
(2024) 06 GAU CK 1545

In the Gauhati High Court

Case No : Crl.Pet. Of 1105 Of 2023, Connected With Crl.Pet. Of 1108 Of 2023

Jahidul Islam And 2 Ors

APPELLANT

Vs

State Of Assam And 3 Others

RESPONDENT

Date of Decision : 28-06-2024

Acts Referred:

Unlawful Activities (Prevention) Act, 1967 — Section 10, 13, 18, 35, 45
Indian Penal Code, 1860 — Section 120(B), 121, 121(A)
Code of Criminal Procedure, 1973 — Section 465(2)

Citation : (2024) 06 GAU CK 1545

Hon'ble Judges : Arun Dev Choudhury, J

Bench : Single Bench

Advocate : S. Borthakur, D. Nath, R. K. D. Choudhury

Final Decision : Disposed Of

Judgement

Arun Dev Choudhury, J

1. Heard Mr. S. Borthakur, learned counsel for the petitioners. Also heard Mr. D. Nath, learned Senior Government Advocate appearing for the State respondent and Mr. R. K. D. Choudhury, learned Dy.SGI, appearing on behalf of the Union of India.

2. These two criminal petitions are taken up together for final hearing as the learned counsels for the parties urged that the cause of action and the challenge made in these two petitions arise out of same cause of action i.e. challenge to the proceedings under Unlawful Activities (Prevention) Act, 1967 (for short UA(P)Act, 1967) for want of sanction under Section 45 of the UA(P)Act. 1967 registered as Sessions Case No. 125/2023 arising out of Barpeta P.S. Case No. 175/2023 under Sections 120(B)/121/121-A of the IPC read with Section 10/13/18 of UA(P) Act, 1967 pending in the Court of learned Sessions Judge, Barpeta. The further challenge is order dated 13.09.2023 passed by learned Sessions Judge Barpeta, whereby Charges under section 10/13/18 of UA(P) Act, 1967, were framed against the petitioners.

3. Contentions of the petitioners:

Mr. Borthakur, learned counsel for the petitioners assailing the aforesaid order and the entire proceedings, argues the following:-

I. Sanction under Section 45 (1) of the UA(P) Act, 1967 is a sine qua non for prosecution. In absence of a valid sanction, the entire proceeding shall be vitiated and in the case in hand, admittedly, there is no sanction as mandated under Section 45(1) of the UA(P) Act, 1967 prior to the order of cognizance.

II. By referring to the charge sheet, Mr. Borthakur, learned counsel argues that the investigating authority admittedly recorded in its charge sheet that on the date of filing of the charge sheet, there was no sanction under Section 45(2) of the UA(P), Act, 1967.

III. Even on the date of cognizance, no such sanction was made available. That being the position, Mr. Borthakur, learned counsel for the petitioners submits that the entire proceeding is liable to be struck down.

IV. Mr. Borthakur, learned counsel further contends that not only a sanction is necessary but such sanction must also be a valid sanction and such sanction should be granted as per procedure laid down under Rule 3 and 4 of the UA(P) (Recommendation and Sanction of Prosecution) Rules, 2008 (hereinafter referred to as Rules, 2008).

V. According to Mr. Borthakur, learned counsel, there was no sanction for the period from the month of June, 2023 till the month of October 2023. Sanction was granted post cognizance and post framing of charge and therefore, the mandatory provision of Rule 3 and 4 of the Rules, 2008 has been infringed and accordingly, the entire proceeding is vitiated. In support of this contention, Mr. Borthakur, learned counsel submits that the Hon'ble Apex Court dealing with a pari materia provision under TADA Act, in the case of Rambhai Nathabhai Gadhi and Others -VS- State of Gujarat reported in (1997) 7 SCC 744, held that valid prosecution sanction as per the Act is a sine qua non and in absence of it, the entire proceeding shall be vitiated. According to Mr. Borthakur, learned counsel, sanction beyond the mandatory period prescribed under Rule 3 and 4 of the Rules, 2008 vitiated the sanction itself.

VI. Mr. Borthakur, learned counsel further contends that the mandate of Section 465(2) of the Cr.P.C. cannot be made applicable in the case of a special Act, like the present one, when a specific provision for sanction pre cognizance has been mandated and therefore, such provision cannot cure the defect made by the authorities in not granting the prosecution sanction.

