

- The Criminal Procedure Code, 1974, outlines two separate orders under Sections 82 and 83.
- Section 82 requires the court to publish a proclamation, if the person against whom a warrant has been issued absconds or conceals themselves.
- This proclamation should state that the person needs to appear at a specified place and time, not less than 30 days from the proclamation's publishing date.
- Section 83 allows for an order of attachment of any property belonging to the person proclaimed under Section 82.
- The order of attachment can be issued at the same time as the proclamation, as stated under Section 83(1).
- **In the given case, a proclamation under Section 82 has already been published.**
- However, an order of attachment must still be specifically issued by the Magistrate under Section 83.
- **Issuing a proclamation under Section 82 doesn't amount to any attachment unless the Magistrate specifically issues an order of attachment.**
- **210 PLRIJ 043**
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(2023-2)210 PLRIJ 043 (Kar.)
HIGH COURT OF KERALA AT ERNAKULAM
Before: Mrs. Justice Anu Sivaraman
STATE BANK OF INDIA - Petitioner,
Versus

SUB REGISTRAR, KOZHENCHERRY and others - Respondents.
WPC 35575/2022

Criminal Procedure Code, 1974 S. 82, 83 - Two separate orders are contemplated under Sections 82 and 83 of the Criminal Procedure Code (CrPC). - Section 82 requires the court to publish a written proclamation requiring the person against whom a warrant has been issued to appear at a specified place and time not less than 30 days from the date of publishing such a proclamation if they abscond or conceal themselves. - Section 83 provides for an order of attachment of any property belonging to the proclaimed person being issued - The order of attachment can be issued simultaneously with the proclamation under the proviso to Section 83(1) -A proclamation under Section 82 has been published in this case - However, an order of attachment must be issued by the Magistrate under Section 83, and the issuance of a proclamation under Section 82 by itself will not amount to any attachment unless an order of attachment is specifically issued by the Magistrate.

JUDGMENT

Anu Sivaraman , J. - (02.06.2023)

This writ petition is filed seeking the following reliefs :-

“(i) Issue a writ, order or direction in the nature of mandamus, directing the 1st respondent to register the sale deed produced by the petitioner, in favour of Mr. Jose Thullakulathil Simon, S/o. Thullakulathil Daniel Simon, Thullakulathil House, Kulananda, Pathanamthitta District, by not insisting the endorsement regarding the “attachment” in the document to be registered.

(ii) Issue a writ, order, or direction in the nature of mandamus, directing the 6th

respondent to efface/ expunge all attachments effected after 5-3-2014 in the mortgaged property, from the Tandaper Register, as the attachment itself is illegal.

(iii) Declare that the insistence of endorsement regarding the “attachment” in the document to be registered is illegal and arbitrary, as the “attachment” was ordered by the Judicial First Class Magistrate Court-I, Peermade, after the creation of mortgage and that the criminal proceedings against the accused in the said case who is the borrower with the bank has been abated by his death on 4-6-2021.”

2. Heard the learned counsel for the petitioner and the learned Government Pleader appearing for respondents 1 and 4 to 6. Though notice had been taken out to respondents 2 and 3 by paper publication which was duly published, there is no appearance for the said respondents.

3. The learned counsel for the petitioner submits that the 2nd respondent Company had availed multiple loans from the petitioner Bank mortgaging 66 cents of property in Kozhencherry Village. The property belonged to Sri. Biju Mathew Abraham, who was one of the Directors of the 2nd respondent Company. The mortgage was created on 5.3.2014. Since the borrowers defaulted the payment of loan, the Bank initiated proceedings under the SARFAESI Act. Biju Mathew Abraham, who was the owner of the mortgaged property passed away on 4-6-2021. The mortgaged property was sold in public auction on 22.7.2022. However, the Bank could not register the sale certificate in favour of the auction purchaser since the 1st respondent directed the petitioner to produce materials to show that the attachment ordered by the Judicial First Class Magistrate Court-I, Peermade is lifted. It is submitted by the learned counsel for the petitioner that the petitioner had made necessary enquiries with the Judicial First Class Magistrate Court-I, Peermade, but it was found that there was no legal or proper order of attachment passed by the said court and that therefore, there was no attachment available to be lifted for execution of the sale certificate. It is submitted that the mortgage having been created on 5.3.2014 and since the owner of the property was booked for offences under the Kerala Preservation of Trees Act only on 22.10.2015, what could have been attached by the Magistrate Court, if at all there was an order of attachment, was only the surviving right of the owner of the property for redemption of the property from mortgage already executed. It is further submitted that as a matter of fact, there was no order of attachment issued by the Magistrate Court in terms of Section 83 of the Code of Criminal Procedure and that only a proclamation under Section 82 had, as a matter of fact, been issued in respect of the property. It is, therefore, contended that there was absolutely no legal impediment to the registration of the sale certificate executed by the Bank after the property was sold in public auction.

