

(2015) 04 AHC CK 0049

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 8053 of 2015

Jangali Pasi

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 16-04-2015

Acts Referred:

Constitution of India, 1950 — Article 134, 141, 145, 226, 300-A
Criminal Procedure Code, 1973 (CrPC) — Section 117, 121, 263, 264, 265
Penal Code, 1860 (IPC) — Section 379, 399, 401
Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 — Section 1, 10, 10, 11, 12

Citation : (2015) 2 ACR 2056 : (2015) 6 ADJ 551 : (2015) 3 ALJ 673 : (2015) 89 ALLCC 911 : (2015) CriLJ 3321

Hon'ble Judges : Amreshwar Pratap Sahi, J;Vijay Lakshmi, J

Bench : Division Bench

Advocate : R.S. Shukla, for the Appellant

Judgement

1. The petitioner who is a member of the scheduled caste, has come up before this Court questioning the order of the District Magistrate, Kaushambi dated 18.12.2014 arising out of proceedings of attachment and refusal to release a truck that had been seized invoking the provisions of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986. The background in which this seizure was made is to the effect that the petitioner was implicated in three other criminal cases, namely, Case Crime No. 117 of 2012 under Section 379 IPC r/w. Section 136 of the Indian Electricity Act, Case Crime No. 140 of 2012 under Section 379 IPC r/w. Section 136 of the Indian Electricity Act and the third case being Case Crime No. 146 of 2012 under Sections 399/401 IPC.

2. It appears from the record that the truck in question bearing registration No. U.P. 70 N 9212 is registered in the name of the petitioner and the same came to be seized in the aforesaid criminal cases. Learned counsel for the petitioner submits that the petitioner has been bailed out in the said criminal cases, but on the strength of the same cases the petitioner has been booked under Section 2/3

of the 1986 Act, where also he has been bailed out on 14.8.2013 by the competent court.

3. The truck was seized in Case Crime No. 146 of 2012. A release application was filed where it was noticed that the said truck was also subject matter of seizure in Case Crime Nos. 140 of 2012 and 117 of 2012 as noted above. The truck had already been released in the said cases on 15.5.2013. Consequently, a release order was also passed on 22.1.2014 in relation to Case Crime No. 146 of 2012. The said orders have been filed on record.

4. However, since the petitioner had been booked under the Gangster Act, the said truck became subject matter of detention after putting the petitioner to notice on the ground that this truck appears to have been purchased from sources that have its genesis in the cases of theft registered against the petitioner. An ex parte order was passed against the petitioner on the basis of a police report on 30.7.2014 attaching the said truck under the provisions of the 1986 Act. The petitioner filed his objection that is on record whereafter the impugned order has been passed by the District Magistrate observing that since the petitioner has not been able to give effective details with regard to the source of his earnings from where he has acquired this truck and the information given is unclear, his objection deserves to be rejected.

5. The case of the petitioner was that he had received a reimbursement against the insurance policy of his son who had died, and that money had been utilized by him that was transacted through a Post Office and a Bank account whereafter it was ultimately utilized for the purchase of the truck through a finance company.

6. The learned District Magistrate has opined that from the said Post Office transaction is not clear as to whether the amount had been received by the applicant or not and how much further amount had been financed by the private finance company referred to in the objection. Similarly, the transaction through the State Bank of India in relation to the said reimbursement of the policy amount is also not clear. It is this order that is assailed herein.

7. Having heard Sri Shukla, learned counsel for the petitioner, and Sri A.K. Sand, learned A.G.A., the prayer made by Sri Shukla in this petition is to the effect that if the District Magistrate Kaushambi was refusing to release the attached property, which is a truck, in terms of Section 15 read with Section 16 of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 then he ought to have referred the matter to the Court of the Special Judge for determination and having failed to do so, the impugned order is vitiated as it does not comply with the provisions of Section 16(1) of the Act.

8. Sri Shukla, learned counsel for the petitioner, submits that the District Magistrate was under a legal obligation to do so and having failed to exercise his jurisdiction, the impugned order deserves to be quashed with a direction to the District Magistrate to adopt the procedure under Section 16 for deciding the issue of release as per the provisions aforesaid.

