

(2007) 10 DEL CK 0092

In the Delhi High Court

Case No : Bail Application No. 2059 of 2007

Rohit Kumar @ Raju

APPELLANT

Vs

State of NCT Delhi and BSES Rajdhani Power Ltd.

RESPONDENT

Date of Decision : 05-10-2007

Acts Referred:

Constitution of India, 1950 — Article 141
Criminal Procedure Code, 1973 (CrPC) — Section 299, 482, 82, 82(1), 83
Electricity Act, 2003 — Section 135, 151, 154
Penal Code, 1860 (IPC) — Section 302, 304, 364, 367, 382

Citation : (2008) CriLJ 3561 : (2007) 98 DRJ 714 : (2008) 1 RCR(Criminal) 101

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : T.A. Mir, for the Appellant; Navin Sharma, for R-1 and V.R. Dattar, for R-2, for the Respondent

Judgement

V.B. Gupta, J.—Petitioner herein had earlier filed CrI.M.C.No.2952/2007 u/s 482 Cr.P.C. seeking quashing of order dated 31st May, 2007 and 25th July, 2007 passed by Sh. Rakesh Tewari, Addl.Sessions Judge in Criminal Complaint case, whereby he had issued non-bailable warrants and process u/s 82 and 83 Cr.P.C. against the petitioner.

2. In that petition, it was also prayed that Addl.Sessions Judge be directed to bail out the petitioner in accordance with law and petitioner undertook that he will appear before the court of Addl.Sessions Judge, if directed and co-operate with the prosecution of the case on the next date of hearing, that is, 19th September, 2007.

3. On that petition, this Court on 17th September, 2007 passed the following order:

Keeping in view the facts and circumstances of the case, the execution of process u/s 82/83 Cr.P.C. issued against the petitioner is stayed till 19th September, 2007 provided the petitioner deposit a sum of Rs. 2,500/- as adjournment costs with

the trial court by that date and appear before the trial court on that day.

4. On 19th September, 2007 as directed by this Court, the petitioner appeared before the trial court who passed the following order, relevant portion of which reads as under:

Accused has appeared along with the counsel and has moved the bail application and annexed the copy of the order of the Hon''ble High Court of Delhi dated 17.09.07 in which he sought the stay of the order dated 31.05.07 and 25.07.07 whereby the process under Section. 82/83 Cr.P.C. was issued against the accused. The time requisite for process under Section. 82 Cr.P.C. had already expired on 29.08.07 when the process server returned the execution reports of the said process. Today the case was fixed for recording of the statement of the process server so that the accused could have been declared as a Proclaimed Offender and the case should have been fixed for recording the evidence under Section. 299 Cr.P.C. Although on 17.09.07 there was no cause of action in favor of the accused before the Hon''ble High Court of Delhi for stay of the said proceedings which were already executed but I take the spirit of the order and directed the accused to deposit the amount as cost as mentioned in the order which he has deposited with this Court.

5. Thereafter, trial court heard arguments on bail application and rejected the bail application of the petitioner and took him into custody.

6. Now, the present bail application has been filed on behalf of the petitioner and notice of the same was issued to State, as well as to respondent No. 2 and the trial court record was also summoned.

7. It has been contended by learned Counsel for the petitioner that, in terms of the order dated 17th September, 2007, petitioner appeared before the trial court and deposited the costs of Rs. 2,500/-, but the trial court rejected the bail application, making certain observations as mentioned above. The trial court had no business to make such comments and it deliberately disregarded the order, dated 17th September, 2007 and rejected the bail application of the petitioner.

8. With regard to the above observation made by the trial court, prima facie, it appears that the trial court was not at ease with the order dated 17th September, 2007 passed by this Court and the observation made by the trial court are uncalled for, as it cast aspersions on the functioning of this Court and the same have also been deprecated by the learned Counsel for the respondents.

9. Brief facts of the case are that respondent No. 2, BSES Rajdhani Power Ltd. had filed a complaint u/s 151 read with Section 154 of the Electricity Act, 2003 against one Raju (user), the present petitioner on 13th April, 2007. After registration of the case, the Addl.Sessions Judge listed the matter on 7th May, 2007 for pre-summoning evidence. On that date, pre-summoning evidence was filed by way of affidavits and the same was closed and the trial court passed the following order:

From the perusal of the record and the statements of the said witnesses, I am satisfied that a prima facie case is made out against the accused u/s 135 of the Electricity Act, 2003. Let the accused be summoned for the said offence on filing of PF and RC and process be given dusty and accused be served through prescribed courier service also for 31.5.07.

