

REVISIONAL CRIMINAL

*Before Kapur and Bishan Narain, JJ.*PAL SINGH,—*Petitioner**versus*THE STATE,—*Respondent*

Criminal Revision No. 1299 of 1953

1954
 August, 13th

Code of Criminal Procedure (Act V of 1898)—Sections 87, 88 and 89—Proclamation issued under section 87—Period allowed less than thirty days—Whether legal—Non-compliance of thirty days' condition—Whether irregularity curable under section 537 of the Code—Property attached under section 88—Whether legal—Attached property—Whether can be restored under section 89, or section 561-A or section 439 of the Code.

P.S. was wanted in a murder case and it was alleged that he was absconding. Proclamation under section 87 of the Code of Criminal Procedure was issued on 13th June, 1950, but was published on 29th June, 1950, requiring P.S. to appear before the Court within thirty days of the date of the issue. On the same date orders for attachment of movable and immovable properties of P.S. was also passed under section 88 of the Code. His movables were attached on 29th June, 1950, and were sold on 12th March, 1951, for Rs. 178-7-0, while his immovable property was attached on 30th August, 1950, P.S. appeared in Court on 15th April, 1951, and was acquitted of the murder charge on 12th April, 1952. P.S. applied for restoration of his attached properties on 21st April, 1951, but the application was rejected.

Held (per Division Bench), that the proclamation that was published on 29th June, 1950, requiring P.S. to appear in Court within thirty days of the date of issue and not within thirty days of the date of the publication was illegal as it did not comply with the mandatory provisions of section 87 of the Code of Criminal Procedure and all proceedings which were taken in consequence of the non-observance of that order were without jurisdiction and must be set aside. Proceedings of attachment under section 88, Criminal Procedure Code, can be taken only by the Court which has issued a valid proclamation within the provisions of section 87 as an illegal proclamation is no proclamation in the eye of law.

Held per Bishan Narain J.... (1). The petitioner cannot get the attached property restored under section 89, Criminal Procedure Code, as under that section no order for restoration can be passed unless the two conditions laid down in the section are proved to the satisfaction of the Court and without such a proof the learned Magistrate has no jurisdiction to set aside the order of attachment even if the attachment was irregularly made or even if proclamation under section 87 was not issued or published in accordance with its provisions.

(2) That section 537 of the Code of Criminal Procedure cannot be applied to make an illegal proclamation legal as it is impossible to regard disobedience to an express and mandatory provision of law as a mere irregularity.

(3) That section 561-A of the Code of Criminal Procedure can have no application to a case where it is necessary to set aside the orders made under sections 87 and 88 of the Code, as the High Court has ample powers under section 439 to interfere with the orders impeached.

Held per Kapur, J. (1) That unless the proclamation issued under section 87 of the Code of Criminal Procedure is valid, the presumption which arises under section 87(3) does not arise.

(2) That unless there is proof of the fact that requirements of section 87 were complied with no presumption can arise that the accused had as a matter of fact come to know as to the time specified when he was to attend and, therefore, it cannot be held that he had such notice, and it was not necessary for him to show that he could not attend, within the period specified in the proclamation. The attached property can, in such a case, be restored under section 89 of the Code of Criminal Procedure.

(3) That section 561-A of the Code of Criminal Procedure gives to the High Court inherent powers to make orders necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. This section is wide enough to give powers to the High Court to correct errors for which there is no other provision in the Code. But it is not necessary in this case to invoke the inherent powers of the Court since the revisional powers of the Court are sufficient for giving relief to the petitioner.

Mst. Jawai v. Emperor (1), *The Crown v. Multan Singh* (2), *Jagdev Khan v. Emperor* (3), *Ronald Wood Mathams v. The State of West Bengal* (4), *Nazir Ahmad v. The King Emperor* (5), and *Raju v. The Crown* (6), relied on. *Hans Raj v. Emperor* (7), not followed.

Petition under Section 439 of Criminal Procedure Code, for revision of the order of Shri Gurcharan Singh, Additional Sessions Judge, Ferozepore, dated the 31st January, 1953, affirming that of Shri Ajit Singh, Magistrate 1st Class, dated the 1st August, 1951, disallowing the application of the petitioner for restoration of the movable and immovable property.

M. L. SETHI, for Petitioner.

K. S. CHAWLA, Assistant Advocate-General, for Respondent.

JUDGMENT

Bishan Narain,
J.