9. Sri A.K. Sand, learned A.G.A., contends that this petition is absolutely premature, inasmuch as, even if the District Magistrate has not referred the matter to the learned Special Judge, the petitioner ought to have moved an application in terms of the aforesaid provision for a reference to the special court. Apart from this, he also contends that after an order is passed by the court of competent jurisdiction under Section 17 of the Act then there is a further remedy to the petitioner of filing an appeal in terms of Section 18 of the Act, hence there should be no interference.

10. At the outset it may be mentioned that the validity of the Act has been upheld by this Court in the case of Ashok Kumar Dixit Vs. State of U.P. and Another, AIR 1987 All 235 and considered by the Apex Court in the case of Dharmendra Kirthal Vs. State of U.P. and Another, (2013) 8 AD 568 : AIR 2013 SC 2569 : (2013) 11 JT 523 : (2013) 9 SCALE 729 : (2013) 8 SCC 368 . Unfortunately no rules appear to have been framed by the State of U.P. as desired inspite of a query raised by this court vide order dated 28.11.2011 in Criminal Misc. Bail Application No. 26805 of 2011, Akbar Vs. State of U.P. 2012 (76) ACC Page 187.

11. In order to appreciate the aforesaid controversy, it would be appropriate to put on record that the 1986 Act was framed by the legislature to make special provisions for the prevention of and for coping with gangsters and anti social activities and for matters connected therewith or incidental thereto. In the instant case, we are concerned with the procedure to be adopted for attachment and release of the property of an alleged gangster in terms of Sections 14 to 17 of the Act and further as to whether an appeal would be maintainable as urged by the learned A.G.A. under Section 18 if an order is passed by the court in terms of Section 16(3)(b) of the Act.

12. To appreciate the controversy the provisions of Sections 14 to 18 of the Act are extracted hereinunder:-

14. Attachment of property.- (1) If the District Magistrate has reason to believe that any property, whether moveable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

(2) The provisions of the Code shall, mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under sub-section (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property - (1) Where any property is attached under Section 14, the claimant thereof may within three months from the date of knowledge of such attachment make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by Court - (1) Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section(1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such Court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3) (a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub-section (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3) the Court, shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No. 5 of 1908), in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits.

(d) requisitioning any public record or copy thereof from any Court or office:

(e) issuing commission for examination of witness or documents;

(f) dismissing a reference for default or deciding it ex parte:

(g) setting aside an order of dismissal for default or ex parte decision

(5) In any proceedings under this section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything of the contrary contained in the Indian Evidence Act, 1872 (Act No. 1 of 1872), notwithstanding.

17. Order after inquiry - If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.

18. Appeal - The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgement or order of a Court passed under the provisions of this Act.

13. A perusal thereof leaves no room for doubt that as per sub-section (2) of Section 15 if the District Magistrate has refused to release the property then he shall refer the matter with his report to the court having jurisdiction to try an offence under this Act under Section 16(2) of Act. Sri Shukla is not wrong in contending that if the District Magistrate has refused to release the property then a reference has to be made to the court having jurisdiction to try the offence under the Act.

14. Sub-section (3)(a) of Section 16 obliges the court that on receipt of reference under sub-section (1) or an application under sub-section (2), the court can fix a date for inquiry and put the concerned person to notice and thereafter is obliged to pass orders under clause (b) of sub-section (3) read with Section 17 of the Act as may be necessary. For the purpose of inquiry under Section 16(3) on a reference the court has extensive powers of a civil court as that of trying a suit. It is thus clear that the matter has to be referred to the court if the District Magistrate has refused to release the property. The assessment and adjudication on evidence led, is within the powers of the court as the outcome thereof leads to the civil consequences directly relating to the attached property.

15. A further perusal of the said section would also demonstrate that the court where the matter is referred has further powers of disposal of such property in case it is not released inasmuch as the Act does not indicate any power available with the District Magistrate authorizing him for disposal of the property. Secondly, the application which has been referred to in sub-section (2) of Section 16 is against refusal to attach and not refusal to release. In the circumstances,

the learned A.G.A. is not correct in his submission that the person claiming such property can move an application in the given circumstances. The application can only be moved when there is a refusal to attach either by the State Government or by any other person concerned. The issue of release is therefore either before the District Magistrate and if he refuses to do so then the reference has to be made to the court concerned.

