**Devendra Singh Negi Alias Debu Vs. State of U.P. and anr.**

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**Court** : Allahabad

**Decided On :** Mar-18-1993

**Reported in** : 1994CriLJ1783

**Judge** : Virendra Saran, J.

**Acts** : Displaced Persons (Compensation and Rehabilitation) Act, 1954 - Sections 24(2); Companies Act, 1956 - Sections 237; Licensing Act, 1872; Indian Penal Code (IPC) - Sections 302; Code of Criminal Procedure (CrPC) , 1973 - Sections 82, 82(2), 83, 83(1) and 482; Constitution of India - Articles 14 and 21

**Appeal No.** : Cri. Misc. Appln. No. 12627 of 1992

**Appellant** : Devendra Singh Negi Alias Debu

**Respondent** : State of U.P. and anr.

**Advocate for Def.** : Standing Counsel

**Advocate for Pet/Ap.** : Rajendra Dobhal, Adv.

**Judgement** :
ORDER

**Virendra Saran, J.**

1. Devendra Singh Negi alias Debu filed this aplication on 8-1-1993 modification of my order dated 30-9-1992 passed in Criminal Misc. Application No. 12627 of 1992. It was prayed that the learned Chief Judicial Magistrate Incharge Sessions Judge, Tehri Garhwal be directed to consider the surrender and bail application of the applicant without further delay.

2. The facts of the case are that an F.I.R. was lodged on 23-3-1992 by one Sanjay Sharma at Police Station Muni Ki Reti, District Tehri Garwal, under Section 302, I.P.C. and the same was registered as Crime No. 10 of 1992. It was stated in the F.I.R. that on 20-3-1992 at 11 a.m. one Indrajeet Singh was murdered by three persons, namely, Yogendra Datt Panwar, Nand Kishore alias Nandu and Rishi. There was no mention that any person other than the three named in the F.I.R. also participated in the crime.

3. The applicant filed an application under Section 482, Cr.P.C. stating that the police was trying to arrest him on the strength of a so called confession made by co-accused Rishi and Yogendra Singh to the police which was not even admissible and there was hardly any other material against the applicant. The applicant had set up a case of mala fide on the part of the police and the learned counsel had further submitted that the bail matters were being dealt with in a lethargic manner at Tehri Garhwal. Considering the entire circumstances of the case, it was directed that if the applicant surrendered and applied for bail, his bail application may be considered the same day by the learned Magistrate concerned, but if the disposal of the bail application was adjourned, the applicant may be released on executing a personal bond till such adjourned date only. The same relief was granted in respect of bail application if moved before the Court of Sessions. This order was passed on 30-9-1992. The present application has been moved on 8-1-1993 stating that even though the applicant wanted to surrender he was not taken into custody and that Sri Naresh Jain, learned C.J.M., Tehri Garhwal, was trying to circumvent and defeat the order of this Court by not allowing the applicant to surrender in court and, thus, giving a free hand to the police to arrest the applicant. Learned counsel for the applicant, Sri R. Dobhal, prayed that a direction may be issued to the learned C.J.M. to take the applicant in judicial custody when he surrenders without giving a long rope which may enable

the police to arrest the applicant, use third-degree methods and humiliate the applicant.

4. Certified copies of the surrender application dated 29-10-1992, the bail application and the order passed by Sri Naresh Jain on 29-10-1992 have been placed on record The original record from the court of learned C.J.M. has also been summoned. The surrender application filed by the applicant on 29-10-1992 makes a mention of the order passed by this Court on 30-9-1992. The record further reveals that a photo copy of the order of this Court was also filed before the learned C.J.M. Not only this, it was clearly mentioned in paragraph 2 of the surrender application that attachment of property has already been made in pursuance of the process issued under Section 82/83 Cr.P.C. Even though the applicant has been proclaimed as absconder and the property had been attached Sri Naresh Jain, the learned C.J.M. did not take the applicant in cusody when he surrendered but passed the following order:--

'A.P.O.-- Please report by 4-11-92 at Kirti Nagar.'

