

Court No. - 11

Case :- CRIMINAL APPEAL No. - 194 of 2024

Appellant :- Faiyaz Abbas

Respondent :- State Of U.P. Thru. Prin. Secy. Home Lko. And Another

Counsel for Appellant :- Mohd. Kumail Haider, Bal Keshwar Srivastava, Ravi Patel

Counsel for Respondent :- G.A.

Hon'ble Abdul Moin, J.

1. Rejoinder affidavit filed today is taken on record.
2. Heard Shri Bal Keshwar Srivastava, learned counsel for the appellant as well as Shri Angad Vishwakarma, learned A.G.A. for the State-respondent(s).
3. The instant criminal appeal has been filed under Section 86 of the Criminal Procedure Code (hereinafter referred to as "Code") challenging the order dated 12.07.2023, a copy of which is annexure 3 to the appeal, passed by learned Special Judge, POCSO Court No.2, Lucknow. By the said order, the application filed by the appellant under Section 84 of the Code has been rejected.
4. The short facts as urged by the learned counsel for the appellant is that an F.I.R. had been lodged by Saiyyad Ali Hasan against Faiyaz Abbas (the appellant herein), Faiz Abbas (the son of the appellant) and Smt. Guddo (the wife of the appellant). The F.I.R. was lodged on 28.11.2015 under the provisions of Section 3 & 4 of POCSO Act as well as under Sections 323, 328, 363, 376, 504 & 506 of I.P.C.
5. As the authorities were unable to ensure the appearance of

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Shri Faiz Abbas, the son of the appellant, consequently an order under Section 82 of the Code dated 12.01.2023, a copy of which is annexure 4 to the appeal, was passed. Subsequently, an order dated 06.02.2023, a copy of which is part of annexure 4 to the appeal, was also passed under Section 83 of the Code whereby the property of the appellant herein was attached which is said to be the house of the appellant.

6. As the house belongs to appellant herein, namely, Shri Faiyaz Abbas, he filed his objections under Section 84 of the Code specifically pointing out that the appellant is the sole owner of the house by way of a will, and that his son namely Faiz Abbas has got nothing to do with the house and as the appellant is living in the house, consequently, the attachment order be set aside.

7. The learned court, vide order impugned dated 12.07.2023, after considering the objections filed by the appellant indicating the aforesaid, was of the view that while deciding the objections under the provisions of Section 84 of the Code, the court is not required to decide the dispute pertaining to the ownership of the house and that as the accused Faiz Abbas is only residing in two rooms of the entire house, consequently, the order of attachment under Section 83 of the Code has correctly been passed and therefore, the objections filed by the appellant have been rejected.

8. Being aggrieved, the instant appeal has been filed.

9. The argument of the learned counsel for the appellant is that the provision of Section 83 of the Code categorically provides that an attachment order can be passed for the property belonging to the proclaimed person who does not appear. Thus, the contention is that sine-qua-non to an order being passed

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under the provision of Section 83 of the Code is a finding, may be prima facie, to the effect that the property being attached belongs to the accused and without recording of such a finding in this regard, the property of a third person, may be in this case belonging to the father of the accused namely the appellant, could not have been attached. He also contends that despite the objections in this regard being filed, the learned court has patently erred in law in affirming the order of attachment passed under the provisions of Section 83 of the Code solely on the ground that the accused is residing in two rooms of the entire house and as such, it was within the power of the authority concerned, while issuing the order under Section 83 of the Code, to have directed for attachment of the property. He thus contends that the order impugned merits to be set aside.

10. On the other hand, learned A.G.A. on the basis of averments contained in the counter affidavit argues that the F.I.R. has been lodged in the year 2015 against the accused Faiz Abbas, the appellant herein and the wife of appellant and thus there is no illegality and infirmity which has been committed by the competent court while passing the order under Section 83 of the Code in attaching the property of the accused and further, no perversity emerges from the order dated 12.07.2023 whereby the objections filed by the appellant against the order under Section 83 of the Code have been rejected. He thus contends that the instant appeal merits to be dismissed.

11. Heard the learned counsel for the parties and perused the record.

12. From a perusal of record, it emerges that admittedly, an F.I.R. had been lodged in the year 2015 against the appellant namely Shri Faiyaz Abbas (the appellant), Faiz Abbas (the son of the appellant) and Smt. Guddo (the wife of the appellant). As

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the son of the appellant namely Shri Faiz Abbas was not appearing, consequently, an order under Section 82 of the Code was initially issued on 12.01.2023 and thereafter, the order under Section 83 of the Code dated 06.02.2023 was passed whereby the property in question was attached. As the property belongs to the appellant on the basis of a will, the appellant filed his objections under Section 84 of the Code whereby this fact of the property belonging to him, on the basis of a will, was specifically urged before the court. The court, vide order impugned dated 12.07.2023 has been of the view that the said attachment order has been passed in order to ensure the appearance of the accused Faiz Abbas and as the accused was residing in two rooms of the property in question, consequently, there is no error in the attachment order. The learned court had gone to the extent of also saying that while passing of an order under the provision of Section 84 of the Code, the ownership and possession of the property is not be ascertained.

