
(1992) 04 AHC CK 0050
In the Allahabad High Court

Ganesh Shanker Pandey & Others

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 24-04-1992

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 226
Criminal Procedure Code, 1973 (CrPC) — Section 482, 50

Citation : (1992) 04 AHC CK 0050

Hon'ble Judges : V.N. Mehrotra, J and H.N. Tilhari, J

Final Decision : Partly Allowed

Judgement

H.N. Tilhari, J.—This writ petition has been filed by Ganesh Shanker Pandey, M.L.C., Hari Shanker Tiwari, M.L.A. Markende Tewari alias Rajendra Tewari, Bheesham Shanker Tewari alias Kushal Tewari and Vinai Shanker Tewari for the following relief's:

?(a) a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the investigation against the petitioners on the basis of reports dated 9492, contained in annexures 1, 2 and 3 to the writ petition and also for quashing of the said reports.

(b) a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the opposite parties, not to investigate against the petitioners in pursuance of the reports dated 9492, annexures 1, 2 and 3 and not to arrest the petitioners in pursuance thereof.

(c) a writ of mandamus or a writ, order or direction in the nature of mandamus restraining the opposite parties from investigating any case or prosecution of petitioners on the basis of the reports dated 9492, contained in annexures 1, 2 and 3 to the writ petition.

(d) a writ of mandamus or an interim mandamus to command the opposite parties not to arrest the petitioners on the basis of the reports dated 9492, contained in annexures 1, 2 and 3 to the writ petition.

(e) any other appropriate writ, order or direction which this Hon'ble Court may deem just and necessary in the circumstances of the case; and to

(f) allow the aforesaid writ petition with costs.?

2. Relief no. 3 claimed in the writ petition is almost as is relief no. 2 by which it has also been sought that writ or order in the nature of mandamus be issued restraining the opposite parties from investigating any case or prosecution of petitioners on the basis of aforesaid annexures 1, 2 and 3 to the writ petition. Relief no. 4 in the writ petition is to the effect that a writ of mandamus or an interim mandamus be issued commanding the opposite parties not to arrest the petitioners on the basis of reports dated 9/9/92 contained in annexures 1, 2 and 3 to the writ petition and petitioners have further prayed for any other appropriate writ, order or direction being issued in the matter which the court deems fit and proper.

3. The petitioner's case, in the nutshell, has been that all the petitioners are members of the same family who are sought to be roped in by the opposite parties without any material against them and that they are not involved in any crime nor is there any report against them in pursuance of which any investigation can be made or petitioners can be arrested. The petitioners in this connection made a reference to the reports contained in annexures 1, 2 and 3 and alleged that they do not pertain to the petitioners. Annexure 1 to the writ petition is the report lodged by Shri R.P. Singh while report no. 2 is one made by Mukhtar Singh and annexure 3 is by Dharendra Kumar Singh. The reports contained in annexures 1, 2 and 3 relate to the occurrence alleged to have taken place on 9/9/92 at 1.45 P. M. as a perusal of annexures 1, 2 and 3 disclosed. Annexure 1 is the report made by Shri R.P. Singh, Kshetradhikari, Lucknow and the place of occurrence mentioned in it is Ashok Marg, Lucknow near Income Tax Office. Annexure 1 indicates that the informant who lodged the first information report has lodged it against Satya Narain Singh. According to the informant vide annexure 1, informant Shri R.P. Singh along with the Additional City Magistrate Shri Satendra Singh was on duty in Vidhan Bhawan on 9/9/92 and at that time i.e. in the afternoon of 9/9/92 Uday Pratap Singh came to him to inform that in front of the Income Tax Office at Ashok Marg the firing was being done by armed Badmashas (bad characters) in which some persons had been injured and thereupon at 1.45 P.M. Shri R.P. Singh and others, as mentioned in annexure 1, started for the place of occurrence and on reaching there he found that there was a good crowd in front of Income Tax Office as well as there was a scene of public running helter-skelter with nervousness. On reaching the spot, according to the informant, it was revealed to him that in connection with the railway contract there had been exchange of firing between the two intergang rivals in which two persons had been injured. It was also revealed by the public men who felt nervous that some bad elements with their arms had run away from the back side of the Income Tax Office compound and thereafter Shri R. P. Singh and his party went on the back side of the Care Takers' room situated in the premises