5. Accordig to the learned counsel for the applicant, the applicant wanted to surrender as he apprehended danger of his life and limbs if he fell in the hands of the police but the learned C.J.M. fixed 4-11-1992 and allowed the applicant to walk way even though a proclamation has already been issued by the same court declaring the applicant to be an absconder. Thus the learned C.J.M. was trying to circumvent the order passed by this court for consideration of applicant's bail application on the same day in case he himself surrendered.

6. From the above facts, I was of the opinion that the learned C.J.M. was trying to give a handle to the police to defeat the order of this Court and went out of his way in not allowing the applicant to surrender in court and hence on 8-1-19931 directed that a notice be issued to Sri Naresh Jain, learned C.J.M., Tehri Garhwal, to show cause why proceedings for contempt of Court may not be drawn, against him.

7. Sri Naresh Jain appeared before me and has filed his counter affidavit. He also brought another file separately opened by him on the basis of the supplementary charge-sheet against the applicant. Thus, two parallel files were being mainained

in respect of the same case by Sri Jain. It is distressing to note that some papers and orders are in one file while other papers and orders are in the other file. The memo of attachment of property is very much there on the record but Sri Jain was unable to tell when the proclamation under Section 82, Cr.P.C. was issued and when the order of attachment under Section 83, Cr.P.C. was made. These orders are not to be found in either of the two files. Even warrant of attachment has not been returned to the court after its execution and only a memo of attachment is there. Sri Jain was unable to tell as to when and by whom the orders under Sections 82 and 83, Cr.P.C. were passed.

8. Tehri Garhwal has only two criminal courts, the Sessions Judge and the C.J.M. A Munsif is also posted there without being conferred with jurisdiction in criminal matters. The report of registry, which I called for, reveals that Sri M. N. Kulshrestha, who was the Sessions Judge, handed over charge on 1-7-1992. His success or, Sri S.N. Singh, took over on 8-7-1992. Sri Singh was on leave from 13-7-1992 to 15-7-1992, and again he was not available for judicial work from 3-8-1992 to 9-8-1992. He was again on earned leave from 10-9-1992 to 24-9-1992, and again from 27-10-1992 to 15-12-1992. On 17-12-1992 Sri Singh was away to Uttar Kashi on some official work. The Court did not sit on 19-12-1992 due to strike while 20-12-1992 was a Sunday. Sri Singh availed journey day on 21-12-1992. He was out of station on 22-12-1992 and 23-12-1992, while 24-12-1992 was availed by him as journey day. From 25-12-1992 to 31-12-1992 he availed winter vacation. Thus, it would be seen that for long intervals no judicial work was done by the learned Sessions Judge and from 27-10-1992 to 31-12-1992 the Sessions Judge was available for judicial work only for two days, i.e. on 16th and 18th December, 1992. In the absence of Sri S. N. Singh, Sri Naresh Jain held two charges simultaneously. He was the C.J.M. and also the Incharge Sessions Judge. However, Sri Naresh Jain was also either on leave or absent for other reasons on a number of dates and the work of the Sessions Judge was not looked after by any one. However, the work of the C.J.M. on some dates was looked after by an Executive Magistrate. In paragraph 9 of the counter affidavit, Sri Jain has stated that on 21-12-1992, he was on leave and the entire judicial work was conducted by Sri Jitendra Kumar, an I.A.S. Officer as Incharge C.J.M, Thus there was none to grant stay in urgent matters if the C.J.M. had passed any wrong

order. In case of conviction by the C.J.M. it was he who himself would have to entertain an appeal against his own orders and grant or refuse to grant bail or to suspend or refuse to suspend his own orders under appeal or revision as Incharge Sessions Judge, Tehri Garhwal. Thus at Tehri Garhwal the judicial apparatus was lying without life and breath for long intervals. There is need to take measures to bring it back to life without the least delay so that people of the region may no more remain justice starved. It is advisable to appoint an Additional Sessions Judge at the earliest. The Munsif at Tehri Garhwal can, likewise, be conferred with jurisdiction to deal with criminal matters.