16. In the instant case the District Magistrate vide ex parte order dated 30.7.2014 had rejected the request for release and on an application to set aside the ex parte order has proceeded to decide the same once again by the impugned order dated 18.12.2014 rejecting the application moved by the petitioner and has maintained the earlier order dated 30.7.2014. We are of the considered opinion that the District Magistrate was under an obligation to have referred the matter with his report to the court having jurisdiction as per Section 16(1) for release of such property which had admittedly not been done as is evident from a perusal of the order dated 18.12.2014.

17. Coming to the question of availability of a remedy against such orders to the petitioner, Section 18 of the 1986 Act makes a provision for appeal. The said section has already been extracted hereinabove. The provision of appeal would be available only after an order is passed by a court of competent jurisdiction.

18. Having said so the other contention raised by the learned A.G.A. deserves to be answered as to whether an appeal would be maintainable after an order of the nature presently involved is passed by the competent court. In this regard the decision in the case of Badan Singh @ Baddo Vs. State of U.P. and others reported in 2001 ALJ Page 2852 has been placed before the Court. The said judgment of a learned Single Judge of this Court holds in paragraph 9 as follows:-

"I shall now advert to the argument advanced by the learned A.G.A. as to the maintainability of the writ petitions on the ground of availability of alternative remedy under S. 18 of the Act. To answer the question, it is necessary to allude to S. 18 which reads as under:

"18 Appeal. The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgment or order of a Court passed under the provisions of this Act."

9. CHAPTER XXIX of the Code of Criminal Procedure, 1973 under caption "Appeal" contains twenty three sections running from Ss. 372 to 394. Section 372 provides that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force. Section 373 makes provision for appeal against order passed under S. 117 and 121, Cr.P.C. Under S. 374 appeal lies to the Supreme Court and the High Court against the order of conviction. Section 375 bars appeal against the order of conviction on the accused admitting his guilt. Section 376 provides that no appeal shall lie in petty cases. Under S. 377 right has been conferred on the State Government to move in appeal against inadequacy of sentence. Section

378 provides for filing appeal against the order of acquittal. Section 379 makes provision for appeal to the Supreme Court against the order of the High Court reversing acquittal to conviction. Special right to appeal in certain cases is provided under S. 380. Sections 381 and 382 prescribe the procedure for filing of appeal in the Court of Sessions and the manner of hearing. The Act is a penal Statute and Section 3 thereof prescribes punishment to be awarded to a gangster as well as public servant rendering illegal help or support to a gangster. No separate procedure is prescribed to challenge the order of conviction or acquittal passed by the Special Judge in exercise of power conferred by the Act. So, on a conspectus of CHAPTER XXIX, Cr.P.C. and Ss. 3 and 18 of the Act what appears is that appeal would lie against the order of conviction or acquittal under the Act and not against the order of attachment of the District Magistrate or the order of the Special Court on the reference made by the District Magistrate. Even assuming that Section 18 has the application and orders of the District Magistrate and the Special Court can be challenged by way of appeal yet I would hold that the writ petition under Art. 226 of the Constitution is maintainable when the very order of attachment passed by the District Magistrate is illegal, arbitrary and without jurisdiction. For arriving at such conclusion, I derive support from the decision of the Apex Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, AIR 1999 SC 22 : (1998) 7 JT 243 : (1998) 5 SCALE 655 : (1998) 8 SCC 1 : (1998) 2 SCR 359 Supp : (1998) AIRSCW 3345 : (1998) 8 Supreme 176 where it is laid down that availability of effective and efficacious remedy will not operate as bar to approach the High Court under Art. 226 of the Constitution in at least three contingencies, namely where writ petition has been filed for enforcement of fundamental rights, or where there has been violation of principle of natural justice or where the order or proceedings are without jurisdiction or vires of an Act is challenged."