of Income Tax Office. It is also mentioned in the said report that the police party headed by Shri R.P. Singh which was subsequently joined by the Senior Superintendent of Police, Lucknow and Additional City Magistrate Shri Satendra Singh requested the persons hiding in the adjacent room to the Care Taker's room to surrender to the police party but instead of surrendering, one of the bad characters (culprits) hiding inside the room resorted to firing at the police party but the informant was saved. It is mentioned in the report that because of the courage and faithfulness, activeness, duty consciousness of Udai Pratap Singh, Shri R.P. Singh was saved and the bullet hit the wall. On having opened the door, it is mentioned in the report that one injured person was found who was putting on bullet proof jacket etc. and appeared to have already died. It is also mentioned that the police caught hold of one person who told his name to be Satya Narain Singh and who alleged himself to be shadow of the person who had already died, namely, Vikram Pratap Singh. The other report annexure2 is by Mukhtar Singh. It is in this report it was disclosed that on 9492 at about 1.45 P. M. informant Mukhtar Singh is alleged to have stated that Vikram Pratap Singh, Ugrasen Singh, Ashutosh Gautam, Pisa Ram and Vikram Pratap Singh's shadow while going to North Eastern Railway Office to offer their tenders, in front of the office on the road attacked with bombs and bullets on the informant Mukhtar Singh and his party and damaged the car and in that Ugrasen Singh and the informant were injured and as a consequence of the incident the public started running helter-skelter and the police came on the spot and the culprits ran away, thereafter injured Ugrasen Singh and Mukhtar Singh were taken to the hospital. In annexure3 it was mentioned that on 9492 the informant constable Rama Kant Tripathi, S.I. Sadhu Ram and constable Ram Lakhan had gone to Divisional Railway Manager's Office on duty to maintain peace and order there i.e. in D.R.M.'s Office where tenders have to be made and at 2 O'clock on having heard the noise of bomb blast the informant along with his party ran towards the direction from which the noise of bomb blast was coming and then, there he saw the Tata Mobile Car number mentioned in annexure3 as well as Maruti Car Standing there. The Tata Mobile car, it is mentioned in the report that its back portion was damaged and by making use of that car deceased Vikram Pratap Singh and his shadow Satya Narain Singh (who had been arrested during police encounter) and their 56 associates had stated in that car and they were firing and throwing bombs with intention to kill the persons and the other party was also firing on them. The police having immediately recognised the deceased Vikram Pratap Singh as well as shadow Satya Narain Singh who was having revolver but their associates had run away after having left their arms. It is mentioned in the report that the occurrence has created an atmosphere of fear and terror and the shops had been closed. The learned counsel for the petitioners referring to these reports contained in annexures1, 2 and 3 placed the petitioners' case that these reports do not show any connection of the petitioners' with the occurrence nor were the petitioners named anywhere in these reports. The petitioners in this writ petition have alleged that on account of prevailing political set up as alleged in the writ petition and on account of the

political maneuvering which the petitioners have alleged in the writ petition, his entire family is sought to be roped in, even without there being any material against them and in paragraph 10 of the petition the petitioners have stated:

?The petitioners submit that in the guise of political animosity the image of the petitioners is sought to be tarnished. Petitioners 1 and 2 claim to be nominees of Congress (1) Party and alleged to be relations as MamaBhanje i.e. petitioner no. 1 is sister's son of petitioner no. 2 while petitioners 4 and 5 are alleged to be cousin brother of petitioner no. 2.

