
(1989) 12 AHC CK 0057

In the Allahabad High Court

Case No : Writ Petition No. 7673 of 1989 (H.C.)

Devi Bux Singh

APPELLANT

Vs

State of Uttar Pradesh and Another

RESPONDENT

Date of Decision : 02-12-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 209, 406
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 404

Citation : (1990) CriLJ 2141

Hon'ble Judges : S.S. Ahmad, J;S.N. Sahay, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

S.N. Sahay, J.—These two writ petitions for Habeas Corpus were allowed by us on 2-12-1989 after hearing the parties. We passed the following order:--

"For reasons to be recorded later, Writ petitions are allowed and the detention of the petitioners Arjun Singh and Devi Bux Singh in Crime Case No. 148 of 1988, under Sections 147/148/149/302 and 405 I.P.C. of P.S. Huzeorpur, District Bahraich, is set aside and the petitioners shall be released there under unless they are liable to be lawfully detained otherwise, leaving it open to the appropriate Court of competent jurisdiction to deal with the petitioners in accordance with law.

Copy of this order may be given to the petitioners today."

2. Now we proceed to record the reasons for the said order.

3. Devi Bux Singh has filed writ petition No. 7673 of 1989 (Habeas Corpus) on the allegations that he was sent to jail in connection with Crime No. 148 of 1988 of Police Station Huzeorpur, District Bahraich. The First Information Report was lodged by Mushtaq Ahmad on 28th December, 1988 at 1.30 p.m. The chargesheet was submitted against 13 persons including the petitioner in the Court of the Chief Judicial Magistrate, Bahraich on 21-3-1989. After submission

of the chargesheet, the Chief Judicial Magistrate, Bahraich, by order dated 30th March, 1989, remanded the petitioner till 14th April, 1989 in the custody of Superintendent, District Jail, Bahraich u/s 209, Code of Criminal procedure. Meanwhile the petitioner was sent to District Jail, Faizabad in connection with Crime No. 23 of 1989 u/s 3 of the U. P. Gangsters and Anti-social Activities (Prevention) Act, 1986, (hereinafter referred to as "the Act"). It is alleged that the petitioner was transferred without obtaining permission of the Chief Judicial Magistrate, Bahraich and he has not been remanded to custody after 14th April, 1989 in Crime No. 148 of 1988. It is further alleged that the petitioner has been released on bail in Crime No. 23 of 1989 u/s 3 of Act and has filed the bail bonds and release order has also been issued. On the basis of the above allegations, the petitioner has asserted that his detention after 18th April, 1989, in Crime No. 128 of 1988 is illegal. He has accordingly prayed for issue of writ of Habeas Corpus.

4. The counter affidavit which has been filed on behalf of the State of U. P. Opposite Party No. 1 in this case shows that crime No. 148 of 1988, was registered against the petitioner and 12 others in connection with murder of four persons belonging to the same family. During investigation of that case, a separate case No. 23 of 1989 was registered against Devi Bux Singh, Bhagwan Bux, Ram Sewak, Gangaram and Dularey u/s 3 of the Act at police station Hazoorpur, District Bahraich on 6th April, 1989. All the thirteen persons except one Pannoo Singh who were accused in crime No. 148 of 1988 were detained in District Jail, Bahraich. Hence, an application was moved by the Investigating Officer before the Munsif Magistrate Bahraich on 8th April, 1989 for remanding the five accused persons including the petitioner to judicial custody in Crime No. 23 of 1989. No order was passed on this application and 10th April, 1989 was fixed as date of hearing. On 10th April, 1989 also no order was passed for remand and 14th April, 1989 was fixed. Since Crime No. 23 of 1989 was to be tried by the Court of Special Judge, Faizabad, an application for remand dated 11th April, 1989 was moved in that Court and remand was given for sixty days. On 12th April 1989, the Senior Prosecuting Officer, Bahraich moved an application in the Court of the Chief Judicial Magistrate, Bahraich for transferring the accused persons in Crime No. 148 of 1988 and the record of the case to the Special Judge, Faizabad. Copy of this application has been filed as Annexure A-1, to the counter affidavit. This prayer was made on the ground that Crime No. 148 of 1988 was connected with Crime No. 23 of 1989 and was to be tried by Special Judge, Faizabad. On 20th April, 1989 the Special Judge, Faizabad sent a letter (Annexure A-2) directing the Chief Judicial Magistrate, Bahraich to send the record of Crime No. 148 of 1988, by 24th April, 1989. Meanwhile the case had been transferred to the Lower Criminal Court, Bahraich and after some correspondence, the record of Crime No. 148 of 1988 was received in the court of Special Judge, Faizabad on 3rd August, 1989. The date of hearing was fixed on 16 August, 1989. But, on that date, no order could be passed on account of the absence of the accused including the petitioner. However, on the next date of