19. The said judgment was cited before a learned Single Judge raising a preliminary objection to the maintainability of the appeal on the strength of the aforesaid observations. The matter came to be considered in Criminal Appeal No. 3000 of 2003, Kailash Sahkari Awas Samiti Vs. State of U.P. and others and another learned Single Judge upon a consideration of all the relevant provisions of the Act as well as the Criminal Procedure Code ruled as under vide order dated 2.2.2010 to the following effect:-

"x x x x x x x x

I have heard both the sides and have pondered over rival submissions. Since the bone of contention between rival sides require interpretation of a statutory provision of an enacted statute, consideration of the whole of the said statute seems to be un-eschewable to foresee legislative intent of the section to be interpreted and while undertaking that exercise a glimpse of the Act indicates that the Act was enacted to contain gangsterism and anti social activities within the State of U.P. which has attained menacing dimensions. The Act was brought to life on 19.3.1986, on which date it was published in the U.P. Gazette part one.

Section 1 of the Act mentions it's title and extent of application, Section 2 provides definitions and meaning of various words occurring under the Act. Section 2(f) which is of some importance to the present controversy provides that the words and phrases used but not defined in the Act but defined under the Code of Criminal Procedure, 1973 or the Indian Penal Code shall have the respective meanings assigned to them in those statutes. Section 3 of the Act provides for penalty for offences under the Act, whereas section 4 lays down special rule of evidence to be applied in the trial of offences under the Act. Section 5 to 10 contemplates creation of special Courts to try offences under the Act, eligibility of the presiding Judge, place of sitting of special courts and the nature of offences to be tried and procedure to be followed by it. Without volumenising, it is recorded that according to section 10 of the Act Special Judge shall have the Power of a Session's Judge and shall follow the same warrant trial procedure which is to be followed by a Magistrate unless the offence is punishable with imprisonment not exceeding three years, in which case it can try the offence in a summary way in consonance with sections 263 to 265 of the code. Section 11 provides for protection to the witnesses whereas section 12 mentions that the trial under the Act shall have precedence over the trial of other cases. Section 13 registers the power to transfer the cases to regular Courts by the Special Court if it finds that the offences being tried by it is not triable by it. From section Section 14 to section 17, the Act provides for attachment of property and it's release. Section 14 lays down that if the District Magistrate has reason to believe that any property, whether movable or immovable, possessed by any person has been acquired by gangsterism as a result of commission of any offence under the Act, then the District Magistrate can order attachment of such property irrespective of the fact whether cognizance of such offence has been taken by any Court or not. Sub Section 14(2) provides that provisions of Cr.P.C. shall applied mutatis mutandis to every attachment carried out under the Act. Section 14(3) and (4) provides for appointing of an administrator over the attached property by the District Magistrate and for police help to administer such property. Section 15 of the Act provides for applying for release of the property by any claimant through an application made to the District Magistrate within three months from the date of the knowledge of attachment. Section 15(2) enact that if the District Magistrate is satisfied about the case of the claimant then he can direct the release of the property from attachment and thereafter the property shall be handed over to the claimant. Perusal of the Section 16 of the Act indicate that if no representation is made within the specified period of three months from the date of the knowledge of attachment or the District Magistrate does not release the property to the claimant as is provided under Section 15(2) of the Act then he (District Magistrate) shall refer the matter with his report to the Court having jurisdiction to try the offences under the Act. Section 16(2) postulates that if the District Magistrate does not act under Section 14(1) of the Act to attach the property, or releases the property under Section 15(2) of the Act then the State Government or any person aggrieved by such refusal or release can make an application to the Court

