

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

CRL.M.C. 1871/2021 & CRL.M.A. 12846/2021, CRL.M.A. 12847/2021

Reserved on : 28.10.2021

Date of Decision : 08.12.2021

IN THE MATTER OF:

MOHD. HARIS USMANI

..... Petitioner

Through: Mr. Vikas Pahwa, Senior Advocate
alongwith Ms. Raavi Sharma, Mr. Nitin Singh,
Mr. Parvez Dabas & Mr. Murari Tiwari,
Advocates.

versus

THE STATE (N.C.T OF DELHI)

..... Respondent

Through: Mr. Hirein Sharma, APP for State
with SI Mukesh Kumar, P.S. Kalkaji
Ms. Aishwarya Rao & Ms. Mansi Rao,
Advocates for Complainant.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of the present petition filed under Section 482 Cr.P.C., the petitioner seeks quashing of the order dated 08.07.2020 passed by the learned Duty M.M. (South-East District), Saket Courts, New Delhi as well as the orders dated 03.08.2021 and 06.08.2021 passed by the learned Metropolitan Magistrate-06 (South-East District), Saket Courts, New Delhi in case arising out of FIR No.

601/2019 registered under Sections 376/506/406/323/313/34 IPC at Police Station Kalkaji, New Delhi, whereby the petitioner has been declared an *Absconder*.

2. Brief facts, necessary for deciding the present petition, are that the aforesaid FIR came to be registered on 04.12.2019. During the pendency of investigation, the Investigating Officer of the case obtained NBWs against the petitioner on 09.01.2020. Thereafter, the Investigating Officer also moved an application dated 06.02.2020 before the concerned Court seeking initiation of proceedings under Section 82 Cr.P.C. against the petitioner. In the application, it was stated that search was made for the petitioner, however, he was not found available at any address. It was also mentioned that an application filed on behalf of the petitioner seeking anticipatory bail came to be dismissed vide order dated 25.01.2020 passed by the learned Addl. Sessions Judge. On the aforesaid application, vide order dated 10.02.2020, process under Section 82 Cr.P.C. was directed to be issued against the petitioner for 24.03.2020. On 08.07.2020, the learned Duty Metropolitan Magistrate recorded the statement of the process server and on the same date, i.e., 08.07.2020, the petitioner was declared an *Absconder*. Later, an application filed on behalf of the petitioner seeking recall/setting aside of the order dated 08.07.2020 was also dismissed on 03.08.2021. Vide order dated 06.08.2021, a typographical error in the order dated 03.08.2021 was corrected.

3. Mr. Vikas Pahwa, learned Senior Counsel appearing for the petitioner, has assailed the proceedings initiated against the petitioner under Section 82 Cr.P.C. by contending that there was complete non-application of mind while declaring the petitioner an *Absconder*. It is submitted that process under Section 82 Cr.P.C. was issued against the petitioner on 10.02.2020 for 24.03.2020, however, a nationwide lockdown came to be imposed on 24.03.2020 on account of the Covid-19 pandemic and as such, the petitioner, who was required to appear before the

Court on 24.03.2020, could not appear on the said date. It is also submitted that in between the petitioner had preferred an application seeking anticipatory bail in which he was directed to join investigation, however, he could not join the same as he was prescribed 15-day home stay isolation by the concerned Doctor from *Community Health Centre, Ghosi Distt., Mau (U.P.)*. It is stated that a copy of the medical slip issued by the said Doctor was also sent on behalf of the petitioner to the Investigating Officer.

It is next contended that the non-application of mind by the Metropolitan Magistrate is also apparent from the fact that while the present case pertains to the jurisdiction of Police Station Kalkaji, the impugned order mentions the name of Police Station as Amar Colony.

4. Learned Senior Counsel further contended that the petitioner could not have been declared an *Absconder*; in terms of Section 82(4) Cr.P.C., he could have been pronounced as a '*proclaimed person*', but that too only after making of an inquiry in this regard. It is submitted that even an inquiry under Section 82(4) Cr.P.C. would require application of mind. In support of his submissions, learned Senior Counsel for the petitioner has placed reliance on the decisions in Sunil Tyagi v. Govt. of NCT of Delhi and Another reported as **2021 SCC OnLine Del 3479** and Sanjay Bhandari v. State (NCT of Delhi) reported as **2018 SCC OnLine Del 10203**.

5. Mr. Hirein Sharma, learned APP for the State, duly assisted by Ms. Aishwarya Rao, learned counsel on the panel of DHCLSC and representing the complainant/prosecutrix in this case, has opposed the present petition. It is submitted that the petitioner has failed to appear before the Investigating Officer and he deliberately avoided joining of investigation, for which reason he was rightly declared an *Absconder*.

6. I have heard learned counsels for the parties and gone through the material placed on record as well as the records of the concerned Court.

7. As the contentions raised by the learned counsels for the parties involve Section 82 Cr.P.C., it is deemed relevant to reproduce the same hereunder:-

“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 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.

(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).]

8. A plain reading of sub-section (1) of Section 82 Cr.P.C. would show that if a Court has '*reason to believe*' that a person, despite issuance of warrant against him, is concealing or absconding himself so that such warrant remains unexecuted, the Court may publish a written proclamation requiring the person to appear at a specified place and time, which is not less than 30 days from the date of publishing of such proclamation.

9. The expression '*reason to believe*' appearing in sub-section (1) of Section 82 Cr.P.C. means sufficient cause to believe. Section 26 IPC also explicates that 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 is issued is either absconding or concealing himself should be reflected by the material placed on record before 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 warrant has been issued against him and his abscondence or concealment is intentional.

