

**Birad Dan Vs. the State**

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**Court :** Rajasthan

**Decided On :** Sep-18-1957

**Reported in :** AIR1958Raj167; 1958CriLJ965

**Judge :** I.N. Modi, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 87, 87(3), 439 and 561A

**Appeal No. :** Criminal Revn. No. 177 of 1956

**Appellant :** Birad Dan

**Respondent :** The State

**Advocate for Def. :** Govt. Adv.

**Advocate for Pet/Ap. :** M.C. Bhandari, Adv.

**Judgement :**

ORDER

**I.N. Modi, J.**

1. This is a revision by the petitioner Birad Dan against an order of the Sessions Judge Balotra by which he dismissed the appeal of the petitioner against an order of the First Class Magistrate, Sanchole, rejecting an application for restoration of

certain attached property under Sections 87 to 89 of the Code of Criminal Procedure.

2. The material facts may be briefly stated as follows. The petitioner was wanted in connection with a case under Sections 302, 379, 148 and 149, I P. C. which was pending in the Court of the First Class Magistrate, Sanchore. It was reported to the Magistrate that the petitioner was absconding. Thereupon a proclamation under Section 87, Criminal P. C. was drawn up and issued against him, on the 27th January, 1954. By this proclamation, the accused was directed to present himself in the Magistrate's Court 'within 30 days of the date of the proclamation.' The Magistrate also issued a warrant of attachment under Section 88, Criminal P. C. on the same date and in pursuance thereof, certain cattle of the petitioner was attached. This cattle was claimed by petitioner's son to be his own and the petitioner also seems to say so but the point whether it belongs to the petitioner or his son under the circumstances is immaterial. The accused appeared in Court voluntarily, according to the petitioner, on the 22nd March, 1954. On the 24th March, he made an application to the Magistrate that he had never absconded and that he was ill and undergoing treatment elsewhere and that the proclamation issued against him was illegal and inoperative and that as soon as he came to know of it he had appeared in Court. The Magistrate recorded evidence on the question of the petitioner's illness and eventually came to the conclusion that it was not worthy of belief. In that view the Magistrate refused to restore the attached cattle to the petitioner, and rejected his application by his order dated the 30th June, 1956. The petitioner then went in appeal to the learned Sessions Judge, Balotra who dismissed the appeal as barred by time. I am informed that the petitioner has since been acquitted of the charge levelled against him. It is contended before me on behalf of the petitioner that a prayer was made to the learned Sessions Judge to treat the appeal as a revision but there is nothing on the record to show that this was done. In any case, the learned Judge did not apply his mind to the question of the illegality of the proclamation issued in the present case and its implications. The present revision has been filed from the aforesaid order.

3. The principal contention raised before me on behalf of the petitioner is that the proclamation issued against him by the Magistrate was not in conformity with the mandatory provisions of Section 87, Cr. P. C. and was, therefore, a nullity and further that any attachment of the cattle under such circumstances could not be supported in law and should be set aside, and the cattle be restored.

4. I have carefully considered this aspect of the case, and heard the learned Government Advocate, and have arrived at the conclusion that the argument is not without force. Sections 87 and 88, Cr. P. C. make certain provisions for compelling the attendance of an accused or for that matter a witness who may be found to be absconding and evading his presence in Court. Section 87 provides that in the circumstances mentioned in the section a proclamation can be issued against the wanted person and lays down the requirements which a proclamation should fulfil. These requirements are that the proclamation should require the person concerned to appear at a specified place and at a specified time, and so far as time is concerned, it further requires that the specified time should not be less than 30 days from the date of the publication of the proclamation. The section further goes on to provide as to the manner of the publication of the proclamation and enacts that it shall be affixed to some conspicuous part of the house of the person required to be present, or to some conspicuous place of the village or the town in which such person ordinarily resides; and also that it shall be publicly read in some conspicuous place of such village or town ; and lastly that a copy of the proclamation shall be affixed to some conspicuous part of the court-house. The correct procedure, when all these things are done, (or the Magistrate appears to be that he should record a proceeding after satisfying himself that the necessary requirements as mentioned above have been complied with, that the proclamation was duly published on a specified date and when this is done, Sub-section (3) of Section 87 provides that such a statement in writing by the Court shall be conclusive evidence that the requirements of Section 87 have been duly complied with and that the proclamation had been published on the specified date. Section 83 then provides that the court issuing a proclamation may also at any time order the attachment of any property, movable or immovable belonging to the proclaimed person. Then the important sub-sections are (6E) and (7) of Section 88. Sub-section (6E) provides that where the proclaimed person appears within