having jurisdiction to try an offence under this Act for inquiry for the purposes of determining whether any property has been acquired by gangsterism or not? Pendente lites such inquiry, the court has been conferred with the power to order for attachment of such property as was done in the instant case. Section 16(3) of the Act, which is in two parts contemplates in sub section (a) that the Court on a reference under Sub Section (1) of Section 16 or on an application under Sub Section (2) of the said section shall conduct an inquiry and sub section (b) provides that on the date so fixed the Court shall hear the parties, receive evidences produced by them, take such further evidences as it considered necessary and decide whether the property was acquired by a gangster as a result of commission of an offence under the Act or not and then shall pass an order under Section 17 as the case may be which is necessary in its opinion. Section 16(4) confers same power on the Court under the Act which is possessed by a civil court under Code of Civil Procedure 1908 in matters of inquiry. Section 16(5) of the Act legislates that the burden of proving that the property or any part thereof has not been acquired by gangsterism or by commission of any offence under the Act shall be on the person claiming the release of the property irrespective of any provision to the contrary contained in the Indian Evidence Act. Section 17 of the Act provides that upon such an inquiry if the Court finds that the property was not acquired by a gangster as a result of commission of any offence under the Act then the Court shall order for release of such property to the person from whose possession it was attached. In any other case, the Court may make such orders as it deems fit for disposal of such property either by attachment, confiscation or delivery to any person entitled to possession thereof or otherwise. Section 18, which is the apple of discord between the rival sides, legislates and provides for applicability of chapter XXIX of the Code in an appeal preferred under the Act. For a clear understanding of the legislative intent, Sections 17 and 18 of the Act are reproduced below:-

"17. Order after inquiry - If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.

18. Appeal- The provisions of Chapter XXIX of the Code shall mutatis mutandis, apply to an appeal against any judgment or order of a Court passed under the provisions of this Act."

From the two referred statutory provisions it is abundantly clear that Sections 14 to 17 of the Act, which deals with attachment/non attachment or release of any property in question is analogous to sections 451, 452, and 457 of the Code. For a ready reference, the aforesaid provisions of Cr.P.C. are registered herein below:-

"451. Order for custody and disposal of property pending trial in certain cases-

When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposal of.

Explanation - For the purposes of this section, "property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

452. Order for disposal of property at conclusion of trial - (1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

(3) A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in sections 457, 458 and 459.

(4) Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.

(5) In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

457. Procedure by police upon seizure of property-

(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such

order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

What is noticeable here is that an order under sections 452 and 453 of the Code is appealable under section 454 thereof. The special provision has been enacted under the Act for a solemn purpose to deter an individual and/or public to acquire property by commission of offences under the Act and thereby to curb the activities of gangsterism. Attachment and release of property or any order of such a nature dealing with disposal of any property by a court has serious consequences of far reaching effects and it impinges upon the right to property of an individual and consequently, under the code such types of orders are made appealable under section 454 thereof. For a ready reference Section 454 Cr.P.C. is reproduced below:-

"454. Appeal against orders under section 452 or section 453. - (1) Any person aggrieved by an order made by a Court under section 452 or section 453, may appeal against it to the Court to which appeals ordinarily lie from convictions by the former Court.

(2) On such appeal, the Appellate Court may direct the order to be stayed pending disposal of the appeal, or may modify, alter or annul the order and make any further orders that may be just.

(3) The powers referred to in sub-section (2) may also be exercised by a Court of appeal, confirmation or revision while dealing with the case in which the order referred to in subsection (1) was made."

Now, turning towards the Act it is recorded that the Act is not a self contained Code. For innumerable aspects of trial procedure and for many interlocutory matters it falls back on the Code. What is of significance here is that the Act does not provide anywhere what orders are appealable and what are not? Under section 18 only this much has been legislated that chapter XXIX of the Code shall *mutatis mutandis* apply to an appeal against any judgment and order of a court passed under the provisions of this Act. Thus the Act confers right to appeal against all orders and judgment of a court under it as the words "an appeal" and "any judgment and order" occurring in section 18 are of enormous magnitude. In consonance with the Principles of interpretation of Statute and harmonious construction of various statutes, these words should be taken to preserve all appeals provided under the Code. The meaning attached to these words can not be restricted in it's scope only to take in it's purview convictions and sentences

passed under the Act. Divastation of once property has got enormous detrimental civil consequences which even can not be recouped in future and in such matters the remedial remedy of appeal can and should not be squeezed from an aggrieved person by the courts when they are called upon to fill up the grey areas left by the legislature in matters of interpretation of a statutory provision. It seems that it is because of this reason that section 454 has been enacted in the code and therefore benefit of the said right under the Act to an individual should not be denied against consequentially analogous orders, especially when there is no legislative intent to the contrary, as the Act is silent on the aspects as to which orders are appealable and which are not?