Sd/-

Rakesh Tewari

ASJ, Delhi/07.05.2007

10. On 31st May, 2007, the trial court passed the following order:

Present: Deemed APP for the complainant

The tenant at the premises in question informed that accused is residing at Daryaganj, Delhi.

Issue NBW against the accused through SHO, P.S. Sangam Vihar, New Delhi for 25.07.07.

Sd/-

Rakesh Tewari

ASJ, Delhi/31.05.2007

11. According to these proceedings, prima facie, it is apparent that the petitioner was never served with any summon nor he was avoiding to receive the summon. Be that as it may, on 25th July, 2007, the trial court passed the following order:

Present:- Deemed APP for the complainant company

The accused being the landlord of the premises in question seldom visits the premises as per report on NBW.

Issue process u/s 82/83 Cr.P.C. against the accused through SHO, PS. Sangam Vihar, New Delhi on the last known address for 29.08.07.

Sd/-

Rakesh Tewari

ASJ, Delhi/25.07.2007

12. On 29th August, 2007, the following order was passed:

Present: Deemed APP for the complainant company

Process u/s 82/83 Cr.P.C. received back against the accused. Let the Process Server be summoned for recording of his statement on 19.09.07.

Sd/-

13. In the meanwhile, on 17th September, 2007, this Court has passed the order in CrI.M.C.No.2952/2007 as mentioned above.

14. This observation made by the trial court that:- "Although, on 17th September, 2007, there was no cause of action in favor of the accused before the Hon"ble High Court of Delhi for stay of the said proceedings which were already executed but I take the spirit of the order..." goes on to show that process u/s 82/83 Cr.P.C. was duly executed, but that was not the case in reality.

15. It appears that the learned Addl.Sessions Judge is not aware with the basics of Code of Criminal Procedure, as it is apparent from record that process under Sections 82/83 Cr.P.C. was never executed in accordance with law. For his knowledge and reference, Sections 82 and 83 of Cr.P.C are reproduced as under:

Section 82. Proclamation for person absconding.-(1) 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 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 u/s 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, 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).

Section 83. Attachment of property of person absconding.-(1) The Court issuing a proclamation u/s 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person:

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court,

it may order the attachment simultaneously with the issue of the proclamation.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made-

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases-

(a) by taking possession; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908).

16. The Code of Criminal Procedure has provided ample powers to execute a warrant. But if it remains unexecuted, there are two more remedies:

(i) issuing of a proclamation (Section 82)

(ii) attachment or sale of property (Section 83)

17. The sine qua non for an action u/s 82 is the prior issuance of warrant of arrest by the Court. There must be a report before the Magistrate that the person against whom the warrant was issued by him had absconded or had been concealing himself so that such warrant can be issued. An attachment warrant can be issued only after the issuance of proclamation.

18. The expression "reason to believe" occurring in Section 82 Cr.P.C. suggests that the Court must be subjectively satisfied that the person has absconded or has concealed himself on the materials before him. The term "absconded" is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense is to hide oneself. Further, u/s 82 Cr.P.C. the Court issuing proclamation must record its satisfaction that accused had "absconded" or "concealed himself."

19. The three Clauses (a), (b), and (c) of Sub-section (2) (i) of Section 82 Cr.P.C. are conjunctive and not disjunctive. The factum of valid publication depends on the satisfaction of each of these clauses. Clause (ii) of Sub-section (2) is optional; it is not an alternative to Clause (1). The latter clause is mandatory.

20. Here the question to be seen is as to whether proclamation u/s 82 Cr.P.C. has been effected in accordance with law or not.

21. As per proclamation u/s 82 Cr.P.C. placed on record, the same was issued on 27th July, 2007 directing the petitioner to appear before the court on 29th August, 2007. As per service report on the back of this proclamation, a copy of this proclamation was pasted on the house and another was pasted on the main door of the court, on 6th August, 2007.

22. So, admittedly, as the proclamation has been effected on 6th August, 2007 and petitioner was given time to appear in the court on 29th August, 2007, the petitioner was granted less than thirty days from the date of publishing of the proclamation, to appear in the court. As per Section 82(1) Cr.P.C. the court was required to give time "not less than thirty days from the date of publishing such proclamation".

23. The proclamation issued u/s 82 Cr.P.C. requires appearance of the person, against whom warrant has been issued, at a specified time, at a specified place. The date fixed should be not less than thirty days from the date of publication of the proclamation. If that be so, simultaneous attachment of property cannot be effected.

