

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRI. REVISION APPLICATION NO. 127 OF 2009

Dharampal s/o Shakarappa Chawale, Aged 60 years, Occupation Agriculture, Resident of Deglur Road, Udgir, District Latur	Applicant
V E R S U S	
1. M/s Vimal Enterprises, Prop. Shahuraj Baburao Navtakke, Resident of C/o Dhokre A.B. Chinamani Niwas, Narayan Nagar, Ausa Road, Latur. 2. Shahuraj s/o Baburao Navtakke, Aged 30 years, Occupation Business, Resident of Tamabarwadi, Taluka Nilanga, District Latur. 3. The State of Maharashtra 4. Tahsildar, Udgir, Taluka Udgir, District Latur. 5. Satish s/o Harishchandra Biradar, Aged 32 years, Occupation Agriculture, Resident of Anand Nagar, Udgir, District Latur.	Respondents

Mr. P.M. Shah, Senior Counsel, instructed by Mr. S.P. Shah,
Advocate for the applicant
Mr. A.S. Bayas, Advocate for respondent No. 2
Mr. T.S. Lodhe, APP for the respondent No. 3 and 4 / State

**CORAM : A.V. NIRGUDE, J.
DATED : 6th October, 2010**

ORAL JUDGMENT

1. This revision is filed against the Judgment and order passed by the learned Additional Sessions Judge, Udgir, dated 9th April, 2009,

allowing the appeal filed under Section 86 of Code of Criminal Procedure and setting aside attachment and sale of certain property belonging to the respondent No.2.

The facts leading to the impugned Judgment, in short, can be narrated as under :

2. The respondent No.2 is a proprietor of respondent No.1. Both of them are accused in Criminal Case No. 1690 of 2004, which was filed by the respondent No.5. It was a case under Section 138 of Negotiable Instruments Act. The case was filed in 2004. Admittedly, the respondent No.2, after his release on bail in the case, remained absent and the non-bailable-warrants were issued against him repeatedly. Ultimately, on 1st February, 2006, a notice to his surety was given. The surety appeared before the Court and sought time to produce respondent No.2. On 1st March, 2006, at the request of the respondent No.5 / the complainant, the learned Magistrate ordered to issue proclamation under Section 82 of Code of Criminal Procedure against the respondent No.2.

3. It appears from the record that the proclamation was published in a newspaper on 24th May, 2006. The record however does not show the original proclamation. The record also shows that after order for issuance of proclamation, mandatory procedure prescribed under Section 82 of Code of Criminal Procedure was not followed. Section 82 of Code of Criminal Procedure 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 specific 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 home-stead 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 Sub-section (2) of this Section requires the Magistrate not only to issue a proclamation directing the accused to appear before him giving time which should not be less than 30 days, but it is also incumbent upon the Magistrate to get the proclamation publicly read out at the town where the accused ordinarily resided, and, in addition to this, it is also necessary to get the proclamation affixed on the conspicuous part of the house of the accused or a place in his town and also at a conspicuous part of the Court house. In addition to this, the learned Magistrate, if he thinks fit, would also publish a copy of the proclamation in a newspaper circulated in the area. In addition to this, the learned Magistrate is expected to make a statement in writing to the effect that the proclamation was duly published in the manner specified above. Admittedly, the learned Magistrate, in this case, did not issue such statement in writing.

5 It further appears from the record that thereafter the learned Magistrate passed an order of attachment of the property in question, vide his order dated 21st August, 2006 under Section 83 of Code of Criminal Procedure. The attachment was effected through the Collector of the District. On 10th July, 2007, at the request of the respondent No.5 / complainant, the attached property in question was ordered to be sold in auction. This order was communicated to the Collector in February, 2008.

The auction took place on 15th May, 2008. In this auction, the present applicant succeeded and deposited the amount of consideration.

6 Thereafter, on 16th June, 2008, the respondent No.2 voluntarily appeared before the learned Magistrate and made an application (Exh.98) under Section 85 of Code of Criminal Procedure seeking to set aside the attachment and sale of the property or to hand over the sale proceeds of the property to him. Section 85 of Code of Criminal Procedure reads as under :

85. 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 of 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 there from all costs incurred in consequence of the attachment, be delivered to him.

7. In order to succeed in this application, the respondent No.2 was under obligation to prove to the satisfaction of the learned Magistrate that he had not absconded or had not concealed himself for the purpose of avoiding execution of the warrant issued against him and that he had not received notice of the proclamation so as to enable

him to attend the Court within time specified therein. In support of such application, the respondent No.2 filed his affidavit, in which he mentioned, as to what prevented him from Court etc.

8 In the meantime, the applicant also appeared before the Court on 2nd July, 2008 and sought permission to oppose the application filed under Section 85 of Code of Criminal Procedure. Accordingly, he was also allowed to file his affidavit opposing the application. The applicant in his affidavit inter alia stated that he had purchased the property in question in auction sale and without further delay the property should be given in his possession etc.

9 The learned Magistrate vide his order dated 10th November, 2008, rejected the respondent No.2's application and ordered the Tahsildar to take further steps in respect of the land *qua* the applicant. The learned Magistrate recorded following reasons for rejecting the said application.

“Perusal of available material and taking into consideration arguments advanced by the learned Advocates, I am of the opinion that the accused was most reluctant during the course of proceedings discussed as supra. He is residing of Tambarwadi Taluka Nilanga. It was possible for the accused to contact his Advocate because village Tambarwadi is not far away from Udgir town....”.

10. This order was challenged in Criminal Appeal No. 26 of 2008 before the Additional Sessions Judge, Udgir. The learned Additional Sessions Judge allowed the appeal, mainly on the ground that the proclamation issued under Section 82 of Code of Criminal Procedure was defective, because the procedure prescribed under Section 82 of the Code was not followed by the learned Magistrate. This Judgment is challenged in this Criminal Revision.