4. The petitioners in paragraph 13 have stated that the police party apprehended a close relation of the petitioners, namely, Surendra Tewari on 11492 at about 6 P.M. and after apprehension and arrest he was taken to the police station Alambagh by one Raja Ram Pal and is alleged in the petition to have been beaten up mercilessly in the police lock U.P. The petitioners' case is that in none of the reports any implication of Surendra Tewari has been done but he was meted by the police as mentioned earlier and so the petitioners apprehend that they might also be subjected to similar treatment by the police authorities in the context of political animosity in order to tarnish the petitioners' image in spite of the fact that there is absolutely no involvement of the petitioners in the alleged shoot out dated 9492. The petitioners case is that there is no material in the annexure; referred to above nor otherwise to suggest the involvement of the petitioners in the said crime and soon account of the facts and circumstances narrated in the writ petition and in order to seek protection of their rights of personal liberty and protection from being illegally arrested which respondents are bent upon to make in order to harass the petitioner, the petitioners have filed this petition under Article 226 of the Constitution of . India. It may be mentioned here that before filing this petition the petitioners have alleged, had filed a writ petition but in the circumstances narrated in paragraph 16 of the writ petition and instead moving the amendment application to that writ petition the petitioners filed the present petition and getting the earlier petition withdrawn. The petitioners have claimed that petitioners have got the fundamental right of personal liberty enshrined in Article 21 of the Constitution and the same cannot be deprived of except by authority of law and there being no justification to make investigation or arrest of the petitioners in pursuance of reports annexure 1, 2 and 3. The petitioners are claimed to be entitled to seek the relief's mentioned in the writ petition in order to seek protection of the fundamental right of personal liberty from violation thereof or interference or intervention, in any manner with the same from any quarter on the basis and in the context of the occurrence reported vide annexures 15 2 and 3 in which their names do not at all find place.

5. Notice of this petition has been received by the learned Chief Standing Counsel. Shri Bireshwar Nath, learned Government Advocate as well as Shri Jagdish Bhalla, learned Addl. Chief Standing Counsel have put in appearance on behalf of opposite parties. We have heard learned counsel for the petitioners i.e. Shri Umesh Chandra, learned Senior Advocate, as well as Shri Bireshwar Nath,

learned Government Advocate and Shri Jagdish Bhalla, learned Addl. Chief Standing Counsel, on behalf of the State and the authorities and have gone through the record and the papers placed by the learned Standing Counsel on behalf of the State for our perusal. The learned Addl. Chief Standing Counsel as well as the learned Government Advocate submitted that the material available at this stage requires not to be disclosed to petitioners or public in the interest of process of investigation and progress of investigation and on account of the fact that the investigation is going on and is in progress, so at this stage we do not think it just & proper to discuss the same or proceed on the basis of the same as it may result in the disclosure of the same on one hand and on the other hand it may be acting on something on the basis of something not disclosed to petitioners. The main contention on behalf of the petitioners has been that in the first information reports contained in annexures 1, 2 and 3 there is no reference at all of the petitioners nor these reports indicate or show any involvement of the petitioners in the occurrence dated 9492 in any manner, and when these documents i.e. first information reports do not, in any manner reveal, indicate or disclose any involvement or any concern of the petitioners with the occurrence in question dated 9492 in which Vikram Pratap Singh had lost his life at the hands of some assailants or some persons, there is no ground and there is no reason and there is no justification for any investigation being made against the petitioners nor is there any justification or reason for the petitioners being arrested but on account of political animosity and on account of petitioners belonging to different political group or party in order to tarnish the image of the petitioners the game is being played to falsely implicate as well as to get the petitioners arrested and to get their image tarnished as well as to deprive the petitioners of his life full of status and to deprive him of his personal liberty one way or the other and so the petitioners have come to take the protection and shelter of the court in the form of writ, order or direction sought in the petition. Learned counsel for the petitioners placed main emphasis on the contents of annexures 1, 2 and 3 in which the learned counsel for the petitioners contended that the petitioners have neither been named nor in any manner said to have been involved and so the petitioner's counsel submitted petitioners to be entitled to seek the protection of the court for their fundamental right of life and liberty. On behalf of the State it was contended that the petition is not maintainable at this stage as the petitioners have neither been arrested and further the relief sought against investigation i.e. quashing of investigation or mandamus directing them not to investigate in pursuance of the reports annexures 1, 2 and 3 as well as not to arrest the petitioners in pursuance thereof. The learned counsel appearing on behalf of the State have invited our attention to the provisions of Sections 154 to 173 contained in Chapter XII of the Code of Criminal Procedure under the head 'information to police & their power to investigate' indicating the process from the stage of information of cognizable offence and investigation and contended that the first information reports having been made to the police, it is the duty of the police to investigate into cognizable offence even without obtaining sanction of the Magistrate and the court should not interfere with the