hearing i.e. 16th August, 1989, order for remand was passed against the petitioner u/s 209, Cr. P.C. In Crime No. 148 of 1988 also. By this order four persons who were accused along with the petitioner in Crime No. 23 of 1989, were also remanded to custody in Crime No. 148 of 1988.

5. In the other writ petition No. 9158 of 1989 which has been filed by Arjun Singh, the allegations are that the petitioner was sent to jail in connection with Crime No. 148 of 1988 of Police Station Huzoorpur, Bahraich. He was remanded from time to time till 10th April, 1989. After submission of chargesheet on 30th March, 1989, Chief Judicial Magistrate, Bahraich remanded the petitioner to the custody of the Superintendent, District Jail, Bahraich, u/s 209 Cr. P.C. till 14th April, 1989. The petitioner was remanded to the judicial custody after 14th April, 1989 by the Chief Judicial Magistrate, Bahraich in Crime No. 148 of 1988. Meanwhile five of the co-accused in this case were transferred to District Jail, Faizabad in connection with a separate Crime No. 23 of 1989 u/s 3 of the Act. The case relating to Crime No. 23 of 1989 is pending in the court of Special Judge, Faizabad. The petitioner Arjun Singh is not an accused in this case. However, Special Judge, Faizabad summoned the file of Crime No. 148 of 1988 and has passed order of remand against the petitioner. It is stated that Special Judge, Faizabad has no jurisdiction to try the case arising out of Crime No. 148 of 1988 and to remand the petitioner. In view of these allegations the petitioner Arjun Singh has filed this petition for writ of Habeas Corpus. No counter-affidavit has been separately filed in this case. It has been argued being with writ petition filed by Devi Bux Singh and submissions have been made on the basis of counter affidavit filed in that case.

6. We have also summoned the record of case Crime No. 23 of 1989 and Criminal Case No. 800 of 1989 arising out of the case Crime No. 148 of 1988 and have perused the same,

7. The undisputed facts are that the petitioners Devi Bux Singh and Arjun Singh and 11 others are accused in case crime No. 148 of 1988 of Police Station Huzoorpur District Bahraich under Sections 147/148/ 149/302/404, I.P.C. Five of them, namely, Devi Bux Singh, Bhagwah Bux Singh, Ram Sewak Singh, Ganga Ram and Dulare are also accused in case crime No. 23 of 1989 u/s 3, U. P. Gangsters and Antisocial Activities Prevention Act, 1986 (hereinafter referred to as "the Act"), which is pending in the Court of Special Judge, Faizabad. In the first-mentioned case, charge-sheet dated 15th March, 1989 was submitted and thereupon Chief Judicial Magistrate, Bahraich took cognizance of the case. The case was registered as case No. 800 of 1989 and was transferred to lower Criminal Court by order dated 9th April, 1989. The accused persons including the petitioners, Devi Bux Singh and Arjun Singh, were remanded in that case from time to time by the Lower Criminal Court, Bahraich and the last order was passed by it on 28th July, 1989 remanding the accused persons to custody till 9th August, 1989.

8. On 11th April, 1989, Section P.O. Bahraich made an application to the Special

Judge, Faizabad stating that both the cases are connected and are to be tried by the Special Court. He, therefore, prayed that the record of case Crime No. 148 of 1988 may be requisitioned from the Court of Chief Judicial Magistrate, Bahraich. Upon this application, the learned Special Judge passed the following order dated 17th April, 1989 --

"Seen the record. Summon accordingly."