9. Adverting to the present case, in. view of the apology submitted by the learned C. J. M. I do not propose to draw the proceedings of contempt of court. However, I must observe that the C.J.M. should have accepted the surrender of the applicant specially when he had been proclaimed as absconder. Sri A.B.L. Gaur, appearing on behalf of the learned C.J.M., has drawn my attention to the fact that the C.J.M. was bound by the order dated 30-9-1992 to consider the bail application of the applicant in the first hours of a working day. This is however, not correct. In the order dated 30-9-1992 this court had directed that in case the learned Magistrate chose to reject the bail application of the applicant, he would do so in the first working hours of the day to enable the applicant to apply for bail in the court of sessions. On 29-10-1992 when the applicant had appeared in the first hours of the day there was no reason not to take him into custody. Sri Gaur has further argued that on some subsequent dates the applicant himself either came late or sought adjournment. The conduct of the applicant was quite natural because his anxiety was not to fall in the hands of the police. By adjourning the surrender of the applicant to 4-11-1992 the C.J.M. had made the police aware that the applicant would come to court on 4-11-1992 and the police could have arrested him even at the doorsteps of the court reducing the order of this court to a mere sheet of waste paper. The continuous absence of the sessions Judge also contributed to the anxiety of the applicant.

10. The practice of some of the subordinate Magistrates not to permit an accused to surrender when they make such request and simply ask the Public prosecutor to report is not proper. When an accused surrenders in court and makes an

application stating that he is wanted in the crime, his prayer should be accepted. The practice of postponing surrender application is not fair and I must record my strong disapproval of the same. Things may, however, stand differently if the surrender application does not specifically mention that the person surrendering is wanted in a case or that the police may be asked to report if he is wanted at all.

11. The learned counsel for the applicant has submitted that there has been non compliance of the mandatory provisions of Sections 82 and 83 of the Code and the attachment of the property is without jurisdiction. The circumstances of the case do go to show that the process for attachment was issued in a surreptitious manner. I have already mentioned above that neither the proclamation order under Section 82 nor the attachment order under Section 83 of the Code are available on the record and the C.J.M. has expressed his inability to tell who passed those orders and when. These orders have not even been preserved on the record.

12. It is unfurtunate that some of the subordinate Magistrates have reduced themselves to mere machines of printing out processes under Sections 82 and 83 of the Code. They overlook that the attachment of property of a person brings serious consequences in its train. The person whose property is attached is humiliated and subjected to public redicule besides being deprived of his right to property. The Magisrates should realise the serious responsibility cast on them.

13. The object of the attachment under Section 83 of the Code is not to punish an accused but to procure his appearance. My view is supported by a Division Bench case of Daya Nand v. State, . The salutory provisions of proclamation under Section 82 have been enacted to protect an unaware person and to give notice to him that he is wanted in the crime to enable him to surrender to custody. Section 82(2) lays down rigorous conditions of the manner in which the proclamation has to be published. The publication includes, inter alia, the affixation of the proclamation at some conspicuous place of the house and homestead of the accused, as also at the notice-board of the court house.

14. The words, 'has absconded or is concealing himself so that such warrant cannot be executed' in Section 82 of the Code are significant. Every person who is not immediately available cannot be characterised as an absconder. The Court

has to record its satisfaction that the accused has absconded or is concealing in order to avoid execution of the warrant. The provisions of Section 82 are mandatory and are to be construed strictly. Section 82 requires that the court must, in the first instance, issue a warrant and it must put down its reasons for believing that the accused is absconding or concealing himself. My view expressed above is supported by a Division Bench case of Dip Narain Singh v. State of Bihar, 1981 Cri LJ 1672 (Patna). Thus, in every case where the warrant is not executed, resort cannot be had to Section 82 and it may be necessary to examine the officer concerned who had gone to execute the warrant and to the measures adopted by him to serve the same. (See Kunwar Singh v. State, 1982 A Cr R29).

