

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

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CRM-M-37501-2023 (O&M)
Date of decision: 19.12.2023

Harwinder Singh

...Petitioner

Versus

State of Punjab and another

...Respondents

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present:- Mr. Navjeet Singh Malmajra, Advocate
for the petitioner.

Ms. Himani Arora, AAG, Punjab.

Mr. M. S. Virk, Advocate
for respondent No. 2/complainant.

MANISHA BATRA, J. (Oral)

1. The instant petition has been filed by the petitioner under Section 482 Cr.P.C. seeking quashing of order dated 17.07.2018 (Annexure P-5), passed by the Court of learned Additional Sessions Judge, Moga in case titled as State vs. Balwinder Singh alias Binda and others, arising out of FIR No. 86 dated 10.09.2015, registered under Sections 363, 366-A, 376 read with Section 34 of the IPC, Section 4 of the POCSO Act, 2012 and Section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (*for short 'SC/ST Act'*) at Police Station Ajitwal, whereby he had been declared as a proclaimed offender.

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2. Brief facts of the case relevant for the purpose of disposal of the present petition are that the aforementioned FIR was registered on the statement recorded by the complainant 'S' (*name withheld*) alleging therein that her 15 years old daughter 'M' (*name withheld*) had slept along with her in the night of 09.09.2015. At about 03:00 AM, she had found her daughter to be missing. She raised suspicion that she had been enticed away by accused Balwinder Singh alias Binda. Initially, the FIR was registered under Section 363 and 366-A of the IPC. Investigation proceedings were initiated. It was revealed that the present petitioner along with one Varinder Kumar alias Davinder Kumar alias Thapa was involved with co-accused Balwinder Singh alias Binda in kidnapping/abduction of the victim. Offences punishable under Section 376 and 34 of the IPC, Section 4 of the POCSO Act and Section 3 of the SC/ST Act were added subsequently. Accused Varinder Kumar alias Davinder Kumar alias Thapa and Balwinder Singh alias Binda were arrested on 17.09.2015. However, the presence of the petitioner could not be secured. Ultimately, proceedings under Section 82 Cr.P.C. were initiated against him. Proclamation was published and he was declared a proclaimed offender, vide impugned order dated 17.07.2018.

3. The present petition has been filed by the petitioner on the grounds and it has been argued by his counsel that he had been falsely implicated in this case due to party fraction in the village. False allegations of rape were levelled against him. Inquiry was conducted by the police authorities and he was found to be innocent. The Inquiry Officer had specifically held that the petitioner along with his family members had come from Italy to meet his ailing father. He had never gone to Amritsar and had

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remained present in the village Dala from 10.09.2015 to 16.09.2015. He was summoned as an additional accused by the trial Court on filing an application under Section 319 Cr.P.C. by the prosecution. Subsequently, he was granted anticipatory bail but had to leave the country to get his permanent residency in Italy, wherein he was already residing. He had fallen ill in Italy as he was diagnosed to be suffering from Hepatitis-C. While declaring him as a proclaimed offender, the proper procedure as laid down in Section 82 Cr.P.C. had not been followed. The matter had been compromised between the parties on 06.02.2023 and a written compromise was executed. He had separately filed a petition for quashing of the FIR on the basis of the said compromise, which was pending. With these broad submissions, learned counsel for the petitioner has argued that the impugned order is liable to be set aside.

4. Learned counsel for respondent No. 2/complainant has submitted that he has instructions to say that a compromise has been arrived at between the parties and respondent No. 2 has no objection if the order, declaring the petitioner as a proclaimed offender, is set aside.

5. Status report has been filed by learned State counsel. He has argued that the petitioner was summoned by the trial Court in pursuance of an application filed by the prosecution under Section 319 Cr.P.C., vide order dated 11.05.2017 (Annexure P-3). He was having knowledge about the pendency of the trial and had intentionally avoided his appearance. Therefore, he was rightly declared a proclaimed offender. Hence, it is urged that the petition is liable to be dismissed.

6. I have heard learned counsel for the parties at length and have minutely scrutinized the record.

7. On giving due deliberation to the contentions as raised by learned counsel for the parties and on overall perusal of the orders passed by the trial Court from the date of initiating proceedings under Section 82 Cr.P.C. as against the petitioner till the date of declaring him a proclaimed offender, I am of the considered opinion that the impugned order dated 17.07.2018 suffers from material illegalities and is liable to be quashed with all the consequential proceedings arising therefrom.

8. At the outset, it would be relevant to refer to the provision of Section 82 Cr.P.C., which provides for publication of proclamation against the person absconding. It 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

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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 subsection (1).”

