

**Siddangouda Vs. State of Mysore**

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**Court :** Karnataka

**Decided On :** Sep-16-1971

**Reported in :** 1972CriLJ289

**Judge :** M.S. Nesargi, J.

**Appellant :** Siddangouda

**Respondent :** State of Mysore

**Judgement :**

ORDER

**M.S. Nesargi, J.**

1. The First Class Magistrate. Koppal by his order passed on an application presented by the petitioner under Section 89 of the Criminal Procedure Code, in Misc. Case No. 84 of 1970. requesting for release of the attached properties in his favour, rejected the request. This petition is directed against that order.

2. The facts necessary for a decision are : that in C. C. No. 21 of 1968 on the file of the said First Class Magistrate, this petitioner was one of the accused. The charge was under Section 302 of the Indian Penal Code. As it was reported that the petitioner was absconding and the Magistrate felt satisfied, he issued a proclamation under Section 87 of the Criminal Procedure Code. The proclamation was issued on 17-10-1968. It may be mentioned here itself that by the said

proclamation the Magistrate called, upon the petitioner to appear in his court within 29-10-1968 to answer the complaint.

3. As the petitioner did not appear in the said court, the Magistrate proceeded to take action under Section 88 of the Criminal Procedure Code and attached the properties in question.

4. It is found that the said criminal case ended in acquittal of the remaining accused and that thereafter this petitioner appeared and filed the application in question. In that application the petitioner had made out that he had no knowledge of such a criminal case pending against him and that he was required to be present in the court in that case and that he was not at all aware of the proclamation and further that the proceedings started against him under Sections 87 and 88 of the Criminal Procedure Code are null and void, and, therefore, he was entitled to return of the attached properties.

5. The records received from the lower court show that the petitioner has examined witnesses in proof of the fact that he was not aware of the proceedings in C. C. No. 21 of 1968 and that he was not absconding. The learned Magistrate has disbelieved the said evidence. In regard to release of properties, he has relied upon the decision reported in (*Palsingh v. The State*). He has held on the basis of this decision that the contention of the proclamation being illegal and the entire proceedings based thereon also being illegal, cannot be taken into consideration while dealing with an application under Section 89 of the Criminal Procedure Code.

6. The proclamation was issued on 17-10-1968. It was proclaimed therein that the petitioner was to appear before the lower court within 29-10-1968. Section 87 (1) of the Criminal Procedure Code mandatory lays down that such proclamation, requiring an absconding person to appear at a specified place and at a specified time, should fix the date and time not less than thirty days from the date of publishing such proclamation. It is evident that the time fixed for the appearance of the petitioner is within the thirty days. Therefore, it is also clear that the proclamation issued by the Magistrate has violated the mandatory provision of Section 87 of the Criminal Procedure Code.

In *Gurappa Gugal v. State of Mysore* 1968 (2) Mys LJ 630 : 1969 Cri LJ 825 this Court has held that the provision of Section 87 of the Criminal Procedure Code is mandatory and a proclamation under that Section ought to specify not less than thirty days from the date of publishing of the proclamation for the appearance of the accused, and further that giving thirty days from the date of the proclamation is in the contravention of the section and such an error is not curable under Section 537 of the Criminal Procedure Code. It was further directed by this Court in that case that in regard to attachment of the property of the petitioner in the said case, all consequential benefits resulting from the order quashing the proclamation were to be given to the petitioner. Therefore, it is seen that the proclamation in question is not at all curable. It is to be quashed and the petitioner is entitled to all the benefits flowing therefrom.

7. In , it is held that the only two conditions laid down in Section 89 of the Criminal Procedure Code will have to be taken into consideration and that even if attachment had been made irregularly in contravention of the provisions of Section 87 of the Criminal Procedure Code, that would not be available for a decision under Section 89 of the Criminal Procedure Code, With great respect I am not in agreement with the principle laid down in this decision.

Section 88 of the Criminal Procedure Code deals with attachment of property belonging to the proclaimed person on issue of proclamation under Section 87 of the Criminal Procedure Code. It is by way of penalty for non-appearance after the issue of proclamation under Section 87 of the Criminal Procedure Code. Therefore, it is certain that issue of a legal and valid proclamation would vest power with the court issuing such proclamation to proceed further in that matter in case the person, against whom the proclamation is issued, fails to appear as directed by the proclamation. It is only under such circumstances that an attachment of the property of the person absconding can be made under Section 88 of the Criminal Procedure Code. If there is no legal and valid proclamation according to Section 87 of the Criminal Procedure Code. an attachment of property made in pursuance of such proclamation cannot at all be regarded as valid attachment in law. The result would be that the court would be retaining the property under an illegal attachment and as such such retention cannot be

countenanced in law. The question of raising such attachment may not at all arise under such circumstances.

Such a view is further supported by the decision in *Bird Dan v. State*. The decision reported in . and the other decisions of the High Courts of Lahore and Madras have been referred to in this decision. The principle laid down in the decision reported in . has not been accepted.

8. In regard to the powers of the court while dealing with such consequences of attachment of property under Section 88 of the Criminal Procedure Code based upon an invalid proclamation issued under Section 87 of the Criminal Procedure Code, it is held that the High Court, exercising its power under Section 439 of the Criminal Procedure Code, can set aside such order of attachment and direct release of the property to the alleged absconding person in order to do justice in the matter.

9. In the result, this petition is allowed. The order passed by the First Class Magistrate. Koppal. in Misc. Case No. 84 of 1970 is set aside. The properties attached are directed to be released in favour of the petitioner.

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