investigation. He further contended that in view of the provisions of Sections 154 and 156 the police has a statutory right and duty to investigate the cognizable offence, and, as such the petitioners are not entitled to file this petition to seek the relief claimed in the writ petition. It was further contended that investigations are disclosing and providing material which may lead to indicate involvement or concern of the petitioners with the occurrence in question irrespective of the fact that at the stage of filing the first information report, annexures 1, 2 and 3 those facts were not in the notice of the first informant and there is no mention of the petitioners name in the first information reports but if the facts and material coming during the course of investigation indicating the involvement or concern or may indicate reasonable suspicion of the petitioner's involvement the opposite parties are entitled to apprehend and to arrest in course of investigation and he placed emphasis on Section 157(1) of the Code of Criminal Procedure (hereinafter shall be referred to as Code) and in particular the expression to take measure of discovery and arrest offenders used in Section 157 (1) of the Code and the learned State Counsel emphasised that as the investigation are in progress it may not be in the public interest to disclose the material at this stage though the court may have a glance.

6. As regards the question of maintainability of the writ petition under Article 226 of the Constitution of India at the stage i.e. pre violation protection i.e. as regards the maintainability of the writ petition for protection of fundamental right under Article 226 of the Constitution of India from its threatened or imminent violation on the ground that until the right of the petitioners are violated by their arrest the petition is not maintainable seeking protection of the right from threat or imminent violation. It is just and proper that we may have a glance to the material portion of Article 226 of the Constitution of India. Clause (1) of Art. 226 reads as under:

226(1) Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases, any Government, within these territories directions, orders or writs, including the writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

Two material expressions used are to be noted, the expressions are for 'the enforcement of any right' and other is 'for any other purpose.' The word enforcement has been defined in Black's Law Dictionary V edition at page 474 as under:

'Enforcement The act of putting something such as a law into effect, the execution of a law, the carrying out of a mandate or command.'

7. The expression 'enforce' in the same dictionary at page 474 has been defined to mean 'to enforce a law to cause to take effect or to make to effective as law,

to compel obedience to law. The expression enforcement when, in the context of rights conferred by Part III of the constitution is considered it means that resort to Article 226 of the Constitution can be had and it has been provided for the enforcement and protection of one or any one of the fundamental rights provided in Part III of the Constitution. Here in the present case under Articles 21 or 22 of the Constitution the petitioners are entitled to file the writ petition to compel the obedience to law and observance of law as contained under Articles 21 and 22 of the Constitution. Article 21 of the Constitution of India provides and reads as under:

?21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.?

8. Article 22 of the Constitution appears to be supplementary to Article 21. It provides for protection against arrest and detention in certain cases, it reads as under:

?22(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of the Magistrate.?

9. The Conferring of the right to life and liberty imposes a corresponding duty on the rest of the society including the State to observe that right i.e. to say not to do act or to anything which would mean infringement of that right except in accordance with the procedure prescribed by law. Enforcement means imposing and compelling the obedience of law as well as compelling the observance of law and so when there is a threat to such a right of a person to be violated or its violation is imminent i.e. when a person apprehends or feels threatened of his right of personal liberty conferred on him by Article 21 of the Constitution being infringed by the act of the State or its authorities then he is entitled to approach this court for the enforcement of that right i.e. to ask the court to issue direction to the State and State authorities to observe his right i.e. to observe the letters and spirit of law while performing the job i.e. in case of persona liberty the State or its authorities should not deprive the person concerned of his life or personal liberty except in accordance with the procedure established by law and the provisions of the Constitution and he can seek an order or direction for that purpose directing the State and its authorities not to interfere with his personal liberty or with his life except in accordance with and according to the procedure established by law including Art. 22 of the Constitution which provides that no person who is arrested shall be detained in custody without being informed of