Another dimensional facet of the involved issue is that courts are required to adopt warrant trial or summary trial procedures while prosecuting an accused as is mandated under section 10 of the Act. Various orders in those trial procedures are appealable. Once the Act does not carve out any exception in matters of appeal in those trial procedures, it will be very injudicious to read them in a statute (Act), as doing so will amount to legislate, which the courts are not capable of. Besides 454, other exemplar appealable sections are 86, 341, 351, and 449 of the Code. More over the two trial procedures, in it's application to offences under the Act and those of IPC and other statutes, can not be bifurcated into two. If the trial procedure provides for filing of an appeal against any order passed during the trial, then those orders shall be appealable under the Act as well. Drawing of such an opinion can be countenanced even on the basis of the words used in section 372 of the code as well which falls under chapter XXIX thereof. Section 372 of the Code postulates that no appeal shall lie from any judgment or order of a criminal Court except as is provided in the Code or in any other law for the time being enforce. The said section clearly indicates that an appeal shall lie from a judgment and order of a criminal court, if it is so provided under the Code or under any other statute in vogue. This section, therefore, imbibes in itself all appeals under Sections 86, 341, 351, 454 and 449 of the code. In this connection, Section 386(d) is also noticeable and is of much significance as it provides as follows:-

"386. Powers of the Appellate Court. - After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a)

(b).....

(c).....

(d) in an appeal from any other order, alter or reverse such order;

(e)..... "

Thus a co-joint reading of Section 372 and 386(d) of the code conspicuously lays down maintainability of all appeals provided under the code. Since section 17 of the Act is an analogous provision of sections 451, 452 and 457 Cr.P.C., the same will be appealable under chapter XXIX of the Code as all appeals under the Act has to be dealt with under that chapter. I am also fortified in my view from the phraseology of Section 18 of the Act, which provides that the provisions of appeal under Chapter XXIX shall mutatis mutandis apply to an appeal under the Act. Section 18 has been couched in a general phraseology and, therefore, it has to be read in conjunction with chapter XXIX of the Code. Eikly, in matters of appeal under Section 15 of the Act Cr.P.C. will also apply as Section 2 of the Act specifically provides for its application. It will be preposterous to cogitate that the offences under the Gangsters Act, which is an off shoot of various offences mentioned under the penal code and other statutes will be tried differentially and will have different appealable sections than that of Cr.P.C. If the legislative intend was that only a conviction and sentence passed under the Act be made appealable, the legislature would have provided for such an eventuality which it has not done consciously as it was conscious of the fact that the attachment, confiscation or disposal of property in any manner has got serious consequences as it even impinges upon the right to property of a citizen of this country. To accept the argument of learned counsel for the respondents, in this respect will lead to hazardous consequences. If a person is deprived of his property without any right of appeal, that will be in direct contradiction with the provisions of Code of Criminal Procedure. In such a view the appeal provided for under Section 18 of the Act takes into its purview all the appeals which are provided for under the Code of Criminal Procedure.

Turning towards, the decision relied upon by the counsel for the respondents, it is to be noted that in the said judgment Hon"ble Single Judge has himself observed thus:-

"No separate procedure is prescribed to challenge the order of conviction or acquittal passed by the Special Judge in exercise of power of Chapter XXIX Cr.P.C. and Sections 3 and 18 of the Act what appears is that appeal would lie against the order of conviction or acquittal under the Act and not against the order of attachment of the District Magistrate or the order of the Special Court on the reference made by the District Magistrate. Even assuming that Section 18 has the application and orders of the District Magistrate and the Special Court can be challenged by way of appeal yet I would hold that the writ petition under Article 226 of the Constitution is maintainable when the very order of attachment passed by the District Magistrate is illegal, arbitrary and without jurisdiction."

(underline emphasis mine)

Thus the aforesaid judgment Badan Singh (Supra), 2001 ALJ Page 2852, does not rule out maintainability of an appeal against an order passed under Section 17 of the Act.

Further, I find that the appeal was admitted by this Court vide order dated 10.7.2003. The State did not object maintainability of an appeal at that stage and, therefore, also I am of the considered view that the instant appeal is maintainable for challenging an order passed under section 17 of the Act and therefore I reject the preliminary objection raised by the counsels for the respondents 2 to 18.