9. The requisition letter was duly sent by the Special Judge, Faizabad on 20th April, 1989. The record of Case No. 800 of 1989 arising out of Crime No. 148 of 1988 was sent by the Lower Criminal Court, Bahraich on 29th July, 1989 and was received in the Court of Special Judge Faizabad on 3rd August, 1989. The learned Special Judge fixed 9th August, 1989 for hearing and on that date adjourned the hearing to 16th August, 1989 on the request of the P. P. Bahraich. On 16th August the petitioners Arjun Singh and some other accused including Devi Bux Singh were not present. Consequently, the learned Special Judge passed the following order:--

"Put up on 11-9-89 for further proceedings. Let the accused present today in custody be sent to District Jail, Bahraich under proper warrant. Let custody warrant be issued against accused Devi Bux Singh and others, who are detained in Faizabad Jail. Let NBW be issued against accused Pannu Singh. Accused Krishna Deo alias Lal Ji and Bhim Singh shall be produced as assured on the said date." The case was again taken up on 11th August, 1989 and on that date the following order was passed :--

"Taken up.

Learned P. P. Bahraich and learned defence counsel both request that the case should be adjourned to 20-9-89 so that they could properly prepare them for argument and other proceeding. Put up on 28-9-89, for further proceeding. Let the accused confined in District Jail, Bahraich be put there under proper warrant. Let proper warrant be also issued in respect of accused Devi Bux Singh and others, who are confined in District Jail Faizabad. Let NBW be issued against accused Pannu Singh."

10. The further orders for remanding the accused persons including the petitioners Arjun Singh and Devi Bux Singh to judicial custody, were passed on 28th September, 1989, 6th October, 1989 and 10th November, 1989. Now the case is fixed for 8th December, 1989.

11. The learned counsel for the petitioners has urged that the learned Special Judge Faizabad has no jurisdiction to proceed in case crime No. 148 of 1988 and consequently, the petitioners are under illegal detention in pursuance of orders passed by him in that case. On the other hand, the learned Government Advocate has submitted that the learned Special Judge has jurisdiction u/s 8(1) of the Act to deal with the case and to order the petitioners to be lawfully detained in that case.

12. It is settled law that in habeas corpus proceedings, the Court is to have regard to the legality or otherwise of the detention at the time of the return or hearing (See B. R. Rao v. State of Orissa AIR 1971 SC 2297 (sic) Talib Hussain Vs. State of Jammu and Kashmir,

13. The U. P. Gangsters and Anti-social Activities Prevention Act, 1986, has been enacted to make special provisions for the prevention of and for coping with gangsters and anti-social activities and for matters connected therewith or identical thereto. Special Courts are established under the Act for a local area in the interest of speedy trial of offences under the act. The Special Court is presided over by a Judge to be appointed by the State Government with the concurrence of the Chief Justice. Sections 7 and 8 of the Act deal with the jurisdiction of the Special Court. It reads as-follows:--

"7. Jurisdiction of Special Courts-- (1) Notwithstanding anything contained in the Code, where a Special Court has been constituted for any local area, every offence punishable under any provision of this Act or any rule made thereunder shall be triable only by the Special Court within whose local jurisdiction it was committed whether before or after the constitution of such Special Court.

(2) All cases triable by a Special Court, which immediately before the constitution of such Special Court were pending before any court, shall on creation of such Special Court having jurisdiction over such cases, stand transferred to it. (3) Where it appears to any court in the course of any inquiry or trial in respect of any offence that the case is one which should be tried by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by the Special Court in accordance with the provisions of this Act.

Provided that it shall be lawful for the Special Court to act on the evidence, if any, recorded by the court in the case in the presence of the accused before the transfer of the case under this section;

Provided further that if the Special Court is of opinion, that further examination of any of the witnesses whose evidence is already recorded in the case is necessary in the interest of justice it may re-summon any such witness and after such further examination, cross-examination and re-examination, if any, as it may permit, the witness shall be discharged.

(4) The State Government may, if satisfied that it is necessary or expedient in the public interest so to do, transfer any case pending before a Special Court to another Special Court.

8. Power of Special Courts with respect to other Offences --

(1) When trying any offence punishable under this Act a Special Court may also try any other offence with which the accused may, under any other law for the time being in force, be charged at the same trial,

(2) If in the course of any trial under this Act of any offence, it is found that the accused has committed any other offence under this Act or any rule thereunder or under any other law, the Special Court may convict such person of such other offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof."

