vide order dated 04.01.2013 for issuance of proclamation under Section 82 of the Cr.P.C. for 06.03.2014 but period of 30 days had not elapsed from the date of publication till 06.03.2014. On that date case was adjourned to 13.03.2014 on which date the petitioner was declared as proclaimed offender. It was held by this Court that the proclamation was not published in accordance with the procedure prescribed under Section 82(1) of the Cr.P.C. by giving mandatory period of 30 days from the date of publication of the proclamation till the date of hearing fixed in the case for appearance of the petitioner and that the mere fact that on 06.03.2014 the Court adjourned the case to 13.03.2014 for

completing the period of 30 days could not be treated as compliance of the provisions of Section 82(1) of the Cr.P.C. Accordingly, the order declaring the petitioner as proclaimed offender was set aside.

The facts of the present case are similar to those of the cases referred above. In the present case vide order dated 13.09.2017 proclamation under Section 82 of the Cr.P.C. was ordered to be published against the petitioners requiring the petitioners to appear before the Court on 09.10.2017. The proclamation was published on 16.09.2017. The petitioners were not given statutory minimum period of thirty days from 16.09.2017 (the date on which the proclamation issued in terms of order dated 13.09.2017 was published) till 09.11.2017 (the date fixed for his appearance before the Court). Learned Judicial Magistrate First Class, Gurugram vide order dated 09.10.2017 adjourned the case to 09.11.2017 for awaiting the appearance of the petitioners on the ground that statutory period of thirty days had not elapsed and vide order dated 09.11.2017 declared the petitioners to be proclaimed person. Learned Judicial Magistrate First Class, Gurugram could not extend the time to complete the period of thirty days by simply adjourning the case on 09.10.2017 to 09.11.2017 for awaiting appearance of the petitioners and was mandatorily required to issue the proclamation again for publication thereof in accordance with the provisions of Section 82(2) of the Cr.P.C. by giving thirty days time to the petitioners from the date of publication of the proclamation till the date fixed for his appearance before the Court. The learned Judicial Magistrate First Class, Gurugram failed to do so. It follows that the petitioners were wrongly declared

proclaimed person vide impugned order dated 09.11.2017 in breach of the prescribed procedure and impugned order dated 09.11.2017 suffers from material illegality and is liable to be quashed.

In view of the above discussion, the petition is allowed and impugned order dated 09.11.2017 passed by learned Judicial Magistrate First Class, Gurugram in complaint case NACT No. 5564 of 2016 titled as 'Indiabulls Housing Finance Ltd. vs Kirat Hotels Pvt. Ltd.' under Section 25 of the Payment and Settlement Systems Act, 2007 read with Section 357 of the Cr. P.C. is quashed along with all consequential proceedings arising out of the same.

However, the petitioners are directed to surrender before learned Judicial Magistrate First Class, Gurugram within four weeks and on such surrender shall be liable to be remanded to Judicial Custody, subject to order for grant of anticipatory/regular bail, if any.

09.04.2021

Vishal

**(ARUN KUMAR TYAGI)
JUDGE**

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No