

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL.M.C. 2514/2020

Reserved on: 01.10.2021

Date of Decision: 07.10.2021

IN THE MATTER OF:

RAJESH EBRAHIMKUTTY MAJIDHABEEVI Petitioner
Through: Mr. Himanshu Sharma, Advocate

Versus

STATE (GOVT. OF NCT OF DELHI) & ANR. Respondents
Through: Mr. Panna Lal Sharma, APP for State
Mr. Vaibhav Mahajan, Advocate for
Respondent No. 2

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The petitioner has preferred the present petition under Section 482 Cr.P.C. assailing the order dated 14.08.2018 passed by the learned Metropolitan Magistrate-04, NI Act, South District, Saket Courts, New Delhi vide which the petitioner was declared an absconder. Additionally, the petitioner has also sought quashing of FIR No. 338/2018 and FIR No. 231/2019 both registered under Section 174A IPC at Police Station Hauz Khas, New Delhi. He also seeks setting aside of the order dated 15.02.2020, vide which his properties have been directed to be attached, and stay of the proceedings pending in FIR No. 338/2018 and FIR No. 231/2019.

2. The present case arises out of a complaint filed by respondent No. 2 under Section 138 N.I. Act read with Sections 141 and 142 N.I. Act and Section 420

IPC being Complaint Case No. 8416/2017 against the petitioner and others. On noting that the petitioner was stated to be an Authorized Signatory of the cheque in question and a Director in the accused Company, namely *ABC Aviation & Training Services (P) Ltd.*, cognizance was taken by the learned Metropolitan Magistrate against the accused under Section 138 N.I. Act read with Section 141 N.I. Act and summons were issued.

3. Learned counsel for the petitioner has assailed the order declaring the petitioner as an '*Absconder*' as well as consequent registration of the aforementioned FIRs by raising the following contentions:

- (i) the proceedings conducted by the concerned Court while declaring the petitioner an '*Absconder*' show complete non-application of mind;
- (ii) the proceedings under Section 82 Cr.P.C. were conducted while showing the petitioner to be a resident of *Kerala*, whereas he was residing in *Karnataka*; the correct address of the petitioner (i.e., of *Karnataka*) was placed on record by the complainant himself;
- (iii) the procedure prescribed under Section 82 Cr.P.C. was given complete go-bye; and
- (iv) two FIRs on the same cause of action could not have been registered.

4. It is also submitted that on behalf of the petitioner that the petitioner undertakes to regularly appear before the Trial Court. Per Contra, learned APP for the State, duly assisted by learned counsel for the complainant, has opposed the prayers. It is submitted that the petitioner was declared Absconder after following due process of law.

5. I have heard learned counsels for the parties as well as gone through the Trial Court Record. Before proceeding further, I deem it apposite to refer to Section 82 Cr.P.C., which 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.

¹*[(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under Sections 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.]*

¹*[(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).]”*

6. A plain reading of sub-section (1) of Section 82 Cr.P.C. would show that publication of proclamation must be preceded by issuance of a warrant and the satisfaction of the Court having '*reason to believe*' that the person against whom warrant has been issued is absconding or concealing himself so that such warrant cannot be executed. On satisfaction of the twin conditions, the Court may cause a written proclamation to be published requiring such a person to appear at a specified place and a specified time in not less than 30 days from the date of publishing of such proclamation.

7. The expression '*reason to believe*' means sufficient cause to believe. As also enunciated in Section 26 IPC, a person is said to have '*reason to believe*' a thing, if he has sufficient cause to believe that thing but not otherwise. Thus, '*reason to believe*' that a person against whom warrant has been issued is either absconding or concealing himself should be reflected by the material placed on record for the Court. The use of expression '*so that such warrant cannot be executed*' further implies that the person must be attributed with the knowledge that such warrants have been issued against him and his abscondence or concealment is intentional.

8. Sub-clause (i) of Section 82(2) Cr.P.C. enunciates the manner in which publication of proclamation has to be effected. Notably, the three modes prescribed thereunder are conjunctive and not disjunctive. The key word being '*shall*', this sub-clause mandates that:

- a) the proclamation be read publicly in a conspicuous place of the town and village where such person ordinarily resides;
- b) the proclamation be affixed to some conspicuous place of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village; and

c) a copy of such proclamation be affixed to some conspicuous part of the Court-House.

9. Sub-clause (ii) of Section 82(2) Cr.P.C. prescribes that 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. The use of the word '*may*' indicates that the same is optional and is not an alternative to the modes prescribed in sub-clause (i).