4. The petitioner had taken notice to respondents 2 and 3 by paper publication and the notice was duly published in Bangalore and Chandigarh edition of Indian Express, but there is no appearance for the parties in spite of notice having been duly served.

5. The learned counsel for the petitioner has also made available a copy of the order sheet from 27.9.2016 to 27.2.2023 in C.C. No.364/2016 in the Court of the Judicial First Class Magistrate-I, Peermade. It is submitted on the basis of the said order sheet, which is produced as Ext.P7, that there was no attachment ordered on 19.2.2018 and all that was directed on 19.2.2018 was to issue 82 and 83 steps to the accused. It is further submitted that the order sheet would show that on no other date before the death of the 1st accused Biju Abraham was an order of attachment under Section 83 rendered by the Magistrate. It is submitted that without such an order of attachment being legally passed by the Magistrate after the proclamation or even simultaneously with the proclamation under Section 82, the contention that there is an attachment is unjustifiable and therefore, there is no impediment to the registration of the sale certificate.

6. On calling for a report from the Magistrate by the Registry of this Court, a report was

made available stating as follows :-

"On verification of case records, steps under Sections 82 and 83 Cr.P.C issued against Sri.Biju Mathew Abraham, Nanaveetilputhenparambil Hosue, ozhencheri kara, Pathanamthitta was executed as per the order dated 19.2.2018 of this Court and the same was returned executed on 14.8.2018 with a certificate issued by Village Officer, Kozhencherry stating that an extent of 26.81 ares of property comprised in Survey No.543/1-2 of Kozhencherry Village belonging to the said Biju Mathew Abraham had been attached."

The learned counsel for the petitioner submits that a reading of Sections 82 and 83 would make it clear that the provisions contemplate the publishing of a written proclamation requiring a person against whom a warrant has been issued to appear at a specified place and at a specified time not less than 30 days from the date of publishing such a proclamation. It is stated that from the materials which are made available before this Court, it is clear that such a proclamation has been issued. However, it is contended that a reading of Section 83 would show that the court issuing a proclamation under Section 82 may order the attachment of any property, movable or immovable or both, belonging to the proclaimed person. The first proviso to Section 83(1) states that in a case where the court is satisfied by affidavit or otherwise that the person in relation to whom the proclamation is to be issued is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local jurisdiction of the court, the order of attachment may be issued simultaneously with the proclamation. However, it is submitted that in both cases, where the order of attachment is issued simultaneously with the proclamation or otherwise, there has to be an order of attachment issued by the competent Magistrate Court. It is submitted that in the instant case, though a proclamation under Section 82 has been duly published, there was no order of attachment under Section 83 by the court as is evident from the materials on record and that therefore, the contention that the attachment had been ordered by the Magistrate Court is incorrect and there is no legal impediment to the sale certificate being registered by the 1st respondent.

7.The learned Special Government Pleader (Forest) submits that it was in respect to a forest offence in C.C.No.364/ 2016 had been charged against three accused including Sri.Biju Mathew Abraham as the 1st accused. It is submitted that it was on the basis of O.R. No.27/2015 that C.C. No.364/2016 had been charged. It is submitted that the Section Forest Officer of the Chellarkovil Section of Kumily Forest Range has reported that the 1st accused in C.C. No.364/2016, that is, Biju Mathew Abraham, S/o.Mathew Abraham, Nanaveetilputhenparambil, Kozhencherry kara, Pathanamthitta had been issued with a warrant for his appearance in the case by the Judicial First Class Magistrate Court- I, Peermade. However, he was not found at his place of residence and the warrant could not be executed. Thereafter, after following all due steps, proclamation and an order of attachment were submitted before the Village Officer, Kozhencherry on 28.3.2018. In response to the same, the Village Officer had issued a certificate stating that the accused person is in possession of 26.81 Ares of dry land in Survey No.543/1 of Kozhencherry Village with Thandaper No.10018 and that the Village Officer had entered the fact of the attachment in the Thandaper. It is submitted that it was on the basis of the orders issued under Sections 82 and 83 that steps had been taken by the Village Officer. The communication of the Village Officer dated 31.3.2018 is also made available by the learned Special Government Pleader. Further, a form of a proclamation under Section 82 requiring Sri.Biju Mathew Abraham to appear before the court on 30.4.2018 is also made available.

8.The learned counsel for the petitioner would immediately point out that the proclamation is one issued in Form 4 attached to the 2nd Schedule of the Cr.P.C. and that the same is only the form of proclamation requiring the 1st accused to appear in answer to

the complaint, within the time specified. It is stated that a reading of Section 83 as well as Form 8 would show that there is a separate order contemplated ordering attachment which has either to follow a proclamation under Section 82 or can be issued simultaneously in case there is a satisfaction recorded by the Magistrate that the person is likely to part with the property in full or in part or remove the property from the jurisdiction of the court. It is submitted that the order of attachment has to be under Form 8 and it is evident that there is no such order issued by the Magistrate in the instant case.