This appeal will now be listed on 8.2.2010 for further final hearing on merits as part heard.

20. The appeal after having been held to be maintainable by the aforesaid order, the same was decided on merits by the learned Single Judge vide judgment dated 22.5.2012 reported in Kailash Sahkari Avas Samiti Limited, Kanpur Nagar Vs. State of U.P. and others, (2012) ACR 2421 : (2012) 6 ADJ 231 . This issue of having decided the preliminary objection of the maintainability of the appeal was again referred to in the final judgment in paragraph 15 which is quoted hereinunder:-

"A prory, a preliminary objection was raised by the respondents counsel regarding maintainability of this appeal in this court, which issued was decided as preliminary issue and it was held that appeal is maintainable as section 372 of the Code (Cr.P.C.) read with section 18 of the Act read jointly preserves all the appeals provided for under the Code. It was noted that the Act is not a self-contained Code and for trial procedure it falls back on the provisions of the Code. It was further noted that since chapter XXIX of the code applies mutatis mutandis to appeals under the Act, hence in view of section 372 of the Code appeal against attachment or release of property shall be maintainable under the Act, just as appeal u/s. 454 of the Code is maintainable. It was also noted that the appeal was entertained on 10.7.2003 and Act does not prohibit entertaining appeal against attachment under Section 18.

After deciding preliminary objection, appeal was heard on merits."

21. Another decision that holds that an order passed under Section 17 of the Act is subject to an appeal is that of Manzoora, Mumtaz, Mustafa @ Jyoti and Gavoora Vs. State of U.P. page 687. Appeals have been entertained by this Court in such matters and have been decided, one of which is Shashi Kant Chaurasiya Vs. State of U.P., (2014) 10 ADJ 111 . Two other judgments, even though short and not loaded with reasons, but straight to the point are State of U.P. Vs. Manoj Kumar Pandey and Others, (2010) 2 ACR 1982 extracted hereinunder:-

"An objection about the maintainability of the appeal was initially raised by the respondents but it was subsequently given up and was not pressed. Neither party has, therefore, addressed the Court on this question. However, since Section 18 of the Act provides for the appeal against the judgment or order of the Court passed under the Act and the impugned judgment and order have been passed by the Court under Section 17 of the Act, therefore, the appeal is maintainable."

and the division bench decision in the case of Krishna Murari Agrawal alias Deepak Vs. District Magistrate, Jhansi and Others, (2001) CriLJ 949 that is already extracted hereinafter.

22. A learned Single Judge of this Court in Government Appeal No. 6042 of 2010, State of U.P. Vs. Nasim Khan and others after noting the Division Bench judgment in the case of Manzoora (supra), 2008 (63) ACC page 687 came to a prima facie opinion that an appeal against an order of release/partial release as aforesaid and passed under Section 17 of the 1986 Act is not maintainable. It was further commented by the learned Single Judge that the remark in Manzoora's case was made casually without going through the provisions of Section 18 of the Act as well as Chapter XXIX of the Criminal Procedure Code and then proceeded to make a reference before a division bench for consideration vide his order dated 28.1.2015 which is extracted hereinunder:-

"Present appeal has been filed by State of U.P. under Section 18 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 against judgement and order dated 23.7.2010 passed by Additional Sessions Judge, Court No. 6/Special Judge Gangster Act, Allahabad in Miscellaneous Case No. 5 of 2009 (Nasim Khan Vs. State of U.P.), Miscellaneous Case No. 3 of 2009 (Abdul Nafis Vs. State of U.P.), Miscellaneous Case No. 4 of 2009 (Sayeed Khan and another Vs. State of U.P.), Miscellaneous Case No. 2 of 2009 (Nizam Vs. State of U.P.) and Miscellaneous Case No. 6 of 2009 (Salim Khan Vs. State of U.P.) arising out of Crime No. 254 of 2007, under section 2/3 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, Police Station Handia, District Allahabad whereby Additional Sessions Judge, Court No. 6/Special Judge Gangster Act, Allahabad has allowed applications under section 16 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 moved in aforesaid each miscellaneous case and has set aside order dated 30.1.2009 passed by District Magistrate, Allahabad under section 14(1) of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986.