the grounds for such arrest at the earliest possible and such arrested person has also not to denied the right to consult or to be defended by a legal practitioner of his choice. The protection of the right is to be differentiated from its restoration by remedial process after violation thereof. If a threatened invasion of the right is removed by restraining the potential violator from taking steps towards violation, the right remains protected and if the State authorities are directed not to interfere with the liberty except in accordance with the procedure established by law, it is nothing but enforcement of the right i.e. it is nothing but compelling the authorities to obey, to compel the authorities to observe law. So the previolation protection is nothing but compelling the obligation and compelling the observance of law not to infringe the right at all as well as not to act in breach of the right that is contained in Article 21 of the Constitution.

10. As such, the writ petition in case of threatened or imminent danger of violation of right is maintainable, when we so express we find support from the observation of their Lordships of the Supreme Court in the case of *S.M.D. Kiran Pasha v. Government of Andhra Pradesh and others*, reported in (1990) 1 Supreme Court Cases 328. The material observations in this regard are contained in paragraph 14 of the judgment which reads as under:

?Article 21 giving protection of life and personal liberty provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. For enforcement of one's right to life and personal liberty report to Article 226 (1) has thus been provided for. What is the ambit of enforcement of the right? The word "enforcement" has been used in Article 32 of the Constitution which provides the remedy for enforcement of rights conferred by Part III of the Constitution. The word "enforcement" has not been defined by the Constitution. According to Collins English Dictionary to enforce means to ensure observance of or obedience to a law, decision etc. Enforcement, according to Webster's Comprehensive Dictionary, means the act of enforcing, or the state of being enforced, compulsory execution compulsion. Enforce means to compel obedience to law; to compel performance, obedience by physical or moral force. If enforcement means to impose or compel obedience to law or to compel observance of law, we have to see what it does precisely mean. The right to life and personal liberty has been guaranteed as a fundamental right and for its enforcement one could resort to Article 226 of the Constitution for issuance of appropriate writ, order or direction. Precisely at what stage resort to Article 226 has been envisaged in the Constitution? When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State, to observe that right, that is to say, not to act or do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law. In other words, conferring the right on a citizen involves the compulsion on the rest of the society, including the State, not to infringe that right. The question is at what stage the right can be enforced? Does a citizen have to wait till the right is infringed? Is there no way of enforcement of

the right before it is actually infringed? Can the obligation or compulsion on the part of the State to observe the right be made effective only after the right is violated or in other words can there be enforcement of a right to life and personal liberty before it is actually infringed? What remedy will be left to a person when his right to life is violated? When a right is yet to be violated, but is threatened to violation can the citizen move the court for protection of the right? The protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty guaranteed and the rest of the society, including the State, is compelled or obliged not to violate that right, and if some one has threatened to violate it or its violation is imminent, and person whose right is so threatened or its violation so imminent resorts to Article 226 of the Constitution, could not the court protect observance of his right by restraining those who threatened to violate it until the court examines the legality of the action? Resort to Article 226 after the right to personal liberty is already violated is different from the previolation protection. Postviolation resort to Art. 226 is for remedy against violation and for restoration of the right, while previolation protection is by compelling observance, of the obligation or compulsion under law not to infringe the right by all those who are so obliged or compelled. To surrender and apply for a writ of habeas corpus is a postviolation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. The question may arise what precisely may amount to threat or imminence of violation. Law surely cannot take action for internal thoughts but can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with that violation and he approaches the court under Article 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus? In the instant case when the writ petition was pending in court and the appellant's right to personal liberty happened to be violated by taking him into custody in preventive detention, though he was released after four days, but could be taken into custody again, would it be proper for the court to reject the earlier writ petition and tell him that his petition has become in fructuous and he had no alternative but to surrender and then petition for a writ of habeas corpus? The difference of the two situations, as we have seen, have different legal significance. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right.?