the time specified in the proclamation, the court shall make an order releasing the property from the attachment- Sub-section (7) provides for those cases where the proclaimed person fails to appear within the time specified in the proclamation, and lays down that in such a case, the property under attachment shall be at the disposal of the State Government. Then we come to Section 89 which provides for the restoration of the attached property to a proclaimed person. That section provides that if a proclaimed person appears voluntarily or is arrested and brought before the court within two years from the date of the attachment and proves to the satisfaction of the court that he did not abscond or conceal himself and that he had not such notice of the proclamation which would have enabled him to attend within the time specified therein, then such property or where it has been sold, the proceeds thereof shall, after satisfying thereout all costs incurred in consequence of the attachment, be paid over to the proclaimed person.

5. From the above analysis of Sections 87, 88 and 89, it clearly follows that a person who fails to appear despite the proclamation issued against him, incurs a heavy penalty; but it is equally clear that before the penalty prescribed by law can be legally imposed, the law also lays down fairly stringent conditions which a proclamation must fulfil. An argument may be advanced that the failure to fulfil the conditions prescribed under Section 87 as to time and place and as to due publication are after all merely irregularities and should not be considered as an illegality vitiating the consequent order of attachment which might follow upon the person concerned not appearing within the time specified in the proclamation, and such a view appears to have been taken in *Hansraj v. Emperor*, AIR 1934 Lah 987 (A). The learned Judges who took this view, however, did not consider an earlier Division Bench ruling of their own High Court in *Emperor v. Multan Singh*, AIR 1919 Lah 57 (B). In this earlier case, the Bench held that as the requirements as to publication prescribed under Clauses (a) and (c) of Sub-section (2) of Section 87 were not complied with and as the date fixed for the appearance of the petitioner was less than 30 days from the date of publication of the proclamation that was not in accordance with law, and, therefore, the subsequent proceedings were invalid. The view taken in AIR 1934 Lah 987 (A) has not been followed in subsequent decisions of that Court. Reference may be made in this connection to *Mt. Javvai V. Emperor*, AIR 1942 Lah 214 (C) and *Jagdev Khan v. Emperor*, AIR

1948 Lah 151 (D). Teja Singh J. in Jagdev Khan's case (D) relied on the Bench decision in AIR 1919 Lah 57 (B). The latest decision of the Punjab High Court on the point is to be found in Pal Singh v. The State, AIR 1955 Punj 18 (E) and the view there taken is that the terms of Section 87, Cr. P. C. as to time and place and as to the manner of publication are mandatory, and that a breach thereof cannot be cured by the application of Section 537, Cr P. C. Apart from AIR 1934 Lah 987 (A), there is thus a strong current of authority that the requirements of Section 87 are imperative in so far as they lay down the condition as to time which should not be less than 30 days from the date of the publication of the proclamation, and also with respect to the manner of publication which has been laid down in Clauses (a), (b) and (c) of Sub-section (2) of Section 87, and that if these conditions are not properly fulfilled, then the proclamation would be void ab initio and could not sustain the penalty prescribed under Section 88. See in this connection Queen-Empress v. Subbarayar, I L R 19 Mad 3 (F) and The Queen v. Bisheshur Pershad, 2 N W (sic) H C R 441 (G). I respectfully agree with this view. I may also point out here that no presumption under Sub-section (3) of Section 87 would arise where the requirements of this section have not been complied with or where the Court issuing the proclamation has failed, as in the present case, to record any statement that the proclamation was duly published on the specified day.