VII. Learned counsel further contends that in absence of such sanction, the cognizance taken by the learned Magistrate is no cognizance in the eye of law and therefore, all other subsequent proceedings, including the order of framing charge, are inconsequential. In support of his contention, Mr. Borthakur, learned counsel relies on the judgment of the Hon'ble Apex Court in the case of Ashraf

Khan Alias Babu Munnekhan

Pathan and Another –Vs- State of Gujrat reported in (2012) 11 SCC 606.

VIII. Mr. Borthakur, learned counsel further contends that want of sanction is a fundamental defect and when there is a fundamental defect, the entire proceeding is liable to be quashed. In support of such contention, Mr. Borthakur, learned counsel relies on the decision of the Hon'ble Apex Court in the case of Smt. Nagawwa –Vs- Veeranna Shivalingappa Konjalgi & Ors reported in (1976) 3 SCC 736.

IX. The charge sheet was filed on 06.07.2023 and the sanction was granted on 13.10.2023 and therefore, there was unreasonable delay on both count, while forwarding the material gathered for sanction as well as in granting the sanction and such delay has vitiated the order of sanction itself inasmuch as such delayed sanction is not a valid sanction in the eyes of law and therefore, is illegal

4. Contention of the respondent/State:-

Mr. D. Nath, learned Senior Government Advocate defending the prosecution argues the following:-

I. Though initially, there was no sanction under Section 45 (2) of the UA(P) Act, 1967, however, such sanction was granted by the competent authority on 13.10.2023. Referring to the record, Mr. Nath, learned Senior Government Advocate submits that the matter was placed before the Independent Review Committee on 11.10.2023 and the Committee made the recommendation for sanction on 12.10.2023. Thereafter, the competent authority, after due application of mind, granted sanction on 13.10.2023 and therefore, there is a valid sanction under Section 45(2) of the UA(P) Act, 1967. However, Mr. D. Nath, learned Senior Government Advocate, in his usual fairness submits that as on the date of taking cognizance and also on the date of framing of charges, the sanction was not there, however, the learned counsel, referring to the judgment of the Hon'ble Apex Court in the case of State of Goa –VS- Babu Thomas reported in (2005) 8 SCC 130, submits that the parties should be relegated to a position where the competent Court can take a decision to take cognizance of the offences.

II. Mr. Nath, learned Senior Government Advocate further contends that the legislature, in its wisdom, has not prescribed any time frame for the investigating authority in placing the matter before the Independent Review Committee and therefore, this Court may not like to read something to the rule, when the legislature in its wisdom has not prescribed it.

III. Countering the argument of Mr. Borthakur, on the point of delay in grant of sanction, Mr. Nath, learned Senior Government Advocate argues that though sanction was granted at the later stage, the same was granted in strict adherence of the time prescribed under Rule 3 and 4 of the Rules, 2008 inasmuch as the matter was placed before the Independent Review Committee

on 11.10.2023 and the said Committee made its recommendation on 12.10.2023 and the sanctioning authority granted the sanction on 13.10.2023. Thus, the entire exercise has been completed within the time prescribed under Rule 3 and 4 of the Rules. As regards delay in submitting the materials gathered by the investigating authority before the Independent Review Authority, Mr. Nath, learned Senior Government Advocate contends that the legislature in its wisdom has not prescribed any such time and therefore, delay in that stage shall not vitiate the sanction order.

IV. Relying on the decision of the Hon'ble Apex Court in the case of

Judgebir Singh alias Jasbir Singh Samra Alias Jasbir and Others – Vs- National Investigation Agency reported in 2023 SCC Online SC

543, Mr. Nath, learned Senior Government Advocate contends that the sanction order passed by the competent authority can be produced and placed on record even after filing of the charge sheet.

5. This Court has given anxious consideration to the arguments advanced by the learned counsel for the parties. Also perused the material available on record, including the record of the Department of Home and Political, Government of Assam relating to sanction, produced by Mr. D. Nath, learned Senior Government Advocate. Also perused the certified copies of the order sheet of the record of learned Sessions Judge produced by Mr. Borthakur, learned counsel.

6. Before proceeding further, for proper understanding of the issue in hand, let this Court record the basic and necessary facts leading to filing of the present case.

I. An FIR was lodged on 07.04.2023 registered as Barpeta P.S. Case No.175/2023 under Section 120(B)/121/121-A of the IPC read with Section 10/13/18 of UA(P) Act.