11. In the State of Haryana v. Ch. Bhajan Lal, reported in (1991 All. Criminal

Cases III) the Hon'ble Supreme Court while dealing with the question of exercise of powers, exercise of extraordinary powers, under Article 226 of the Constitution or under inherent powers under Section 482 of the Code have formulated certain guidelines when the High Court can exercise those powers vested in it either under Article 226 of the Constitution or under Section 482 of the Code in the matter of quashing the first information report or investigation and material portion in this regard reads as under:

In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently canalised and inflexible guidelines or rigid formula and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
2. Where the allegations in the First information Report and other materials if any, accompanying the F.I.R. do not disclose a cognizable offence justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of section 155(2) of the Code.
3. Where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and made out a case against the accused.
4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a noncognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
5. Where the allegations made in the F.I.R. or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceedings is instituted) to the institution and continuance of the proceedings and/or where there is a specific provisions in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for

wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.?

12. These observations definitely show that the petition is maintainable under Article 226 of the Constitution. It is another thing that power of quashing criminal proceedings should be exercised very sparingly and with circum inspection and that too in the rarest of rare case. But it is no doubt true that the petition is maintainable under Article 226 of the Constitution even at the stage which may be called previolation stage and that the previolation stage under Article 226 of the Constitution the guarantee of protection is by compelling the observance of the obligation or compulsion of law.

13. As regards the present case the allegations made in the first information report, no doubt constitute a cognizable offence having been committed by some unknown culprits and the law does cast a duty under the provisions of Section 154, 156 and 157 of the Code on the police officer or officer in charge of the police station to record it and to investigate the same and to find out the offenders or culprits, so as regards investigation with reference to occurrence referred to in annexure 1, 2 and 3 by the police authorities i.e. their duty which the police authorities are performing which they are ordained to perform under the provisions of the Code after having received the information in that regard. But as regards the petitioners and their right not to be deprived of their fundamental right of personal liberty enshrined under Article 21 of the Constitution, the petitioners have got a right to approach this Court under Article 226 of the Constitution and the enforcement of that right has got to be made under Article 226 of the Constitution, if there is an apprehension or imminent danger of the same being violated. Article 21 of the Constitution ordains that no person shall be deprived of his life and personal liberty except according to procedure established by law, as such, a reference can be made and need be made to the material provisions of the Code of Criminal Procedure. Section 41 contained in Chapter V of the Code provides as when a police officer may arrest a person without warrant. Section 50 of the Code provides every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest. Clause (2) provides that where a police officer arrests without warrant any person other than a person accused of a nonbailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf. Section 49 is also material which says the person arrested shall not be subjected to more restraint than is necessary to prevent his escape. The expression used in Section 157 of the Code which provides that the Officer in charge of the police station shall..... or shall depute one of his subordinate officers.....not below such rank as the State may by general or special order provide in this behalf to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for discovery and arrest of the offender. The expression to proceed to take measures for arrest of the offender has got to be read in conjunction and

subject to what is provided in Section 41 and Section 50 of the Code. As we have said, the protection to the fundamental right under Article 21 can be afforded by enforcing the mandate of law contained under Article 21 of the Constitution and in case of threatened violation it is open to this Court to grant the appropriate relief to the petitioners and i.e. that the petitioners shall not be deprived of their liberty by arrest or otherwise by the opposite parties except in accordance with the letters and spirit of the provisions of Articles 21 and 22 of the Constitution i.e. supply all the grounds and Section 41 as well as Section 50 of the Code i.e. Section 41(1)(a) provides that the police may, without an order from a Magistrate and without a warrant, arrest any person who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists, of his having been so concerned. There is no doubt that in the first information report no role has been assigned to the petitioners nor their names do at all find place nor the first information reports indicate their involvement, as such, it is not open to the opposite parties to arrest the petitioners or to interfere with their liberty until and unless investigation with reference to the occurrence of 9492 reveal or disclose the involvement or the facts coming in course of investigation on the conclusion of the investigation reveal or give rise to reasonable suspicion of petitioners having been so concerned with the occurrence or the incident of 9492, it may be open to the opposite parties to take process for arrest of the petitioners after having complied with the requirements of law as referred to above and contained in Sections 41, 49 or 50 of the Code. Out till any such material comes into picture providing a ground for arrest and the police take measures for arrest, it is not open to the opposite parties to interfere with the liberty of the petitioner.