24. Since the proclamation u/s 82 Cr.P.C. had been effected only on 6th August, 2007, so the petitioner, could not be asked to appear before the court on 29th August, 2007, as specified time of not less than thirty days was not given to him.

25. Now, coming to proclamation issued u/s 83 Cr.P.C, it was issued on 27th July, 2007 directing the petitioner to appear in the court on 29th August, 2007. As per service report on the back of this proclamation interestingly, it was effected only on 29th August, 2007, that is, the day on which the petitioner was supposed to appear in the court.

26. The procedure laid down u/s 83 has to be followed strictly. Jurisdiction to pass attachment order cannot be assumed unless a proclamation u/s 82 Cr.P.C. has been issued. The normal rule is that the Court has to wait until the expiry of 30 days, to enable the accused to appear in terms of the proclamation. The words "at any time after the issue of proclamation" are not to be interpreted in isolation. The key for gathering the intention of the law makers is to be found in Section 82 Cr.P.C. Sections 82 and 83 Cr.P.C. are to be read in harmony. Thus except in cases covered by the proviso to Section 82(1) the attachment order has to maintain a distance of not less than 30 days from the date of the publication u/s 82. The words "at any time" in Section 83(1) only mean that if after the issue of proclamation either of the two conditions mentioned in Clauses (a) and (b) of the proviso to Section 83(1) come into existence, an order of attachment may be made without waiting for 30 days to expire. Even in such a case the Court has to record its reasons for arriving at the judicial satisfaction that such conditions as mentioned in the proviso to have come into existence.

27. So, proclamation issued u/s 82 Cr.P.C. by the trial court is against the mandatory provisions of law and the same was invalid, consequently, proclamation issued u/s 83 Cr.P.C. also become void.

28. When on 29th August, 2007, no valid proclamation u/s 82 and 83 Cr.P.C. has been effected, then where was the question for the trial court for recording the statement of the process server so, that the petitioner could have been declared as a proclaimed offender and case should have been fixed for recording the evidence u/s 299 Cr.P.C. It appears that the trial court was in undue haste and was bent upon to declare the petitioner as proclaimed offender, without following the due process of law.

29. So, the above mentioned orders passed by Sh. R.K.Tewari, Additional Session Judge goes on to show that he lacks even elementary knowledge about the Code of Criminal Procedure and also does not know as to in which cases and in what manner, proclamation u/s 82/83 Cr.P.C. are to be issued. In spite of the fact that

Sh. R.K.Tewari has no basic knowledge of the criminal law, he has chosen to comment on the order passed by this Court, which amounts to judicial indiscipline.

30. It also appears that, this judicial officer is not aware of the fact or does not have even that knowledge, that the sub-ordinate courts are, by way of constitutional provisions, bound by the decision of local High Courts as is every court in the country including the High Courts, are bound by the decision of the Supreme Court by virtue of provisions of Article 141 of the Constitution of India and on this point, judgment of this Court on its own motion v. Central Bureau of Investigation 2004 (72) DRJ 629 may be relevant and para 28 of it is reproduced as under:

28. There is no gain saying the fact that the disobedience or disregard of the law laid down by the High Court by the subordinate courts is not only against the very concept of rule of law but also verges on the contempt of court as subordinate courts are, by way of constitutional provision, bound by the decision of the local High Court as is every court of the country including the High Courts, bound by the decisions of the Supreme Court by virtue of provisions of Article 141 of the Constitution. If the subordinate courts start ignoring the law laid down by their High Courts and start acting contrary thereto, then not only the legal anarchy will set in but the democratic structure of the country, rule of law and concept of liberty of citizens will be the first casualty.

31. The observations made by the trial court in its order dated 19th September, 2007 are per se disobedience of the order passed by this Court and verges on the contempt of court. Since Sh. R.K. Tewari, Additional Session Judge does not have even elementary knowledge of the Code of Criminal Procedure, under these circumstances, it would be appropriate, if Sh.Rakesh Tewari, Addl.Sessions Judge, undergoes refresher course at Delhi Judicial Academy in criminal law and procedure, at the earliest and the District and Sessions Judge would see to it that name of this officer is recommended in the first available such course and this officer should undergo training in Delhi Judicial Academy, under the supervision of the Director, Delhi Judicial Academy at least for a period of three months and, Director, Delhi Judicial Academy, should submit to this Court, performance report, with regard to this judicial officer.

32. Registrar General of this Court is directed to send the copy of this Judgment to all the Judicial Officers of Delhi for guidance and one copy be sent to the Inspecting Judge as well as one copy of Judgment be placed in the personal file of this Judicial Officer.

33. Trial Court record be sent back forthwith. Ordered accordingly.