15. Order of attachment of property under Section 83 of the Code should not be passed in haste or without application of mind. The leanred Magistrates should act under Section 83 with great circumspection. It may not be necessary to issue an attachment order straightway against the persons who are readily available at the place of their vocations such as Government servants, doctors, engineers, lawyers and businessmen having permanent place of business and the like unless there is tangible evidence or material to show that they have really absconded. It should be borne in mind by the learned Magistrate that a passive acquiescence to the wishes of the police in these matters tends to diminish the lustre of their independence, dries up fragrance of the judicial process and. shake the confidence of the people. The reasons why in some cases reports for making attachment come on the very day of the offence while in more serious cases a report may not come for several months are no more a secret. The process of attachment is not to be reduced to an instrument of punishing or wreacking vengeance. It cannot, however, be overlooked that quite often the attachments are attended with savage revenge and malevolence and even articles like feeding bottles of sucking children are whisked away in most inhuman manner.

16. The procedure laid down under Section 83 has to be followed strictly. Jurisdiction to pass an attachment order cannot be assumed unless a proclamation under Section 82 of the Code has been issued. The normal rule is that the Magistrate 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 of the Code. Sections 82 and 83 of the Code do not spell out dichotomous procedures, they are to be read in harmony. Thus except in cases covered by the proviso to Section 83(1) the attachment order has to maintain a distance of not less than 30 days from the date of the publication Under Section 82. These 30 days are to be computed from the date of the publication of the proclamation and the provisions in this respect are mandatory. (See Gurappe Gugal v. State of Mysore, 1969 Cri LJ 826). 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 Magistrate has to record his reasons for arriving at the judicial satisfaction that such conditions as mentioned in the proviso to have come into existence. If Section 83(1) is interpreted to mean that it confers arbitrary powers on the Magistrates to order an attachment at their sweet will or in a whimsical manner Section 83(1) of the Code might have to be struck down as violative of Articles 14 and 21 of the Constitution. In the case of Maneka Gandhi v. Union of India, : [1978]2SCR621 , it was held that equality and arbitrariness are sworn enemies. In para 56 the Supreme Court observed :--

'The principle of reasonableness, which legally as well as philosphically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.'

17. The proviso to Section 83(1) of the Code can also not be pressed into service in an arbitrary manner. The exercise of discretion to order an attachment simultaneously with the issue of publication Under Section 82 has not been left to the whims or caprice of the Magistrates. The two conditions in which jurisdiction under the proviso can be assumed have been written with pen and ink by the person in relation to whom a 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.

18. It must be emphasized here that the nature of the satisfaction mentioned in the proviso is objective and not merely subjective. The attachment of property incurs civil consequences and is deprivation of the valuable right to property of the person whose property is so attached. The satisfaction cannot be arrived at arbitrarily or on fanciful ground. There has to be evidence by way of reliable evidence or other tangible material on which alone such satisfaction can be founded. The application or the affidavit of an interested person is not at all sufficient. In the case of Shauqin Singh v. Desa Singh, : AIR 1970 SC672 the Supreme Court while interpreting the word 'is satisfied' occurring in Section 24(2) of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 observed (at p. 674) :--

'The Chief settlement Commissioner has, therefore, power under Sub-section (2) to cancel an allotment if he is satisfied that the order of allotment of land had been obtained by means of fraud, false representation or concealment of any material fact. 'The power is judicial and by the use of the expression is judicial' the Chief Settlement Commissioner is not made the final arbiter of the facts on which the conclusion is reached. The jurisdiction of the Chief Settlement Commissioner arises only if an allotment is obtained by means of fraud, false representation or concealment of material facts. The relevant satisfaction is a jurisdictional fact on the existence of which alone the power may be exercised. A superior authority or the High Court in a writ petition would, therefore, be entitled to consider whether there was due satisfaction by the Chief Settlement Commissioner on materials placed before him and that the order was made not arbitrarily, capriciously or perversely.'

(The underlining is mine).