BISHAN NARAIN, J. The only point that requires consideration in this case is whether the petitioner is entitled to the restoration of his property which was attached under section 88 Criminal Procedure Code.

The present petitioner was wanted in a murder case and a proclamation under section 87, Criminal Procedure Code, was issued on the 13th June, 1950, ordering him to appear before the Court within 30 days from the date of its issue. The proclamation was published on 29th of June, 1950. On the date the proclamation was issued, i.e., 13th of June, 1950, the Court also ordered attachment of movable and immovable property under section 88, Criminal Procedure Code. His movables were attached on 29th June, 1950, and

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- (1) A.I.R. 1942 Lah. 214
 - (2) 32 P.R. 1919
 - (3) A.I.R. 1948 Lah. 151
 - (4) 1954 S.C.A. 907
 - (5) I.L.R. 17 Lah. 629
 - (6) I.L.R. 10 Lah. 1
 - (7) A.I.R. 1934 Lah. 987

were sold on 12th March, 1951, for Rs. 178-7-0 while his immovable property was attached on 30th August, 1950, and is still under attachment. It appears that the petitioner voluntarily surrendered himself or was apprehended and brought before the Court on 15th April, 1951. He was tried under section 302, Indian Penal Code, but was acquitted by the Sessions Judge by his order, dated 12th April, 1952. On 21st of April, 1951, the petitioner applied under section 89, Criminal Procedure Code, for restoration of his attached property but the trial Court after hearing evidence came to the conclusion that the conditions laid down in section 89, Criminal Procedure Code, for restoring the attached property were not satisfied in this case and therefore the petitioner could not get any relief from the Criminal Courts and suggested that his remedy lies in a Civil Court or in the High Court under section 439, Criminal Procedure Code. His appeal was also dismissed by the learned Additional Sessions Judge, Ferozepore. The petitioner filed the present revision petition which came up for hearing before Kapur, J., who finding a conflict in Lahore decisions referred the matter to the Division Bench and it has come before us under the orders of Honourable the Chief Justice.

The learned counsel for the petitioner urged before us rather half-heartedly that the findings of the lower Courts that the petitioner had absconded and that he had the notice of proclamation under section 87 are erroneous but no cogent reason has been advanced for setting aside these findings. Therefore the petitioner cannot get the attached property restored under section 89, Criminal Procedure Code, as under that section no order for restoration can be passed unless the two conditions laid down in the section are proved to the satisfaction of the Court and

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without such a proof the learned Magistrate has no jurisdiction to set aside the orders of attachment even if the attachment was irregularly made or even if proclamation under section 87 was not issued or published in accordance with its provisions.

The main point argued by the learned counsel for the petitioner was that the proclamation had not been published in accordance with the provisions of section 87 and therefore the attachment proceedings under section 88 were vitiated with the result that the order of attachment being invalid must be set aside and the property restored to the petitioner. It was contended that once it comes to the notice of this Court that the order of attachment was illegal it has ample power under section 439 to set it aside and pass the consequential order directing the delivery of the property or its sale price to the petitioner. Now section 87 (1) reads—

“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.”

This section must be strictly construed as the failure to obey the orders in this section has penal consequences. Admittedly, in the present case 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.

It is therefore evident that the provisions of the section were not complied with and that being so the proclamation was legally defective and need not have been obeyed. As the terms of the section are mandatory and imperative it appears to me that the petitioner could not have been successfully prosecuted under section 174, Indian Penal Code, for disobeying this defective proclamation. It is not understood how section 537, Criminal Procedure Code, could be made applicable in such a case as suggested by the learned counsel for the State. It is impossible to regard disobedience to an express and mandatory provision of law as a mere irregularity. If the petitioner had been prosecuted under section 174, Indian Penal Code, the State could not have urged successfully that section 537 may be utilized in proof of the legality of the proclamation and that defects in the proclamation may be ignored or in other words that an illegal proclamation may be considered to be legal by applying section 537, Criminal Procedure Code, to it. As observed by Blacker, J., in *Mt. Jawai v. Emperor* (1),—

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“ A failure of justice, however, does not mean an erroneous decision or conclusion. It means that that procedure has not been followed which in the ordinary course would give the accused person or the persons with regard to whom such proceedings are taken a fair opportunity to appear and clear his position. There are three requirements of S. 87 and all of them must be fulfilled. It is clear that the failure to fulfil any one of these may well have resulted in the absconder in this case not coming to hear of the proceedings

(1) A.I.R. 1942 Lah. 214 at pages 214-15

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against him of which he might well have come to hear if that requirement had been fulfilled."

