

Abdul Khadar Vs. State of Kerala, represented by The Public Prosecutor

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Court : Kerala

Decided On : Oct-12-2015

Judge : B. Kemal Pasha

Appeal No. : Crl. MC. No. 4681 of 2015

Appellant : Abdul Khadar

Respondent : State of Kerala, represented by The Public Prosecutor

Judgement :

1. Annexure A2 order, by which the court below has dismissed CMP No.1656/2013 filed by the petitioner in C.P No.11/2006, seeking the release of his property from the attachment effected under Section 83 Cr.P.C., is under challenge.

2. The petitioner is the 2nd accused in Crime No.237/1992 of the Tanur Police Station. The final report was filed in the matter, for the offences under Sections 143, 147, 148, 395, 450, 427 and 295A read with Section 149 IPC and Section 3(I)(xv) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

3. The final report was taken on file by the Judicial First Class Magistrate's Court-I, Parappanangadi as C.P No.11/2006. As the petitioner was not available, coercive steps were taken by the court below for procuring his presence. As his presence could not be procured, steps under Sections 82 and 83 Cr.P.C were initiated. A

proclamation was issued under Section 82 Cr.P.C. Finally, an order of attachment of his property was issued by the court below under Section 82 Cr.P.C., on 05.04.2006. Consequently, the property of the petitioner was attached.

4. Thereafter, the petitioner voluntarily appeared before the court below on 25.07.2007, and moved for bail. Even though very serious offences were alleged against the petitioner and the other accused, the court below had chosen to enlarge the petitioner on bail on the same day itself. The case against the petitioner also was committed to the Court of Session. Subsequently, the Sessions Court acquitted him through Annexure A1 judgment, on 15.10.2007.

5. The petitioner has approached the court below through CMP No.1656/2013 seeking to get the attachment lifted and to get his property delivered back to him under Section 85(3) Cr.P.C. The court below has dismissed the said CMP through Annexure A2, mainly on two grounds. According to the court below, no satisfactory evidence was adduced by the petitioner before the court below to show that the petitioner was not deliberately absconding or evading process. Further, according to the court below, the two years' time for getting the property delivered by proving to the satisfaction of the court below that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, was over and therefore, the attachment could not be lifted.

6. Heard Sri. K.K. Mohamed Ravuf, the learned counsel for the petitioner and Sri.Tom Jose Padinjarekkara, the learned Additional DGP.

7. The learned counsel for the petitioner has argued that the provisions contained in Sections 82 and 83 are not penal in nature; whereas it is meant for procuring the presence of the concerned persons before court. Further, it has been pointed out that the petitioner was enlarged on bail on the same day of his surrender on 25.07.2007 by the court below and therefore, any further satisfaction of the court below was not required in the matter within the meaning of Section 85(3) Cr.P.C.

8. Per contra, the learned Additional DGP has pointed out that if the petitioner had surrendered before the court below within the period prescribed in the proclamation, no satisfaction of the court below was called for; at the same time, in

case of surrender after the period mentioned in the proclamation, within two years from the date of attachment, he has got a liability to prove to the satisfaction of the court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant. Precisely, the argument is that in order to exercise the powers conferred on the court under Section 85(3) Cr.P.C, there is a burden on the part of the concerned person to prove to the satisfaction of the court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant.

9. The learned counsel for the petitioner has invited the attention of this Court to the decision in *V.G.Peterson v. O.V. Farbs and another*[AIR 1963 SC 692], wherein it was held:

We have assumed that the Court had the power to attach the properties of the alleged contemner; but have held that it had no power in law to make these over to the government. The attachment however could only subsist so long as the contemner was alive on the contemner's death the attachment could not in law or equity continue. For, the purpose for which the attachment was made, viz, to secure the presence of the alleged contemner could no longer be achieved. Obviously, in such a case, the rightful owner of the property would be entitled to restoration of the property on the contemner's death. It would not be proper for the Court to say then that it cannot do anything in the matter because the property has passed into the hands of the Government by the Court's own mistake. In our opinion, the court will be failing to perform its primary function of doing justice if no such circumstance the court on discovering its mistake refuses to correct that mistake. As it is plain here that it is the mistaken act of the Court which has put government in possession of the property even though without being a claimant to it, it is only right and proper that the Court should correct that error and restore the property to the person from whom it was wrongly taken.