II. The petitioners namely, (1) Jahidul Islam, (2) Jakir @ Zakir Hussain and (3) Abu Shama Ahmed, in Criminal petition No. 1105/2023 were arrested on 07.04.2023 and the petitioner namely, Zakir Hussain in criminal petition No. 1108/2023 was arrested on 15.04.2023.

III. The investigation was completed on 04.07.2023 and on the same date, the investigating officer submitted all the evidence gathered before the Superintendent of Police, Barpeta with a request to forward the proposal to the competent authority for accord of prosecution sanction in connection with Barpeta P.S. Case No. 175/2023.

IV. Thereafter, on 06.07.2023, Charge Sheet being CS No. 419/2023 under Section 10/13/18 of UA(P) Act, 1967, was filed by the investigating officer. In the charge sheet, the investigating officer also recorded that a copy of prosecution sanction will be submitted before the court, once it is received.

V. The charge sheet was filed before the learned Sessions Judge, Barpeta, which

is reflected in the order of the learned Sessions Judge, Barpeta dated 06.07.2023.

VI. On 06.07.2023, the learned Sessions Judge, issued a production

warrant and fixed the matter on 15.07.2023 for production of the accused from custody and for furnishing of copy of materials gathered by the investigating authority.

VII. On 07.07.2023, the matter was again taken up for consideration for prayer of bail made by some of the accused persons and after hearing, the case was fixed on 11.07.2023 for passing order on the applications of bail.

VIII. On the same date i.e. on 07.07.2023, the Superintendent of Police, Barpeta by its communication No. BPTA-CB/53E/781 forwarded a copy of the charge sheet along with the communication of the investigating officer dated 04.07.2023 (supra) seeking sanction under Section 45(2) of the UA(P) Act., to the Commissioner and Secretary, Department of Home and Political, Government of Assam, through the IGP, Western Range, Bongaigaon,

IX. On 31.07.2023, the Inspector General of Police, Western Range, Bongaigaon forwarded the said copy to the Commissioner and Secretary Department of Home and Political, Government of Assam.

X. The record reveals that such copy was received on 01.08.2023 in the office of the Commissioner and Secretary, Department of Home and Political, Government of Assam.

XI. In the meantime, proceeding before Sessions Judge continued. The case was fixed for consideration of charge on 05.08.2023 and it was further fixed on 29.08.2023. Hearing on charge continued and on 13.09.2023, the learned Trial Judge, framed the impugned charges under Sections 10/13/18 of the UA(P) Act, 1967.

XII. Thereafter, On 04.10.2023, the present petitions were filed challenging the Charge sheet with the ground that the learned Court proceeded without sanction under section 35 of UA(P) Act, 1967.

XIII. On 10.10.2023, the Commissioner and Secretary, Department of Home and Political, Government of Assam placed the matter before the Independent Review Committee.

XIV. On 11.10.2023, the Independent Review Committee fixed the matter on 12.10.2023 and recommended for sanction.

XV. On 13.10.2023, the sanction was granted by the competent authority.

7. Effect of want of sanction under Section 45 of the UA(P) Act, 1967, being the subject matter of this litigation, the provision of section 45 is quoted herein below:

"Section 45....."Cognizance of offences.

[(1)] No court shall take cognizance of any offence--

(i) under Chapter III without the previous sanction of the Central Government or any officer authorised by the Central Government in this behalf;

(ii) under Chapter IV and VI without the previous sanction of the Central Government or, as the case may be, the State Government, and 2[if] such offence is committed against the Government of a foreign country without the previous sanction of the Central Government.

[(2) Sanction for prosecution under sub-section (1) shall be given within such time as may be prescribed only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of investigation and make a recommendation, within such time as may be prescribed, to the Central Government or, as the case may be, the State Government.]

8. Section 45(1) of the UA(P) Act, 1967, mandates that no court can take cognizance of any offence under Chapter III of the UA(P), Act, 1967 without the previous sanction of the Central Government or any officer authorized by the Central Government. The Parliament, in its wisdom has incorporated such a provision and also created an Independent Authority to review the proposal for prosecution sanction. It is by now well settled that such procedural safeguards have been prescribed to protect an accused from unwarranted prosecution and trial inasmuch as the provisions of UAPA are very stringent. Therefore, in the considered opinion of this Court, such provision is an additional safeguard to an accused.