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Proceedings of attachment under section 88, Criminal Procedure Code, can be taken only by the Court which has issued a valid proclamation within the provisions of section 87 as an illegal proclamation is no proclamation in the eyes of law. Therefore the penalties provided in section 88 for the disobedience of the proclamation could not be imposed on the petitioner. I therefore hold that the proclamation under section 87 and the attachment and sale proceedings under section 88, Criminal Procedure Code, were invalid. I am supported in this view by the decision of a Division Bench in a similar case, the *Crown v. Multan Singh* (1), where the Honourable Judges held—

"Now, turning to the proclamation proceedings we find that, as stated by the learned Sessions Judge, the requirements as to publication contained in section 87 (2) (a) and (c) were not complied with. Moreover, such publication as there was took place on the 15th of May which was less than thirty days from the 11th of June, the date fixed for the appearance of the petitioner. It is therefore clear that the publication of the proclamation was not in accordance with law, and the subsequent proceedings are therefore also invalid. In I.L.R. XIX Mad. 3 it was held that there was no legal proclamation under section 87, Criminal Procedure Code, and the High Court set the order of attachment aside."

(1) 32 P.R. 1919

This matter again came up for decision before Teja Singh, J., who agreed with the observations quoted above,—*vide Jagdev Khan v. Emperor* (1). The learned counsel for the State has relied upon the decision of the Division Bench in *Hans Raj v. Emperor*, (2). In that case the learned Judges after holding that the petitioner could not get any relief under section 89, Criminal Procedure Code, in similar circumstances came to the conclusion that although the proclamation did not comply with the provisions of section 87, Criminal Procedure Code, the defect which again was of the similar nature did not amount to more than an irregularity which can be cured under section 537, Criminal Procedure Code. The learned Judges have given no reasons for their decision and for making an illegal proclamation legal by applying section 537, Criminal Procedure Code, and their decision may well have been different if the case reported in *Crown v. Multan Singh* (3), had been brought to their notice. In any case with due respect to the learned Judges I am of the opinion that section 537, Criminal Procedure Code, cannot be applied to make an illegal proclamation legal. It is significant that Blacker, J., and Teja Singh, J., when dealing with this very matter did not refer to this decision of the Division Bench which was binding on them.

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Now the question arises regarding the remedy available to the petitioner after it has been held that the relief provided in section 89, Criminal Procedure Code, was not available to him. In *Hans Raj's case* (2), the Honourable Judges were asked to interfere under section 561-A of Criminal Procedure Code but they declined to do so in the

(1) A.I.R. 1948 Lah. 151
(2) A.I.R. 1934 Lah. 987
(3) 32 P.R. 1919

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peculiar circumstances of that case. I am, however, of the opinion that section 561-A, Criminal Procedure Code, can have no application to a case like the present one where it is necessary to set aside the orders made under sections 87 and 88, Criminal Procedure Code, as the High Court has ample powers under section 439 to interfere with the orders impeached and this is in consonance with the course adopted in the Punjab and Lahore cases mentioned above.

For the reasons given, acting under section 439, Criminal Procedure Code, I set aside the orders passed by the Magistrate under section 87 and section 88 on 13th of June, 1950, and direct that the immovable property attached in pursuance of those orders be restored to the petitioner and further that the sale-proceeds of the attached movable property amounting to Rs. 178-7-0 be paid to him.

Kapur, J. I have had the advantage of reading the judgment of my learned brother Bishan Narain, J., and I agree with the orders proposed but I would like to give my reasons, more so because of the importance of the question which has been raised.

Pal Singh, petitioner, was accused of an offence of murder and it was alleged that he was absconding. On the 13th June, 1950, a Magistrate issued a proclamation, under section 87 of the Criminal Procedure Code, in which it was stated—

“Therefore by means of this proclamation it is ordered that Pal Singh should appear within thirty days from today at Moga before this Court and should show cause.”

This proclamation was affixed at the house of Pal Singh and of the Court-house on the 29th June,

1950, and therefore it may be taken that it was according to law proclaimed on that day.