19. In the case of Berium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295 the Supreme Court held that even a subjective satisfaction has in existing circumstances to reach such satisfaction. Shelat J. observed (at p. 325):--

'If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.'

Hidayat Ullah J. (as he then was) went on to observe (at p. 309, para 27) :--

'Since the existence of 'circumstances' is condition fundamental to the making of an opinion, the existence of circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness.'

20. In the case of Rohtas Industries Ltd. v. S.D. Agarwal, : [1969]3SCR108 the Supreme Court has held that when an opinion has to be formed even while exercising discretionary power Under Section 237(b) of the Companies Act, 1956 the discretion must be exercised in an honest manner after application of mind to the relevant materials and not capriciously or arbitrarily.

21. In paras 27 and 28 of the judgment the Supreme Court observed:

'27. We shall now refer to the decisions relied on by the appellant.

28. As long as 1891 the House of Lords was called upon to consider the scope of some of the provisions of the Licensing Act, 1872 which gave discretion to the Magistrates in granting certain licences. The question for decision was as to the nature of the discretion granted. Lord Halsbury L.C. speaking for the House observed in Susannah Sharp v. Wakefield, 1891 AC 173 at p. 179:

'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion Rooke's case, according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.'

22. The circumstances upon which attachment order is founded should clearly spell out from the order itself. The Magistrate should also bear in mind that orders Under Sections 82, 83 of the Code should always be passed in open court and preserved on the record and at the same time the process of attachment should not be hastily issued in a routine manner or surreptitiously.

23. In the present case I have already noticed earlier that the orders Under Sections 82, 83 of the Code have not been preserved on the record. The learned C.J.M. has not been able to tell who passed these orders and he further informed the court that some times the orders in original are passed on an application given by the Investigating Officer and the same is taken away by him. Such a practice, on the face of it is beyond all known canons of judicial process. In such circumstances, I have no option but to quash the proceedings Under Sections 82, 83, Cr.P.C. against the applicant.

24. The learned, counsel for the applicant has taken pains to argue that the atmosphere against the applicant; at Tehri Garhwal is surcharged with bias and more so now because it is on his application that this Court had issued notice to the C.J.M. Tehri Garhwal. He has prayed that the case be transferred to some neighbouring district. The submission made by the learned counsel for the applicant has substance. The applicant has not been given a fair deal when he wanted to surrender and he may have a reasonable apprehension in his mind that he will not get even justice in the surcharged atmosphere at present. I am further of the view that in the circumstances prevailing at Tehri Garhwal the speedy disposal of the bail application of the applicant is far dream. The case may be transferred for the speedy disposal of the bail application of the applicant to some neighbouring district.

25. In the result, this application is disposed of with the following directions:-

(a) The applicant may surrender before the Sessions Judge, Dehradoon within one month from today. If he surrenders and makes an application for bail the Sessions Judge shall dispose of his bail application in the manner as directed by the order of this Court dated 30-9-92. Needless to observe that the learned Sessions Judge shall be free to decide the bail application on merits. The

Registrar shall, within 3 days, send the two records of this case through a Special messenger to the Sessions Judge, Dehradoon in a sealed cover who after disposal of the bail application shall transmit it to the C.J.M. Tehri Garhwal. It is further made clear that in case the applicant does not surrender within one month the facility of surrendering and applying for bail at Dehradoon shall be treated as withdrawn.

(b)The process issued under Sections 82, 83, Cr.P.C. against the applicant is quashed and the property shall be released forthwith.

(c)The notice issued to Sri Naresh Jain, C.J.M. Tehri Garhwal for initiating proceedings of Contempt of Court is vacated.

(d)The stay order dated 13-1-1993 shall continue to operate for one month only to enable the applicant to surrender.

(e)The Registrar shall send a copy of this Order to all the Chief Judicial Magistrates within one week from today for their guidance in taking action under Sections 82, 83 of the Code. The Chief Judicial Magistrates shall make the subordinate Magistrates aware of this decision without any delay.

(f) The applicant shall be supplied a copy of this order within 3 days.