10. Sub-section (3) of Section 82 Cr.P.C. stipulates that a written statement by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day in the manner specified in sub-clause (i) of Section 82(2) Cr.P.C. shall be conclusive evidence that the requirements of the Section have been complied with and that the proclamation was published on such day.

11. Sub-section (4) of Section 82 Cr.P.C. further provides that where a proclamation is published under sub-section (1) in respect of a person accused of offences specified therein and on failure of such a person to appear at a specified place and time, the Court after making such inquiry, as it thinks fit, pronounce such a person as proclaimed offender and make a declaration to that effect. Sub-section (5) stipulates that 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).

12. Briefly stated, the facts discernible from the material placed on record are that the complainant/respondent No. 2 had preferred a complaint under Section 138 N.I. Act read with Sections 141 and 142 N.I. Act impleading the petitioner as one of the Directors of the accused company, and in pursuance, the petitioner was summoned vide order dated 05.08.2017.

13. The summons addressed to the petitioner at his address in Kerala i.e., *Rajab, T.C. 27/648(1), Vanchiyoor, P.O. Trivandrum-695035, Kerala*, were received back with the report '*addressee left*'. On 03.11.2017, while noting that tracking report of summons for the petitioner mentioned '*unclaimed*',ailable warrants were issued against the petitioner which were made returnable on 11.01.2018. In the meantime, the matter was put up for appearance of another accused, namely *Sanaulla Zulfiqar Ahmed Khan*. On this date, i.e. 15.11.2017, the matter was referred to the Mediation Centre at request of parties and the case was directed to be listed before the Court on 04.12.2017.

14. The matter was taken up on 04.12.2017, on which date an application was filed by the complainant thereby bringing on record the fresh address of the petitioner in *Karnataka*. The Trial Court while taking note of the fresh address of the petitioner brought on record and without awaiting the Report on the previously issuedailable warrant, directed issuance of non-ailable warrants against the petitioner in complete disregard of the provisions of Section 82 Cr.P.C. Bothailable as well as non-ailable warrants were made returnable on 11.01.2018.

15. On receipt of Report of non-execution of the warrants, the Trial Court mechanically and without application of mind, directed publication of proclamation against the petitioner vide order dated 11.01.2018. The process under Section 82 Cr.P.C. was received back unexecuted with the Report that the time was short for execution of the same. A fresh process under Section 82 Cr.P.C. was issued against the petitioner on 09.04.2018. On 14.08.2018, a Report was filed by the process server and his statement was recorded.

16. As per the Report of the process server, he had visited the petitioner's given address in *Kerala* on 28.04.2018 and finding the house locked, made enquiries from the neighbor *Vibhu Kumar*, who informed him that the petitioner

had sold the premises 8-10 years ago and nobody was living at the said address. In spite of this, the process server went ahead and publicly read the proclamation and also pasted a copy of the same outside the said address. A copy of the process was also pasted outside the Court premises. In his statement recorded before the Court, he stated that neighbor *Vibhu Kumar* informed him that the petitioner had left the premises 11 years ago.

17. After recording the statement of the process server to the aforesaid effect on 14.08.2018, the Trial Court once again, mechanically recorded its satisfaction on the Report of the process server *Ct. Arjun Singh* and declared the petitioner an '*Absconder*'. The Court also passed directions for initiation of proceedings under Section 174A IPC against the petitioner resulting in registration of FIR No. 338/2018 at Police Station Hauz Khas, Delhi on 10.12.2018. Apparently, the petitioner's misfortune continued and even a second FIR bearing No. 231/2019 was registered on 13.08.2019 for the same offence at the same police station on the basis of aforesaid directions.

18. At this stage, I deem it profitable to refer to the decision in Inder Mohan Goswami and Another v. State of Uttaranchal and Others reported as (2007) 12 SCC 1, wherein the Supreme Court cautioned the Courts to not issue bailable and non-bailable warrants without proper scrutiny. It was enunciated as under:

“Personal liberty and the interest of the State

50. Civilised countries have recognised that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice—liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law.