13. From the perusal of the aforesaid facts, it thus emerges that the orders under Section 82 & 83 of the Code have been passed in order to ensure the appearance of the son of the appellant. Section 83 of the Code on reproduction reads as under:

"Section 83. Attachment of property of person absconding:

*(1) The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, **belonging** to the proclaimed person.*

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the 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, it may order the attachment simultaneously with the issue of the proclamation.

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(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorize the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(a) By seizure; or

(b) By the appointment of a receiver; or

(c) By an order in writing prohibiting the delivery of such property to the proclaimed person or to anyone on his behalf; or

(d) By all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(a) By taking possession; or

(b) By the appointment of a receiver; or

(c) By an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or

(d) By all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide by the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908."

14. From the perusal of the provisions of Subsections (1) & (2) of Section 83 of the Code, it clearly emerges that the court while issuing a proclamation under Section 82 of the Code may, for reasons to be recorded in writing, at any time after issue of the proclamation, order of the attachment of any property movable or immovable, or both, **belonging to the proclaimed person.**

15. Thus from perusal of subsections (1) & (2) of Section 83 of

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the Code, it is apparent that it is the property which belongs to the proclaimed person which is to be attached.

16. From the objections as were raised by the appellant before the concerned court, it clearly emerges that the property in fact belongs to the appellant and not his son Faiz Abbas, the proclaimed person, consequently, it was in the fitness of things that this aspect of the matter should have been considered by the concerned court instead of rejecting the application on the ground that while deciding the application, the ownership or possession of the property is not required to be seen.

17. The aforesaid finding and reasoning is found patently perverse, more particularly, considering subsections (1) & (2) of Section 83 of the Code which clearly stipulates that it is only the property belonging to the proclaimed person which can be attached. Thus, the sine-qua-non to an order being passed under the provisions of Section 83 of the Code would be of a finding, may be prima facie, that the property for which the attachment order is being passed belongs to the accused person and consequently, without such finding, obviously, no such order could have been passed under the provision of Section 83 of the Code which in turn has been affirmed with the dismissal of the objections filed by the appellant.

18. It was also meaningless for the concerned court to have indicated that it was not the entire property which has been attached rather only two rooms were attached in which the accused was residing. Once, as already indicated above, it is only the property belonging to the proclaimed person which can be attached, consequently, there cannot be any occasion of attachment of the property in which the accused may be residing.

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19. To elaborate this fallacious reasoning of the concerned court, an example may be taken where a proclaimed person may be residing in rented premises. Mere residence of the proclaimed person in rented premises by no stretch of imagination or by operation of law can empower the concerned authority to seize or attach the rented property as the said rented property would not **belong to the proclaimed person.**

20. Here it would be pertinent to indicate as to what the Hon'ble Privy Council has laid down more than 8 decades ago in the case of **Nazir Ahmad Vs. King Emperor 1936 SCC OnLine PC 41** wherein the Privy Council has held as under:-

"that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

21. A three Judge Bench of the Hon'ble Supreme Court in the judgment reported as **Chandra Kishore Jha v. Mahavir Prasad & Ors. 10 1999 (8) SCC 266**, held as under:-

"17.....It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage: Nazir Ahmad v. King Emperor [(1935- 36) 63 IA 372 AIR 1936 PC 253 (II)], Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 1954 SCR 1098], State of U.P. v. Singhara Singh [AIR 1964 SC 358: (1964) 1 SCWR 57]). An election petition under the rules could only have been presented in the open court up to 16-5- 1995 till 4.15 p.m. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done..."

22. Similarly, the said principle as enunciated by the Privy Council in the case of **Nazir Ahmad (supra)** has been followed by the Hon'ble Supreme Court Court in **Cherukuri Mani Vs. Chief Secretary, Government of Andhra Pradesh & Ors. 2015 (13) SCC 722** wherein it was held as under:-

"14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed

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procedure....."

20. Keeping in view of the aforesaid discussion, the criminal appeal is **allowed**. The order dated 12.07.2023, a copy of which is annexure 3 to the appeal, as well as the attachment order dated 06.02.2023, a copy of which is part of annexure 4 to the appeal, are **set aside**.

21. Consequences to follow.

22. It is needless to mention that irrespective of the aforesaid order having been set aside, it would always be open for the authorities to proceed against the accused person namely Faiz Abbas in accordance with law.

Order Date :- 18.7.2024

S. Shivhare