14. The provisions of Section 49 of the Code clearly indicate the purpose of arrest to be nothing else but to prevent the escape of the person concerned from facing trial if he is disclosed either by first information report or by facts and material coming during the course of investigation and reveal the concern of the person concerned with the alleged cognizable offence subject matter of investigation and this indicates that the restraints are put or the purpose of arrest is prevention of escape.

15. The use of expression 'shall forthwith communicate to him full particulars' in Section 50 of the Code and in particular expression 'forthwith' makes it mandatory on the part of police officer making the arrest, to simultaneously or immediately with the arrest communicate to the person concerned the full particulars of offence for which he is arrested or other grounds for such arrest. The expression forthwith means immediately and without delay, it means promptly. This being considered in the context of expression to take measures for discovery and arrest of offender leads to conclusion that measures required to be taken under the provisions of the Code in the matter of and concerning with the process of arrest have to be taken before the police authority completes the process of arrest i.e. in the context of Section 50 of the Code it is to be read

with what is required to be done in the earlier under Section 50 of the Code as to supplying of the particulars of offence for which arrest is being made or other grounds for arrest, the police officer when the facts come to their knowledge either through the first information report or if not on the basis of first information report but the facts and material as alleged to have come during the course of investigation against a particular person then the police authority has in the first instance to take steps of collecting material or particulars relating thereto in order to supply the same while making arrest i.e. to say simultaneously with the arrest of the person or immediately at the time the arrest is made.

16. With reference to the matter of grant of relief, the learned counsel representing the State submitted that if this Court grants the relief to the effect that petitioners be not arrested till the investigation and materials collected during investigation disclose the involvement of the petitioners in the occurrence or offence concerned and if the relief is granted restraining the State Police Officer and directing not to arrest the petitioners and making provision even to the effect that petitioners be not arrested subject to the conditions that the petitioners submit an undertaking & bond declaring that they shall make themselves available for interrogation by a police officer as and when required: that they shall not directly or indirectly interfere with the investigation by inducing or by threatening or the like to the persons acquainted with the facts of the case so as to dissuade him from disclosing the facts to the court and any police officer and further that the petitioners will not abscond as well as will not leave India without previous permission of the court and the like as prayed for and requested by the counsel for the petitioners Shri Umesh Chandra, a learned Senior Advocate, it will be tantamount to granting the same thing like the grant of bail to a person apprehending arrest and although the Parliament incorporated Section 438 i.e. the provision of anticipatory bail but the State having deleted the said provision, the same may not be granted as it may go against the intent of the State Legislature. We have considered this argument of the learned counsel for the State. It is to be taken note of that State Legislature has not made any provision to the effect that in the State of U.P. no anticipatory bail or no release or no direction restraining the arrest of a person can be issued in respect of a person apprehending interference with his liberty by arrest subject to like conditions as might be mentioned in Section 438 of the Code, it cannot be submitted that the State Legislature has put a bar against the consideration of the matter of a person apprehending the violation of his fundamental right of personal liberty otherwise than in accordance with law by arrest. It is the jurisdiction of this Court under the provisions of Art. 226 of the Constitution to issue direction to opposite parties not to arrest the petitioners and putting the petitioners to terms as indicated above or as indicated by the Parliament in Section 438 of the Code, is not a bar. Putting the petitioners to such terms at one hand and directing the opposite parties not to interfere with the liberty of the person concerned may be a previolatory measure to protect fundamental right of