14. Section 10 deals with procedure and power of Special Courts. Sub-section (1) provides that a Special Court may take cognizance of any offence triable by it without the accused being committed to it for trial upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. Sub-section (4) provides that subject to the other provisions of this Act, a special court for the purpose of the trial of any offence have all the powers of a Court of Sessions and shall follow the procedure prescribed in the Code for the trial of warrant cases by the Magistrate. Sub-section (5) provides that subject to the other provisions of this Act every case transferred to a Special Court under Sub-section (3) of Section 7 shall be dealt with as if such case had been transferred u/s 406 of the Code to such Special Court. Sub-sections (2) and (3) of Section 10 are not relevant.

15. It will be seen that the Act has made a distinction between an offence punishable under the Act and other offences. In respect of the former, the Special Court has exclusive jurisdiction and the Special Court may take cognizance of every such offence upon receiving a complaint or police report directly and the case need not be committed to it. But no such provision has been made in respect of other offences. It follows that if there is any offence which is triable by a Court of Session, then the Special Court cannot take cognizance of such offence unless the case is committed to it as a Court of Session in accordance with law or if it has already been committed to the Court of Session, then it is transferred to the Special Court in accordance with law. It may be mentioned that by virtue of Section 2 (a) of the Act, Code means the Code of Criminal Procedure. The provisions of the Code are applicable to the proceedings under the Act and it is common knowledge that a Court of Session cannot take cognizance of the case unless the case is duly committed to it.

16. There is a special provision also in | Section 7 (3) of the Act for transfer of a case in | respect of other offences to the Special Court. Section 7(3) confers power on the Court in which the inquiry or trial is pending, to transfer the case to Special Court. If it appears to the Court in the course of inquiry or trial that the case is one which should be tried by a Special Court constituted under the Act for the area in which such case has arisen, then it shall transfer such case to the Special Court. The order of transfer which is passed u/s 7 (3) is a judicial order and is passed by the Court concerned the application of mind on being satisfied that the circumstances stated therein exist and cannot be passed under the directions of some one else including the Special Court. Moreover, there should be an order of transfer within the meaning of Section 406, Cr. P.C. and not a mere requisition for sending the record of a case. The last portion of the

provisions of Section 7(3) make it clear that the Special Court is clothed with jurisdiction to try and dispose of the case after transfer and not before transfer,

17. It is no doubt provided in Section 8(1) that the Special Court may also try any other offence with which the accused may under any other law for the time being in force be charged at the same trial. For invoking Section 8 (1) it is not enough that there is some offence with which the accused may be charged at the same trial. It is also necessary that the law should also enable the accused to be so charged at the same trial and to be tried along with the offence under the Act. The provisions of the Code of Criminal Procedure relating to joinder of charges and accused for purposes of trial, in respect of which no exception has been made under the Act, cannot be overlooked.

18. The facts which have come to light in the present case do not show that the Chief Judicial Magistrate or the Lower Criminal Court who has jurisdiction to proceed in the case arising out of Crime No. 148 of 1988 has transferred the case u/s 7(3) of the Act to the Court of Special Judge, Faizabad. The record of the case has been sent in compliance with a requisition sent therefore by the learned Special Judge. The requisition cannot amount to transfer of the case in the eye of law. The Special Judge has not passed any order that he has jurisdiction to try the case or that the accused persons can, at the same trial, be charged with and tried for the offences in that case along with accused persons in case Crime No. 23 of 1989 for offences under the Act. The case has not been committed or otherwise transferred in accordance with law to the Special Judge who exercises the powers of a Court of Session. The learned Special Judge has, therefore, no jurisdiction to proceed in the case arising out of Crime No. 148 of 1988 and in passing the impugned orders of detention against the petitioners, he has exercised jurisdiction not vested in him.

19. We have been referred to Writ Petition No. 8613 of 1988, Chakradhar Misra v. State of U. P. decided by a Division Bench of this Court on 20th September, 1989 in which it was held that cases pending in connection with the offences punishable in any other law may also be tried together with the case under the Act. This case is distinguishable inasmuch as the points raised in this case were not considered and decided in that case.

20. For the above reasons we have come to the conclusion that the detention of the petitioners in the case arising out of Crime No. 148 of 1988 in pursuance of the impugned orders passed by the learned Special Judge, Faizabad referred to above, is illegal and consequently, we were persuaded to pass the order dated 2nd December, 1989 reproduced above.