On the 13th June, 1950, the order of attachment was also made under section 88 of the Criminal Procedure Code by the Magistrate and movable property of Pal Singh was attached on the 29th June, 1950, and his agricultural land on the 30th August, 1950. The movable property was sold on the 12th March, 1951, for a sum of Rs. 178-7-0. On the 15th April, 1951, the accused appeared in Court and it is not quite clear whether he appeared voluntarily or was apprehended. On the 21st April, 1951, he made an application under section 89, Criminal Procedure Code, for the release of the property attached and for the return of Rs. 178-7-0 on the ground that he had appeared in Court voluntarily. On the 12th April, 1952, he was acquitted in the murder case by a learned Additional Sessions Judge of Ferozepore.

The application under section 89, Criminal Procedure Code, was dismissed and the order was affirmed by the learned Additional Sessions Judge. Pal Singh has come up in revision to this Court and when the matter was placed before me I found that there was some conflict of opinion in the Lahore High Court and I referred the matter to a Division Bench.

Section 87, Criminal Procedure Code, provides for proclamations against persons who are absconders and the relevant portions of this section are—

“ 87 (i) * * * such Court may publish a written proclamation requiring him to appear at a specified time not less than thirty days from the date of publishing such proclamation.

(2) * * * *

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(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

Under section 88, Criminal Procedure Code, a Court issuing a proclamation under section 87 may at any time order the attachment of the property * * * * belonging to the proclaimed person, and under section 89, Criminal Procedure Code, a person whose property has been attached can apply within two years from the date of the attachment for restoration of the attached property on the grounds that (1) he did not abscond for the purpose of avoiding execution of the warrant, and (2) he had not such notice of the proclamation as to enable him to attend within the time specified therein.

In the present case the proclamation was made on the 29th June, 1950, wherein it was provided that Pal Singh should appear within thirty days of the date of the order of the Magistrate which was the 13th June, 1950, and therefore, there was no compliance with the thirty days' period which is one of the requisites to make the proclamation lawful. Quite recently the Supreme Court have in *Ronald Wood Mathams v. The State of West Bengal* (1), 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."

(1) 1954 S.C.A. 907 at page 913

and as in that case the Court had declined to issue process under section 257, Criminal Procedure Code, it was held that this deprived the accused of an opportunity to rebut the prosecution case, and the conviction was set aside on this ground. It is the observations of Venkatarama Ayyar, J., which are relevant to the present case. The Privy Council in *Nazir Ahmad v. The King-Emperor* (1), have laid great stress on a meticulous following of the rules of procedure. Their Lordships there said at page 641—

“ * * 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.”

As I read the provisions of sections 87, 88 and 89 of the Criminal Procedure Code, section 87 prescribes the mode of giving notice by means of a proclamation to an accused person alleged to be absconding to appear in Court on a particular date and the section makes it mandatory that the accused person shall be given notice of not less than thirty days' period to present himself in Court and if no such notice is given the proclamation is not a valid proclamation and unless the proclamation itself is valid the presumption which arises under section 87(3) does not arise. No doubt there is no period prescribed for the attachment of property. All that section 88 provides is that the Court issuing the proclamation under section 87 can at any time order the attachment. The question arises as to what is the effect of section 89. As I have already said two conditions are necessary for getting the property restored, (1) that the accused did not abscond, and (2) that he had no such notice as to enable him to attend within the time specified therein. It is true that in the present case it has not been shown that the

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accused did not abscond or conceal himself, but in my opinion unless there is proof of the fact that requirements of section 87 were complied with no presumption can arise that the accused had as a matter of fact come to know as to the time specified when he was to attend, and, therefore, in my opinion, it cannot be held that he had such notice, and it was not necessary for him to show that he could not attend within the period specified in the proclamation. I am, therefore, of the opinion that even under section 89 the property could be restored.

The question then arises what are the powers of this Court. Section 561-A of the Criminal Procedure Code, gives to this Court inherent powers to make orders necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. This section is wide enough to give powers to this Court to correct errors for which there is no other provision in the Code and that was the opinion of the Lahore High Court as given in *Raju v. The Crown* (1). But it is not necessary in this case to invoke the inherent powers of the Court since the revisional powers of the Court are sufficient for giving relief to the petitioner.

As I have already held that there was no proper and legal proclamation specifying the period of thirty days or more for the petitioner to appear, all proceedings which have been taken in consequence of the non-observance of that order are without jurisdiction and must be set aside.

I would, for the reasons I have given above, allow this petition, order that the attachment be withdrawn and direct restoration to the petitioner of the attached immovable property and also that he be paid Rs. 178-7-0 the sale-proceeds of movable property which was attached.

(1) I.L.R. 10 Lah. 1