9. The learned counsel for the petitioner, relying on the decision of this Court in *Molly v. State of Kerala* [1994 (2) KLT 62], contended that where the accused fails to appear in spite of process being issued against him, the Magistrate could definitely have taken steps against him as an absconding offender under Section 82(1). However, for an order of attachment to be issued against his property under Section 83, the court must be satisfied by affidavit or otherwise that the conditions provided in clauses (a) and (b) of proviso to sub-section (1) of Section 83 are available. It was held that the proceedings under Sections 82 and 83 are distinct and separate and it is only when there is a satisfaction by the Magistrate that the person in relation to whom the proclamation is to be issued is about to dispose of the whole or part of his property or is about to remove the whole or part of the property from the local jurisdiction of the court that the attachment can be issued simultaneously with the proclamation.

10. Relying on a judgment of the High Court of Karnataka in *Nithya Shambhavananda v. State of Karnataka* [2021 PLRonline 5204 (Kar.): (2021) 2 KCCR 1808], it is contended that an order of attachment under Section 83(1) is one which has to be passed by the concerned court and in the absence of such a specific order of attachment passed by the Magistrate Court, there can be no delegation to the jurisdictional Deputy Commissioner or District Magistrate or any other officer to attach the property. It is further contended that the said decision is authority on the point that it is only after a proclamation of an accused to be an absconder under Section 82 of Cr.P.C. is issued that the power of ordering attachment of properties of the absconding person can be exercised by the Magistrate.

11. It is further contended that in *MD. Nazrul Islam v. State of Assam* [2008 PLRonline 0202 (Gau.)], the issue has been considered and it was held that the issuance of proclamation and attachment under Sections 82 and 83 of the Cr.P.C. is not an automatic or casual exercise. It was held that before issuance of such proclamation and attachment, the court must apply its judicial mind and arrive at a decision disclosing the reasons to believe that a simultaneous action needs to be taken for proclamation and attachment. Mere return of warrant of arrest without execution would not authorise the Magistrate to issue an order for proclamation and attachment. It was further held as follows :-

"22. The aforesaid provisions of law, particularly sections 82 and 83, Cr.PC makes it abundantly clear that the court must record its reasons to believe for taking such action and it must also satisfy about the abscondance of the accused as well as about the dealing with his property as contained under section 83, Cr.PC and without such compliance, the issuance of such order for proclamation and attachment cannot be said to have done in valid exercise of power."

12. In the instant case, it is the specific case of the petitioner that all that had been done by the Magistrate on 19.2.2018 was the issuance of orders for publishing a proclamation under Section 82(1). No order was in existence directing the attachment of the property of the 1st accused or directing simultaneous publishing of proclamation and the attachment of the property after entering a satisfaction that the conditions as provided in the proviso to Section 83(1) exists. From the records made available by the learned Special Government Pleader also, it appears that what was done after the order dated 19.2.2018 was the publishing of a proclamation under Section 82. Thereafter, without any orders having been

passed by the Magistrate under Section 83, it appears that steps have been taken by the Village Officer on a wrong understanding of the provisions and assuming that the power under Section 83 had also been exercised by the Magistrate.

13. Going by the provisions of Sections 82 and 83, it is evident that two separate orders are contemplated under the provisions of the said sections. Under Section 82, the court, on being satisfied that the person against whom a warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed, has to publish a written proclamation requiring him to appear at a specified place and at a specified time not less than 30 days from the date of publishing such a proclamation. From the materials placed on record, it appears that a proclamation under Section 82 has been published in accordance with the procedure provided in Section 82(2). Therefore, the statement by the court that such a proclamation has been published is liable to be accepted by this Court as well under Section 82(3). Thereafter, Section 83 provides for an order of attachment of any property, movable or immovable belonging to the proclaimed person being issued. Going by the proviso to Section 83(1) in the circumstances provided thereunder, such order of attachment can be issued simultaneously with the proclamation as well. However, it is clear from a reading of Section 83 that there must be an order of attachment issued by the Magistrate under Section 83 and the issuance of a proclamation under Section 82 by itself will not amount to any attachment unless an order of attachment is specifically issued by the Magistrate.

14. In the instant case, I find that though a proclamation has been published under Section 82, no order of attachment either simultaneous to the proclamation or issued thereafter has been rendered by the Magistrate to justify the stand taken by the 1st respondent with regard to the registration of the sale certificate.

In the above view of the matter, I am of the opinion that the prayers as sought for in the writ petition are liable to be granted. There will be a direction to the 1st respondent to register Ext.P2 sale certificate in accordance with law. There will also be a direction to the 6th respondent to efface/expunge any attachment effected in respect of the property covered by Ext.P2 sale certificate from Exts.P3 and P4 holding that there is no valid attachment under Section 83.

This writ petition is ordered accordingly.

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