51. *The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.*

52. *Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.*

When non-bailable warrants should be issued

53. *Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:*

- *it is reasonable to believe that the person will not voluntarily appear in court; or*
- *the police authorities are unable to find the person to serve him with a summon; or*
- *it is considered that the person could harm someone if not placed into custody immediately.*

54. *As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.”*

19. Reference may further be made to the decision rendered in Dalmia Resorts International Pvt. Ltd v. Deepak Gupta and Anr. reported as **2002 SCC OnLine Del 538** by another Bench of this Court while dealing with a complaint case under the N.I. Act, where it was opined that issuance of proclamation and attachment orders are exceptional remedies. While also taking note of the non-

application of mind by the concerned Magistrate to the Report of the process server, the Court quashed the proceedings initiated under Sections 82/83 Cr.P.C. against the accused therein in the following terms:-

“3. ...This apart, proclamation for any person absconding can be issued if the Court has the reasons to believe that the person against whom a warrant has been issued by it has absconded or is concealing himself and that warrant of arrest cannot be executed only then the Court is empowered to publish a written proclamation requiring him to appear to a specified date and time, within thirty days from the date of publication of such proclamation. The term ‘absconding’ does not necessarily imply a change of place. The petitioner being a private limited company, the question of its absconding does not arise. The process of proclamation and attachment are exceptional remedies and should not be issued as a matter of course whenever the warrant is returned unexecuted. The non-conformance of Section 82(1) and (2) would be violation of the procedure established by law within the meaning of Article 21 of the Constitution of India. It appears that while issuing process under Sections 82/83 Cr. P.C., the Court did not even notice the report on the warrant. The impugned order issuing proclamation against the petitioner, on the face of it is not sustainable.”

(emphasis added)

20. It would be expedient to refer also to the decision rendered by another Bench of this Court in G.SagarSuri v. State and Anr. reported as **2003 SCC OnLine Del 759**, where the importance of recording of reasons by the Magistrate before issuing written proclamation has been noted, besides highlighting that the processes illustrated in Section 82 Cr.P.C. may first be exhausted before directing attachment of property of the person absconding:-

“13. It is manifest from the provisions of Section 82 Cr. P.C. that before publishing the written proclamation requiring the accused to appear under the provisions of Section 82 Cr. P.C. the court has to record the reasons either after taking evidence or without evidence that a person against whom warrants have been issued has absconded or is concealing himself so that such warrants cannot be executed. The procedure for publication of the proclamation is laid down in sub-section (2) of Section 82. Sub-section (1) provides that the Court shall wait for thirty days after publication of the

proclamation for the appearance of the accused and it is only after processes under Section 82 Cr. P.C. are exhausted that the next step under Section 83 is to be taken by the Court.”

(emphasis added)

21. From the foregoing, it follows that the provisions of Section 82(1) and (2) Cr.P.C. should be construed strictly. Before issuing process, a Court is required to record its satisfaction that the accused has absconded or is concealing himself to avoid execution of warrants.

22. The impugned order, when tested in light of the abovementioned enunciation of law, fails miserably on the touchstone of judicial scrutiny and application of mind required before issuance of warrants much less publication of proclamation. The non-application of mind on the part of the Trial Court is writ large at every stage of the proceeding and the same is evident from following events:-

- (a) despite the fresh address of the petitioner brought on record by the complainant, the trial court did not issue fresh summons/warrants at the new address of the petitioner;
- (b) Without awaiting the report on the execution of bailable warrant, the Trial Court issued non-bailable warrants against the petitioner; in fact, both were made returnable on the same date, i.e. 11.01.2018;
- (c) The Report of the Process server had revealed that on enquiry it was found that the petitioner had left the last known address about 8-10 years ago, and yet the Trial Court did not take steps in terms of sub-clause (ii) of Section 82(2) Cr.P.C. and
- (d) The Trial Court directed attachment of properties of the petitioner vide order dated 15.02.2020, without having exhausted all the processes

outlined in Section 82 Cr.P.C. to secure his presence before passing of the order.

23. On a specific query, learned APP for the State has replied that the second FIR was inadvertently registered as the impugned order was received twice in the concerned Police Station.

24. On a careful reading of the material placed on record and in view of the above discussion, it is apparent that the impugned orders suffer from the vice of non-application of mind and deserve to be set aside. The declaration of the petitioner as an '*absconder*', as well as attachment of his properties, was neither fit in the facts and circumstances of the case nor was it in accordance with law. Accordingly, the impugned orders passed in proceedings under Sections 82/83 Cr.P.C. against the present petitioner are set aside. As a necessary consequence, the proceedings initiated in consequence of the impugned order dated 14.08.2018, i.e., FIR No. 338/2018 and FIR No. 231/2019 registered under Section 174A IPC at Police Station Hauz Khas, Delhi are also quashed.

25. The petition is allowed. The petitioner's undertaking to the effect that he shall regularly appear before the Trial Court is taken on record.

26. A copy of this judgment be communicated electronically to the concerned Trial Court.

(MANOJ KUMAR OHRI)
JUDGE

OCTOBER 7, 2021
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