liberty on one hand and on the other hand to see and to provide that person apprehended or in respect of whom some reasonable suspicion might arise on the collection of facts during investigation may not escape to face interrogation or trial as and when needed in connection with an occurrence. It is in consonance with what we have stated earlier that it is open to a person to approach this Court under Article 226 of the Constitution at pre-arrest stage of his fundamental rights and it comes within the jurisdiction and power of this Court under Article 226 of the Constitution to pass suitable order and directions keeping pace with the facts of the case as well as keeping in view on one hand the fundamental right of personal liberty and on the other hand the progress without obstruction of the process of investigation and trial in accordance with law without permitting the person concerned to escape or interfere in any manner with the investigation. It may not be just and proper that he may be asked to wait for and to go to the subordinate court for surrendering and then seeking the bail first before the Magistrate and then on rejection by the Magistrate to approach the Session Court for the same and to leave him at the mercy of the State and the subordinate court simply for ritual particularly when the fundamental rights on one hand have got their important place along with the rule of law, and, as such, it is a fit case for issuing the direction as under.

17. Thus considering the facts and circumstances of the case, we find that the petitioners are not entitled to get the relief Nos. 1, 2 and 3 mentioned in the writ petition. As regards the fourth relief which is couched in very wider terms and which is to the effect:

to issue a writ of mandamus or an interim mandamus to command the opposite parties not to arrest the petitioners on the basis of the reports dated 9/4/92 contained in Annexures 1, 2 and 3 to the writ petition.

It is well settled that if relief is couched in wider and larger sense or is couched in wider and larger terms and scope, it is open to the court to grant a person lesser relief, if the same can be granted in the facts and circumstances of the case, and, as such, we propose to grant them the lesser relief.

18. We hereby provide & direct by way of order in the nature of writ of mandamus that the petitioners shall not be arrested and their personal liberty shall not be interfered with by the opposite parties provided the petitioners furnish a personal bond worth Rs. 15000 before the Sessions Judge concerned in writing and two sureties of the value of Rs. 15000 each separately within a period of ten days from today and also an undertaking in writing declaring that they shall make themselves available for interrogation by a police officer as and when required as well as to face the trial if at any stage it is needed and that the petitioners will not directly or indirectly interfere with the investigation in any manner either by inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade from disclosing such facts to the court or to the police officer making investigation and further that they shall not abscond or leave India without previous permission of the Court.

19. The petition is thus disposed of and is dismissed as regards relief nos. 1, 2 and 3 as mentioned above and is allowed with respect to relief no. 4 in part by issuing a writ of mandamus of that nature as mentioned above.

Sd H.N. Tilhari

Jagree

Sd V.N. Mehrotra

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20. After we have delivered the judgment learned counsel for the petitioners as well as State Counsel prayed for that the office may be directed to furnish electrostate certified copy of the judgment, if possible within 24 hours. They may apply and furnish the cost and on furnishing cost it may be supplied within 24 hours.

Sd V.N. Mehrotra

Sd H.N. Tilhari

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21. After the judgment was pronounced the learned Government Advocate orally prayed for that this court may certify that the case is fit for appeal to the Supreme Court of India. We have put a query on what ground the learned Government Advocate prays for certificate of fitness for appeal to Supreme Court of India, the learned Government Advocate submitted, as this Court has rejected relief nos. 1, 2 and 3 in which the petitioners have sought for the quashing of the first information report and the quashing of the investigation etc. the fourth relief of direction not to violate the fundamental right of personal liberty of petitioners enshrined in Article 21 of the Constitution, which has been granted subject to certain conditions mentioned in the order, could not have been granted and he says that it amounts to interference in the investigation. We have considered this question. It has not been brought on record that the petitioners are required in the case and there is nothing on the record at this stage which may be said to indicate the involvement of the petitioners and that in our order we have taken care that neither investigations are interfered with by the petitioners in any manner nor do petitioners escape in case of need for interrogation or trial if required while passing the order and disposing of the writ petition and securing enforcement of fundamental right of petitioners. Thus considering, we find that there is no substantial question of law much less substantial question of law of public importance involved, so the State cannot be granted certificate of fitness under Article 134A of the Constitution of India.

22. The oral prayer for certificate of fitness for appeal to Supreme Court is rejected and certificate prayed for is refused.

Sd V.N. Mehrotra

Sd H.N. Tilhari

2441992

(Petition partly allowed.)