9. The Hon'ble Apex Court in the case of Ashraf Khan Alias Babu Munne Khan Pathan and Another -Vs- State of Gujarat reported in 2012 SCC 11 606, while dealing with a similar provision (Section 20-A of the TADA Act), laid down the proposition that negative words can rarely be held directory. It was laid down that reading plain and ordinary meaning is the best guide to ascertain the intention of the legislature. Other methods to understand the meaning of the statute are resorted to only when the language is ambiguous and plain reading leads to absurd results. When a sentence starts with a negative word, no such ambiguity exists.

10. In case of UA(P) Act, 1967 also, in the face of Section 45 (2) of the UA(P) Act, 1967, the requirement of prior approval cannot be said to be directory in nature as the provision itself starts with the negative word "no Court shall take cognizance".

11. Thus, such a sanction is required to enable a court to take cognizance of the offence and in absence thereof, the Court cannot not take cognizance, not to say proceed further and frame charges

12. Law is by now well settled that such sanction must be a valid sanction and a

sanction under Section 45 of the UA(P) Act, 1967, is a condition precedent for empowering the prosecuting agency to approach the Court, so that the Court can take cognizance of the offences under Part-III of the UA(P) Act, 1967. Thus, a Court shall get jurisdiction to try a case against any person for commission of alleged offence under Part-III of the UA(P) Act, 1967, by taking cognizance, only when there is prosecution sanction. One of the reasons for providing such a condition, in the opinion of this Court, is that the provisions of UA(P) Act, 1967, are rigorous and the penalty provided is more stringent compared to offences under the IPC. Therefore, such procedure of sanction has been introduced and an Independent Review Committee has been created to safeguard a citizen from any vexatious prosecution under UA(P) Act, 1967. Therefore, a Court cannot take cognizance of an offence under Part-III of the UA(P) Act, 1967, unless there is a valid sanction accorded by the competent authority as prescribed under the UA(P) Act, 1967.

13. Now, let this Court deal with the argument of Mr. Borthakur, learned counsel as regards delay in granting sanction and the effect thereof. It is the argument of Mr. Borthakur, that such delay has vitiated the order of sanction itself and such delayed sanction is not a valid sanction in the eyes of law and therefore, is illegal.

14. Section 45(2) of the UA(P) Act, 1967, mandates that sanction under Section 45(1) of the UA(P) Act, 1967, shall be given within such time as prescribed. Thus, the Parliament in its wisdom has prescribed a time limit and used the word "shall" for adhering to the time prescribed.

15. Use of the word "shall" in a statutory provision would normally mean that the provision is mandatory. However, it is also well settled that the word "shall" is not always decisive. Therefore, to interpret the import and meaning of "shall", the most important aspect is the context, subject matter and the object of the statutory provision. Yet another aspect is that while, interpreting the word "shall", the nature, design, and consequences of constraint is to be looked into. Reading of Section 45 (1) and (2) UA(P) Act, 1967, read with Rules 3 and 4 of the Rules 2008, leaves no room of doubt that a specific period is mandated for completion of the process of sanction.

16. Another aspect of the matter is that to prescribe the time limit in terms of section 45 (2), the Rules 2008 has been framed. While enacting Rule 3 and 4 of the Rules, 2008, the word "shall" has been used. Therefore, from this context also, the period prescribed shall be mandatory. Therefore, the period prescribed under Rule 3 and 4 of Rules, 2008, shall be mandatory in nature.

17. The record reveals that the Independent Reviewing Authority took two days' time to complete the review and the sanctioning authority had taken one day's time thereafter to issue the order of sanction. Therefore, in the considered opinion of this Court, there was no delay in terms of Rule 3 and 4 of Rules, 2008 inasmuch as the Rule 3 of the Rules, 2008 prescribes that the reviewing authority is to make its recommendation within seven working days on receipt of

the evidence gathered by the investigating officer. The sanctioning authority needs to take its decision within seven days of receipt of the recommendation in terms of Rule 4 of the Rule, which is followed in this case. Therefore, such arguments of Mr. Borthakur, do not find favour of this Court, in the factual background of the present case.

18. Now let this Court consider the other limb of argument of Mr. Borthakur, learned counsel, i.e. the delay in submitting the evidence gathered by the investigating authority before the reviewing authority and the effect thereof.

19. Under the scheme of UA(P) Act, 1967, even after an investigation is completed and evidences are gathered and a Final Form is submitted before the competent court, want of sanction shall still debar the competent Court to proceed in the matter. A conjoined reading of Section 45(1), Section 45(2) of UA(P) Act, 1967 and the Rules, 3 and 4 of the Rules' 2008, leaves no room of doubt that the prescription of time shall be very vital.