10. Before proceeding to analyse the facts of the present case, I deem it apposite to refer to the decision rendered by a Co-ordinate Bench of this Court in Dalmia Resorts International Pvt. Ltd v. Deepak Gupta and Anr. reported as **2002 SCC**

OnLine Del 538 while dealing with a complaint case under the N.I. Act, wherein 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 had 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)

11. It is deemed expedient to refer also to the decision rendered by another Co-ordinate Bench of this Court in G.Sagar Suri 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)

12. Recently, this Court in Rajesh Ebrahimkutti Majidhabeevi v. State (Govt. of NCT of Delhi) and Another reported as **2021 SCC OnLine Del 4642** also held that the provisions of Section 82 (1) and (2) Cr.P.C. should be construed strictly and before issuing process, the concerned Court has to record its satisfaction that the accused has absconded or is concealing himself to avoid execution of warrants.

13. Adverting to the present case, it is noted that vide order dated 10.02.2020, the learned Metropolitan Magistrate issued process against the petitioner under Section 82 Cr.P.C. in a cryptic manner. The order reads as under:

“Heard.

File perused.

82 Cr.P.C. issued against Accused Haris Usmani for 24/03/2020.”

14. Judicial notice is taken of the fact that on 24.03.2020, a nationwide lockdown was imposed in the country, for which reason the physical functioning of Courts was suspended. The same is also evident from the fact that in pursuance of the process issued under Section 82 Cr.P.C., a Report came to be filed by the concerned Investigating Officer on 06.07.2020, wherein it was stated that the Report could not be filed in the Court on 24.03.2020 because of the imposition of national lockdown. It was also stated in the Report that on the application filed on behalf of the applicant seeking anticipatory bail, the learned Addl. Sessions Judge had directed the applicant to join investigation and on 14.06.2020, the Investigating Officer received a medical prescription dated 04.06.2020 from the petitioner, in terms whereof he was required to remain in home isolation for a period of 15 days.

15. From the above, it is apparent that it was not possible for the petitioner to appear on 24.03.2020 and his non-appearance on the said date before the concerned Court was neither deliberate nor willful but due to reasons which were beyond his control.

16. On a perusal of Section 82(4) Cr.P.C., it is observed that the use of the expression '*after making such inquiry as it thinks fit*' implies that at the time of pronouncing a person as '*proclaimed person*' or '*proclaimed offender*', the concerned Court has to satisfy itself that the steps indicated in Section 82(1) Cr.P.C. are scrupulously followed. The Court is required to record reasons either after taking evidence or without evidence that the person against whom warrant was issued has absconded or concealed himself so that such warrants cannot be executed.

17. It is worthwhile also to note that the issuance of process under Section 82 Cr.P.C. and pronouncing a person as '*proclaimed person*' or '*proclaimed offender*' entail serious consequences, including not only deprivation of personal liberty of a person, but also attachment of properties and initiation of proceedings under Section 174A IPC against such person. Therefore, any order to that effect must reflect satisfaction of the Court that the person concerned has absconded or is concealing himself to avoid the process of law. Even otherwise, reasons form the heart and soul of any judicial pronouncement. No judicial order is complete without reasons and it is expected that every Court, which passes an order, should give reasons for the same [Refer: Sebastiani Lakra and Others v. National Insurance Company Limited and Another reported as **(2019) 17 SCC 465**].

18. However, in the present case, an overview of the impugned orders would show that while passing the same, the learned Metropolitan Magistrate has not recorded any reasons for his belief that the petitioner either concealed himself to avoid execution of warrants and/or absconded.

19. Notably, the petitioner, who is stated to be a practicing Advocate, has placed on record various order-sheets to support the averment that he was not concealing himself from the process of law at the relevant time, and was in fact appearing as a counsel before different District Courts in Delhi including Saket Courts, subsequent to issuance of NBWs against him. From the material placed on record, it is also discernible that the process server's report, to the effect that the petitioner was not found at his chamber in Saket Courts, was based on a visit to chamber No. 435 of the Court. However, the petitioner has disputed the search conducted for him at Saket Courts. It has been submitted on the petitioner's behalf that his chamber No. is 456, which he was duly visiting at the relevant time.

20. For the reasons stated hereinabove and in view of the Report filed by the Investigating Officer that the petitioner failed to appear on the date specified in the proclamation i.e., on 24.03.2020, this Court is of the opinion that the learned Magistrate ought to have issued a fresh proclamation under Section 82(1) Cr.P.C. requiring the petitioner to appear before it on a subsequent date,.

21. The impugned order dated 08.07.2020, when tested in the light of the mandate of Section 82 Cr.P.C. and the decisions mentioned hereinabove, fails on the touchstone of judicial scrutiny that application of mind is required before pronouncing a person as '*proclaimed person*' or '*proclaimed offender*'.

22. Further, in view of the decisions of Coordinate Benches of this Court in Sanjay Bhandari (Supra), Arun Kumar Parihar v. State (Govt. NCTD) reported as **2021 SCC OnLine Del 2767** and Manoj Tandon v. State, **CRL.M.C. 1961/2020**, the petitioner, who is not accused of any of the offences punishable under Sections enumerated in Section 82(4) Cr.P.C., could only have been pronounced as a '*proclaimed person*' and not declared as an *Absconder*.

23. Keeping in view the aforesaid discussion, the petition is allowed and the impugned order declaring the petitioner an *Absconder*, alongwith the orders dated 03.08.2021 and 06.08.2021, is set aside. Miscellaneous applications are disposed of as infructuous.

24. A copy of this order be communicated to the concerned Court forthwith.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 08, 2021
'dc'

[Click here to check corrigendum, if any](#)