11. The learned Advocate appearing for the applicant made following submissions,

The scope under Section 85 of the Code was limited and it prevented the learned Additional Sessions Judge to travel beyond the facts relevant for inquiry under Section 85 and to hold that the proclamation issued under Section 82 was illegal. He said that it was a jurisdictional error committed by the learned Judge.

He also mentioned that while making observations in respect of the proclamation under Section 82, the learned Judge could not have invoked his revisional powers under Section 386 of Cr.P.C.

The learned Advocate then asserted that in the application moved by the respondent No.2 under Section 85 of Cr.P.C., he had not raised the issue of legality of the proclamation etc. So, the learned Judge of the appellate Court had no reason to go into such question.

The learned Advocate then submitted that assuming that the procedure laid down under Section 82 (2)(i)(a)(b)(c) is not followed in this case, the publication of the copy of proclamation in a newspaper, amounted to a better way of publishing the proclamation. He said, the respondent No.2 for whom the proclamation was issued could have easily taken note of such publication through a newspaper rather than on the public reading of the proclamation and affixing copies of proclamation etc.

The learned Advocate then submitted that on facts the respondent No.2 admittedly was not residing at his usual place of residence for three years, and so, there was no question of his getting knowledge of the publication of the proclamation. The learned Advocate lastly contended that the learned Additional Sessions Judge did not record any reason as to why the conclusions of facts drawn by the learned Magistrate in respect of abscondancy of the respondent No.2 should be set aside.

12. All these submissions are devoid of merits. On perusal of the provisions of Section 82 to 86 of Code of Criminal Procedure, it is clear that at initially a Criminal Court should have reason to believe that an accused against whom a warrant has been issued by it, has absconded or has concealed himself so that the warrant could not be executed. Assuming, in this case, the learned Magistrate had drawn such conclusion as against the respondent No.2, and so, he had an ample justification for issuance of proclamation under Section 82 of Code of Criminal Procedure. But, in this case, as mentioned above, the learned Magistrate did not issue such proclamation at all. The record does not carry the original proclamation duly signed by the learned Magistrate. It is apparent that the proclamation was not published as per the provisions of sub-section (2)(i)(a)(b)(c) of Section 82. It was not publicly read out in the village of the respondent No.2, neither it was affixed on his house or in the Court house. The learned Magistrate admittedly did not issue a statement in writing declaring that the proclamation was duly published in the manner specified in clause (1) of Section 82. Unless this mandatory procedure is followed, the person against whom such proclamation is issued, had no reason to have knowledge about it. The proclamation ordered to have been issued in such fashion, has no legal sanctity. Merely giving publicity to proclamation in a newspaper is not compliance of the procedure prescribed under clause (1) of sub-section 2 of Section 82. No matter whether it is more effective or otherwise. It is settled Law that the rules which involve penal consequences are required to be scrupulously followed. The Supreme Court in the case of **Ronald Wood Mathams v. State of West Bengal (AIR 1954 SC 455)** observed

“But it is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them”. It is also settled

Law that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.” (see, ***Nazir Ahmad v. King Emperor***, reported in ***AIR 1936 PC 253***).

13. This will sufficiently answer the objection based of argument that the learned Judge of the lower Court committed jurisdictional error. S.85 is a provision made for providing a relief to a “proclaimed person”. This provision thus presupposes a valid proclamation. The appellant thus would be able to show that the proclamation itself is invalid. Such objection in the appeal filed under S.85 cannot be brushed aside.

14. The submission of Mr. Shah, the learned Advocate appearing for the applicant that non-observance of the procedure prescribed under clause (1) of sub-section (2) of Section 82 is mere irregularity, is thus incorrect. In this regard, useful reference can be made to the Judgment of Division Bench of Punjab High Court in the case of ***Pal Singh Santa Singh v. The State (AIR 1955 Punjab 18)***. In this particular case, the Punjab High Court was examining the validity of the proclamation issued under Section 87 of 1960 Code, which is equivalent to Section 82 of the present Code. The proclamation was issued rather belatedly in that case, and thus, did not give mandatory 30 days period for the cause to appear before the Court. The Punjab High Court held as under :

“Section 87 must be strictly construed as the failure to obey the orders in this section has penal consequences. The proclamation under S. 87 requires the appearance of the absconder within 30 days of the date of the publication of the proclamation.

Where the proclamation issued on 13th June 1950 ordered the petitioner to appear “within 30 days from today” and was published on 29th of June 1950, the provisions of the section are not complied with and that being so the proclamation is legally defective and need not be obeyed.

As the terms of the section are mandatory and imperative....”

“Proceedings of attachment and sale under S.88, Criminal P.C., can be taken only by the Court which has issued a valid proclamation within the provisions of S.87, as an illegal proclamation is no proclamation in the eyes of law. Therefore the penalties provided in S.88 for the disobedience of the proclamation cannot be imposed on the petitioner where the proclamation is defective.”

15. The learned Advocate appearing for the applicant however contended that the above Judgment is of no avail because even in that Judgment the Punjab High Court did not wish to set aside the order of attachment and sale of the property in question, because the accused could not satisfy the Court that he had absconded or that he had no notice. The observations are made by the Punjab High Court while exercising Their revisional powers. The situation before this Court is also similar, and, I think, the observations made by the Punjab High Court, in the above mentioned case, are fully applicable to the facts of this case also.

16. The revision thus should fail. The revision stands dismissed. In view of this, interim orders passed in these proceedings stand vacated. The request of Shri. Shah, learned Advocate for the applicant to keep the order in abeyance is rejected.

(*A.V. NIRGUDE, J.*)