9. There are catena of judgment of different High Courts discussing the requirements necessary for issuance and publication of proclamation against an absconder under Section 82 Cr.P.C. and for declaring him as a proclaimed person/offender. These requirements have been discussed from time to time in ***Rohit Kumar Vs. State of Delhi : 2008 CrL J. 2561, Rohit Kumar Vs. State of Delhi : 2008 CrL J. 2561, Bishundayal Mahton and others Vs. Emperor : AIR 1943 Patna 366, Devender Singh Negi Vs. State of U.P. : 1994 CrL LJ (Allahabad HC) 1783, Gurappa Gugal and others Vs. State of Mysore : 1969 CriLJ 826, Shokat Ali Vs. State of Haryana : 2020(2) RCR (Criminal) 339, Dilbagh Singh Vs. State of Punjab : (P&H) 2015 (8) R.C.R. (criminal) 166, Ashok Kumar Vs. State of Haryana and another : 2013 (4) RCR (Criminal) 550, Pawan Kumar Gupta Vs. The State of W.B. : 1973 CriLJ 1368, Birad Dan Vs. State : 1958 CriLJ 965, Birad Dan Vs.***

State : 1958 CriLJ 965, Negi alias Debu Vs. State of U.P. and another, 1994 Cri LJ 1783 and Pal Singh Vs. The State : 1955 CriLJ 318.

10. The position of law as laid down in the above cited authorities 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.
- (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.
- (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.
- (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.
- (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.
- (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

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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. 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 Courthouse 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.

(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.

(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.

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11. On applying the above discussed position of law to the peculiar facts and circumstances of the present case, it is noticed that though the petitioner was named in the FIR but he was found to be innocent and had not been arrested and challaned. Subsequently, during the course of trial of co-accused, the prosecution had filed an application under Section 319 Cr.P.C. for summoning the petitioner as an additional accused, which was allowed, vide order dated 11.05.2017 and he was ordered to be summoned as such. Learned counsel for the petitioner has placed on record a copy of order dated 20.02.2018 showing that the petitioner had initially appeared and had been extended benefit of bail but as on that day, he failed to turn up, due to which, his bail was cancelled and bonds were forfeited to State. He was ordered to be summoned through warrants of arrest, which was issued for 20.03.2018. The copy of order dated 20.03.2018 has also been placed on record showing that the warrants issued against him were received back unexecuted and by observing that he was avoiding service and his presence could not be procured through non-bailable warrants, the trial Court had passed an order for securing his presence through publication of proclamation under Section 82 Cr.P.C. for 30.04.2018. Annexure A-3 is the copy of order dated 30.04.2018 showing that the statement of serving police official Constable Lakhvir Singh had been recorded on that date to the effect that he had effected/affixed proclamation on 28.04.2018. By further observing that as the period of 30 days had not lapsed, the trial Court had adjourned the case to 07.07.2018 for awaiting the presence of the petitioner and then on 17.07.2018, the petitioner was declared a proclaimed offender.

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12. It is clear from the above that the warrants of arrest were issued and proceedings under Section 82 Cr.P.C. were initiated as against the petitioner when he was in Italy. There is nothing on record to show that the trial Court had made any efforts or had passed any order for serving the petitioner at his place of residence abroad. No attempt was made to serve the petitioner through Ministry of External Affairs at Italy. Therefore, the satisfaction, as recorded by the trial Court that the presence of the petitioner could not be secured easily, appears to be recorded without applying mind.

13. More so, it is clear from the above discussion that the proclamation was ordered to be issued for 30.04.2018 and the same was effected/published by the executing Constable on 28.04.2018. Though, vide order dated 30.04.2018, the trial Court had adjourned the case for 07.07.2018 for awaiting the appearance of the petitioner on the ground that statutory period of 30 days had not lapsed but it had declared the petitioner as a proclaimed offender, vide order dated 17.07.2018. The trial Court failed to consider the fact that it could not extend the time by simply adjourning the case for awaiting the appearance of the petitioner and was mandatorily required to issue proclamation again for publication thereon in accordance with provisions of Section 82(2) Cr.P.C. It follows that the petitioner was wrongly declared a proclaimed offender in breach of the prescribed procedure. Therefore, the impugned order dated 17.07.2018 suffers from material illegalities and is liable to be quashed.

14. Accordingly, the present petition is allowed and the impugned order dated 17.07.2018, passed by the learned Additional Sessions Judge, Moga in case FIR No. 86 dated 10.09.2015, registered under Sections 363,

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366-A, 376 read with Section 34 of the IPC, Section 4 of the POCSO Act, 2012 and Section 3 of the SC/ST Act at Police Station Ajitwal is quashed with all consequential proceedings arising therefrom.

15. However, the petitioner is directed to surrender before the Court concerned within a period of four weeks, subject to order for grant of anticipatory bail, if any passed on his petition to be filed under Section 438 of the Cr.P.C. In the absence of any order for grant of anticipatory bail and on such surrender, the petitioner shall be liable to be remanded to judicial custody subject to any order for grant of regular bail to be passed by the concerned Court in accordance with law.

16. Needless to observe that in case any application is filed before the concerned Court for grant of regular bail, then the concerned Court shall be bound to dispose of the same expeditiously and that nothing in this order shall be treated as expression of any opinion on merits so as to bind or influence the concerned Court in disposal of the same.

17. However, this order will be subject to payment of costs of Rs. 5,000/-, to be deposited by the petitioner with the District Legal Services Authority, concerned.

19.12.2023

Waseem Ansari

(MANISHA BATRA)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes