

(2012) 01 DEL CK 0209

In the Delhi High Court

Case No : Criminal M.C. No. 4208 of 2011 and Criminal M.A. 19453 of 2011

Maneesh Goomer

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 04-01-2012

Acts Referred:

Citation : (2012) 1 JCC 465

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Sidharth Aggarwal and Mr. Simon Bengamin, for the Appellant;
Manoj Ohri, APP for State with ASI Satbir Singh PS Farsh Bazar, for the
Respondent

Final Decision : Dismissed

Judgement

Mukta Gupta, J.—By the present petition the Petitioner seeks quashing of FIR No. 14/2011 registered u/s 174-A IPC at PS Farsh Bazar.

2. Before advertng to the facts of the case it may be noted that the Petitioner had earlier filed a W.P.(CRL) 412/2011 before this Court with the same prayer seeking quashing of the abovementioned FIR and the proceedings arising therefrom. The said writ petition came up for hearing before this Court on 25th March, 2011 when notice was issued and the Respondent/State was directed to file a reply. The matter was listed on 18th July, 2011 after a status report was filed by the State. On 18th July, 2011 after the matter was heard, learned counsel for the Petitioner realizing that the Court was not inclined to grant any relief, sought leave to withdraw the said petition, which was permitted to be withdrawn.

3. On a preliminary issue regarding the maintainability of the present petition posed to the learned counsel for the Petitioner, reliance is placed on Daryao and Others Vs. The State of U.P. and Others, to contend that if a petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Article 32 of the

Constitution because in such a case there has been no decision on the merits by the Court. No doubt it would not constitute a bar of res-judicata but certainly propriety does not permit the Courts to entertain repeated petitions for the same prayer when the Petitioner as seeing that no relief is being granted, cleverly withdraws the petition.

4. Learned counsel for the Petitioner contends that a complaint u/s 138 Negotiable Instruments Act (in short N.I. Act) was filed against the Petitioner. During the said proceedings summons were not served on the Petitioner and without service of summons, the next process of issuing warrants and non-bailable warrants were resorted to. Even the procedure adopted u/s 82 Cr.P.C. was illegal as the proclamation was not published in the newspaper "The Statesman" as directed by the Court but in another news daily. Further the statutory time of 30 days notice was not adhered to. Moreover, since the Petitioner appeared before the Learned Trial Court in the proceedings u/s 138 of the N.I. Act, the Petitioner was no more an absconder and the process u/s 83 Cr.P.C. was recalled. In view thereof the direction of the Learned Metropolitan Magistrate for registration of FIR u/s 174-A IPC and the continuation thereof is an abuse of the process of the Court and is required to be quashed to meet the ends of justice. It is also contended that cognizance for an offence punishable u/s 174-A IPC can be taken only on a complaint filed u/s 195 Cr.P.C. and in the absence of a complaint, no cognizance on the charge-sheet could have been taken.

5. Learned APP on the other hand contends that the essential requirement u/s 82(2)(i) Cr.P.C. is of affixation and the requirement under Clause (iii) for publication in the newspaper is not mandatory. Hence in the absence of a proper publication also, if an affixation alone is made the requirement of procedure u/s 82 Cr.P.C. stands satisfied. Even the Learned Trial Court noted satisfaction on the basis of return of process u/s 82 Cr.P.C. by way of affixation and had thus directed registration of FIR u/s 174-A IPC.

6. I have heard learned counsel for the parties. The facts of the present case are that a complaint was filed u/s 138 of the NI Act against the Petitioner. On 20th April, 2008 summons were issued to the Petitioner. As per the record of the Trial Court the process was served on Ms. Seema, wife of the Petitioner. Thereafter again processes were issued, however the Petitioner remained unserved. Thus on 28th July, 2009 the Learned Trial Court issued bailable warrants in the sum of Rs. 3000/- returnable on 9th October, 2009. However, the said process could also not been executed. Since the bailable warrants also could not be executed, the Learned Trial Court issued non-bailable warrants on 9th October, 2009 returnable for 4th December, 2009. Even the non-bailable warrants were received back unexecuted with the report that the accused was hiding himself. Thus, the Learned Trial Court issued process u/s 82 Cr.P.C. against the Petitioner for 15th April, 2010. It was also directed that the process be issued through publication having circulation in the newspaper "Statesman" and also be given dasti. After

the process of Section 82 Cr.P.C. the proclamation u/s 83 Cr.P.C. was issued against the Petitioner vide order dated 29th September, 2010 and the Learned Trial Court directed registration of FIR u/s 174-A IPC.

7. Since coercive actions were taken, the Petitioner settled the matter with the complainant in complaint u/s 138 NI Act and, thus, the said complaint was permitted to be withdrawn vide order dated 16th October, 2010. Thereafter, the Petitioner moved an application for recalling of the proclamation u/s 83 Cr.P.C. The Learned Metropolitan Magistrate vide order dated 9th March, 2011 recalled the proclamation, since the complaint u/s 138 NI Act had already been withdrawn and the Petitioner had been acquitted therein. The Petitioner thereafter filed a petition being W.P.(CRL) 412/2011 before this Court seeking quashing of the abovementioned FIR. This Court issued notice and after issuing notice, on the next date the learned counsel for the Petitioner after addressing arguments sought leave to withdraw the petition which was permitted. Now the present petition has been filed with a few more grounds.

8. As observed earlier, de-hors the fact that the earlier petition was dismissed as withdrawn this Court had heard the learned counsel for the parties on merits. As regards the contention of the Petitioner that the Petitioner was not served at the right address as Ms. Seema is not the wife of the Petitioner, it may be noted that this is an issue which would have to be adjudicated during trial whether the service was affected on the right person i.e. on the Petitioner's wife or not. Merely on the Petitioner's contending that the process was not affected on his wife, this Court cannot come to the conclusion that there was no service of the summons.

9. As regards the next contention of the Petitioner that for a prosecution u/s 174-A IPC no cognizance can be taken on a charge-sheet but on a complaint u/s 195Cr.P.C., it may be noted that Section 174-A IPC was introduced in the Code with effect from 23rd June, 2006. Section 195(1) Cr.P.C. provides that no Court shall take cognizance of offences punishable u/s 172 to 188 (both inclusive) of the IPC or of the abatement, or attempt to commit the said offences, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Section 195 Cr.P.C. has not been correspondingly amended so as to include Section 174-A IPC which was brought into the Penal Code with effect from 23rd June, 2006. The Legislature was conscious of this fact and that is why though all other offences under chapter X of the Criminal Procedure Code are non-cognizable, offence punishable u/s 174-A IPC is cognizable. Thus the Police officer on a complaint u/s 174-A IPC is competent to register FIR and after investigation thereon file a charge-sheet before the Court of Magistrate who can take cognizance thereon. Thus, I find no merit in the contention raised by the Learned Counsel for the Petitioner.

10. Adverting to the last contention of the learned counsel for the Petitioner that the process u/s 82 Cr.P.C. was illegal as the proclamation was not in the newspaper as directed by the Court but in the other newspaper, it may be noted

that Section 82(2) Cr.P.C. provides for the procedure for publishing the proclamation. Clause (i) of Sub-Section (2) is mandatory in nature as it directs that the proclamation shall be publically read in some conspicuous place of the town in which the person ordinarily resides, shall be affixed in some conspicuous place of the house in which the person ordinarily resides, and shall be affixed in some conspicuous part of the Court- house. However, Clause (ii) of Section 82(2) Cr.P.C. is not mandatory and it states that the Court may also if it thinks fit direct a copy of the proclamation to be published in a daily newspaper circulated in the place in which such person ordinarily resides. Since Clause (ii) is not mandatory in nature, the non-adherence to the strict compliance thereon will not vitiate the process u/s 82 Cr.P.C. The abovementioned FIR for offence punishable u/s 174-A IPC is an independent cause of action and merely because the complaint case u/s 138 NI Act is settled, there is no reason that the abovementioned FIR be also quashed.

11. The present petition and application are clearly an abuse of the process of the Court by the Petitioner. Hence the same are dismissed with a cost of Rs. 5000/- to be paid to the Delhi High Court Legal Services Committee by the Petitioner within two weeks.