6. Now let us see what are the facts and circumstances in the present case. I have perused the proclamation. It was drawn up on the 27th January 1954. It called upon the petitioner to appear in Court within 30 days of the date of the proclamation. This is a clear violation of the terms of Sub-section (1) of Section 87 which requires that a proclamation should specify a time not less than 30 days from the date of the publication of the proclamation. The error so far as this aspect of the case is concerned was of a three-fold character. In the first place, no precise date was fixed. In the second place the accused was asked to appear 'within' 30 days' of a certain point of time, and, thirdly, this specified point of time was also wrongly fixed as it could not have been fixed with reference to the date of the issue of the proclamation but should have been fixed from the date of the publication thereof. Apart from this, it also appears that though a copy of the proclamation was affixed to the house of the petitioner in the village in which he resided, there is nothing to show that it was publicly read in any conspicuous place of the village or

that a copy thereof was affixed to some conspicuous part of the Court house. I have, therefore no hesitation in holding that the requirements of Section 87 in the present case were not at all complied with, and, therefore, the proclamation was invalid. It follows as a corollary that the attachment of property made for failure to comply with the terms of the proclamation cannot be sustained for the simple reason that when the foundation for such an attachment, viz., the proclamation, collapses, the superstructure of attachment and further consequent proceedings cannot possibly be supported or sustained.

7. Some argument was raised before me as to whether it was open to the Magistrate under Section 89, Criminal P. C to give effect to a contention raised as respects the illegality of the proclamation. Some Courts have taken the view that a Magistrate has no jurisdiction to take cognizance of such a contention on the language of Section 89 which provides that before a proclaimed person can have his property restored to him, he should show (1) that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant issued against him, and (2) that he had not such notice of the proclamation as to enable him to attend within the time specified therein, and, that a plea as to the illegality of the proclamation cannot be held to fall within the four corners of Section 89. Kapur J., as he then was, in A I R 1955 Punj 18 (E), seems to hold a contrary view. It seems to me, however, unnecessary to go into that controversy. So far as the powers of this Court are concerned, the view has been more or less uniformly taken that, apart altogether from the provisions of Section 561A which may or may not be capable of being invoked according to the exigencies of a particular case this Court would have ample jurisdiction under Section 439, Criminal P. C. to pass a suitable order having regard to the illegality with respect to a defective proclamation brought to its notice, and going to the very root of the matter. I have no doubt that this Court has ample powers under Section 439 to correct any illegality which might have been committed in the Courts below in a matter of this kind. Any other view, in my opinion, would result in an irremediable injustice particularly on the view that Section 89 is not intended to cover a case of illegality in the making or the manner of publication of a proclamation.

8. For the reasons mentioned above, I am of opinion that this is a fit case in which this Court should interfere and I hold that the proclamation issued by the Magistrate in the present case was in clear violation of the imperative requirements of Section 87, Criminal P. C., and was, therefore, a nullity, and, consequently, the forfeiture of the petitioner's cattle was likewise illegal and must fall along with the proclamation. The cattle shall be restored to the owner, I am informed by learned counsel for the petitioner that the cattle is already in his possession or in possession of the surety on his behalf and has, therefore, been virtually in his possession, and in this view of the matter, no steps need be taken to compel him to produce the cattle in Court.

9. Before taking leave of this case I should like to point out two things which clearly call for vigilance on the part of those concerned; first, that it is the duty of Magistrate to exercise greater care than they are accustomed to in complying with the provisions of Section 87 the breach of which entails very serious consequences for the person found in default, but which consequences, in the very nature of things, can be allowed to have effect only if the strict preconditions mentioned in the section are properly observed; and secondly that it appears that the printed forms in use in some of the Courts are defective and are misleading and lead to error and those concerned should see that the printed forms in use are correctly formulated, so as to conform to the relevant form prescribed in Schedule V of the Code of Criminal Procedure (See form No. IV).