10. It was in a case wherein the alleged contemner died after 10 years of the proclamation and attachment, the said observations were made by the Apex Court. In such a case also it was found that the legal representatives of the alleged contemner, who died, are entitled to claim the property and to get the attachment

lifted as the intention behind the said attachment was solely for procuring the presence of the alleged contemner.

11. In *Vimlaben Ajitbhai Patel v. Vatslaben Ashokbahi Patel*[(2008) 4 SCC 649] it was held in paragraph 32:

The provisions contained in Section 82 of the Code of Criminal Procedure were put on the statute book for certain purpose. It was enacted to secure the presence of the accused. Once the said purpose is achieved, the attachment shall be withdrawn. Even the property which was attached should be restored. The provisions of the Code of Criminal Procedure do not warrant sale of the property despite the fact that the absconding accused had surrendered and obtained bail. Once he surrenders before the court and the standing warrants are cancelled, he is no longer an absconder. The purpose of attaching the property comes to an end.

12. The statutory provisions make it clear that once the person, against whom the proclamation was issued and whose property was attached, surrenders before the court and the standing warrants are cancelled, he is no longer an absconder and therefore, the purpose of attachment of the property comes to an end.

13. Section 85(3) of the Code does not say that a formal application is required to be filed for getting the attachment lifted or getting the property or the sale proceeds, as the case may be, delivered. Any application is not contemplated for the said purpose and therefore, the petitioner could not have been found fault with in not filing an application for the same. The said position is made clear in *Babu M.C. v. State of Kerala and another*[2011 (3) KLT 383]. In such circumstances, it is the duty of the court to take note of the fact whether there were sufficient grounds for believing that the said accused did not abscond or conceal himself for the purpose of avoiding execution of the warrant. Otherwise, a formal application would have been specified by the statute. In the absence of any such application, in case of the surrender of such an accused or arrest and production before court within the period mentioned in Section 85(3) Cr.P.C., the court has to consider whether there are materials to show that he had absconded or deliberately concealed himself for avoiding the execution of the warrant.

14. In this particular case, even when serious offences including the one under Section 395 Cr.P.C. were alleged against the petitioner, the court below has gone to the extent of enlarging the petitioner on bail on the date on which he surrendered before the court below. Had there been any satisfaction on the part of the court below that he had deliberately absconded or he had deliberately concealed himself for avoiding execution of the warrant against him, normally, the court below would not have enlarged him on bail on the date of his surrender itself. When the court below has chosen to exercise that option, it has to be deemed that the court below was satisfied that the petitioner did not abscond on his own or he had concealed himself for avoiding the execution of the warrant against him.

15. In such case, it has to be noted that the purpose of the attachment had come to an end as was held by the Apex Court in *Vimlaben* (supra). Matters being so, any further enquiry is not required. When the court below was satisfied that the petitioner had not absconded or concealed himself for avoiding execution of the warrant against him, that satisfaction itself was sufficient to release the property from attachment, in favour of the petitioner. When a formal application is not contemplated, that satisfaction itself will automatically result in the cessation of the attachment, and the property has to be delivered to such a person. The court below shall take note of the fact that the attachment had already been ceased on 25.07.2007 itself and thereafter, there was no specific attachment in respect of the property, as the attachment became automatically lifted. Matters being so, Annexure A2 order passed by the court below in CMP No.1656/2013 in C.P. No.11/2006 is erroneous and is liable to be quashed.

In the result, this Crl.M.C. is allowed and Annexure A2 order, in CMP No.1656/2013 in C.P. No.11/2006 of the Judicial First Class Magistrate's Court-I, Parappanangadi, is hereby quashed. The court below shall inform the matter to the Sub Registry, Tanur.

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