20. The independent reviewing authority and the sanctioning authority have been granted seven days time, to complete their duty. The independent authority as well as the sanctioning authority needs to consider the materials gathered by the investigating authority and apply its own mind. Thus, it requires application of mind to the evidence gathered in as much as, evidence in a given case, may be voluminous and even then, the Parliament in its wisdom has prescribed only seven days time to each of the authorities to complete the process.

21. In the aforesaid context and under the scheme of the UA(P) Act, 1967, it cannot be perceived that the investigating authority shall be at liberty to wait and submit the material gathered during the investigation at its own will and without any time limit. When the parliament in its wisdom has prescribed time under Section 45(2) of the UA(P) Act, 1967, and resultantly Rules 2008, has been framed prescribing specific limit both for the Independent Reviewing Authority and the competent sanctioning authority, and bars a competent Court to even to take cognizance, in the considered opinion of this court, the investigating officer is also to submit the material collected before the reviewing authority seeking sanction without unreasonable delay, with reasonable speed and expedition inasmuch as after completion of the investigation, now the only duty cast upon the investigating authority is to submit the evidence gathered before the authorities under Rule 3 and 4 of the Rules' 2008. Law is no more res integra that "without unreasonable delay" shall mean that the action prescribed is taken with reasonable speed, with expedition and any delay in the matter is satisfactorily explained.

22. Therefore, the investigating authority should submit the evidence already gathered, without unreasonable delay, which is to be determined in the facts of a given case, having due regard to the prescription of time under Rules 3 and 4 of the Rules'2008.

23. As recorded hereinabove on the basis of material produced by Mr. Nath,

learned Counsel, the investigating officer completed his investigation on 04.07.2023 and on the said date itself, the investigating officer forwarded the evidence gathered by him to the Reviewing authority through the Superintendent of Police, Barpeta. The Superintendent of Police Barpeta, in turn forwarded the same to the Commissioner and Secretary, Home and Political Department, Government of Assam on 07.07.2023, through the Inspector General of Police, (Western Range) Bongaigaon. Thus, the Superintendent of Police took 2 (two days) time to forward the same to the IGP. However, the Inspector General of Police, (Western Range) Bongaigaon, forwarded the same to the Commissioner and Secretary of the Department on 31.07.2023. Thus, it took 24 (twenty four) days to forward the evidence already gathered by the investigating officer. The record produced further reveals that the communication of Inspector General of Police, Western Range, Bongaigaon was received in the office of the Commissioner and Secretary, Home and Political Department on 01.08.2023, and that office had sent the proposal seeking sanction to the independent reviewing authority on 10.10.2023 i.e. after 2 (two) months 10 (ten) days.

24. In the considered opinion of this Court, under the scheme of the Act, in a normal course, time spent in the office of IGP, Western Range and in the office of the Commissioner and Secretary, Home & Political Department, under the scheme of UAPA, cannot be termed as reasonable delay in sending the material already gathered by the investigating authority. However, this Court cannot reach such a conclusion in the present case in absence of any challenge made to the sanction order in as much as the authorities did not have any opportunity to explain the delay in absence of such a challenge. Accordingly, the contention of Mr. Borthakur, learned counsel, on this point, stands rejected.

25. For the reason and discussion made hereinabove, this court is of the unhesitant view that a valid sanction under Section 45(1) of the UA(P) Act, 1967, is sine qua non for taking cognizance of an offence under Part-III of the UA(P) Act, 1967, and in absence of such sanction, a trial even if proceeded, shall be vitiated.

26. Accordingly, it is held that without there being any order of sanction under Section 45 (1) and without there being any order of cognizance, the learned Session Judge, exceeded in its jurisdiction in passing the order of framing charge. Accordingly, the impugned order dated 13.09.2023 passed by learned Sessions Judge Barpeta, whereby charges under section 10/13/18 of UA(P) Act, 1967 were framed against the petitioners, is set aside and quashed.

27. Since, sanction has already been granted by the competent authority, the parties are relegated to the stage of cognizance of the offence and it is directed that the competent Court shall consider the case of both the parties and pass a reasoned order.

28. It is further provided that the petitioner shall be at liberty to file an application seeking regular bail, in the meantime, and in the event such an

application is filed, the learned court below shall consider the same in accordance with law.

29. Accordingly, both the criminal petition stands disposed of.