Affidavits have already been exchanged between the parties.

Shri Narendra Dev Roy, learned A.G.A. appeared for State of U.P. Shri Daya Shankar Mishra as well as Shri Mukhtar Alam appeared for respondents.

I have heard learned A.G.A. as well as learned counsel for respondents and perused the record.

Learned A.G.A. contended that impugned judgement and order passed by Additional Sessions Judge, Court No. 6/Special Judge Gangster Act, Allahabad is against provisions of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 as well as evidence on record.

Learned A.G.A. contended that impugned judgement and order dated 23.7.2010 passed by Additional Sessions Judge, Court No. 6/Special Judge Gangster Act, Allahabad should be set aside and impugned order 30.1.2009 passed by District

Magistrate, Allahabad should be restored.

Learned counsel for respondents contended that impugned order has been passed under section 17 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as "Act") and there is no provision of appeal against order passed under section 17 of Act either in the Act or in Chapter XXIX of Criminal Procedure Code which has been made applicable on appeals against judgement and order passed under the Act per section 18 of the Act.

Learned counsel for respondents further contended that learned trial court has passed impugned judgement and order after having considered all evidence and submissions made by the parties. The impugned judgement and order passed by trial court is in accordance with provisions of the Act as well as evidence on record.

Learned counsel for respondents contended that appeal has no merit and it should be dismissed.

In reply learned A.G.A. contended that appeal is maintainable against impugned judgement and order in view of Section 18 of the Act.

Learned A.G.A. placed reliance upon judgement of Division Bench of this High Court rendered in the case of Manzoora, Mumtaz, Mustafa @ Jyoti and Gavoora Vs. State of U.P. .

In view of contentions made by the parties following points for determination arise in this appeal:

1. Whether appeal filed by State of U.P. is maintainable in view of Section 18 of the Act against impugned judgement and order passed by trial court.
2. Whether impugned judgement and order passed by trial court is against provisions of the Act as well as evidence on record.

Admittedly, District Magistrate, Allahabad passed order of attachment of property of respondents under section 14-(1) of the Act against which respondents made representation before District Magistrate for release of property under section 15(1) of the Act. But District Magistrate, Allahabad did not release property attached and referred the matter under section 16-(1) of the Act to the court having jurisdiction to try offence under the Act, whereupon trial court made inquiry under section 16(3) of the Act and ultimately passed impugned order under section 17 of the Act whereby he has allowed the applications of respondents moved under section 15-(1) of the Act and has set aside order dated 30.1.2009 passed by District Magistrate, Allahabad under section 14(1) of the Act.

Section 18 of the Act provides provisions for appeal. Section 18 of the Act is reproduced below:

"The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgement or order of a Court passed under the provisions of this Act".

Reading of Section 18 of the Act shows that it does not speak about judgements and orders which are appealable. It says only that Chapter XXIX of the Code (Criminal Procedure Code) shall mutatis mutandis apply to an appeal against any judgement or order of a Court passed under the provisions of the Act.

In view of Section 18 of the Act it is relevant to go through provisions of Chapter XXIX of the Criminal Procedure Code.

Heading of Chapter XXIX of the Criminal Procedure Code is "appeals". This Chapter consists of Sections 372 to 394, out of which Section 372 provides that no appeal shall lie from any judgement or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force. Section 373 of the Chapter provides provision for appeal against orders requiring security or refusal to accept or rejecting surety for keeping peace or good behaviour.

Section 374 of the Chapter provides provision for appeal from convictions.

Section 375 of the Chapter provides that notwithstanding anything contained in Section 374, where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal.

Section 376 of the Chapter provides provision for no appeal by convicted person in certain petty cases.

Section 377 of the Chapter provides provision for appeal by State Government against the sentence on the ground of its inadequacy.

Section 378 of the Chapter provides provision for appeal in case of acquittal.

Section 379 of the Chapter provides provision for appeal against conviction by High Court in certain cases.

Section 380 of the Chapter provides that notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appellable judgement or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

Section 381 of the Chapter provides provisions that appeal to the Court of Session shall be heard by the Sessions Judge or by an Additional Sessions Judge.

Section 382 of the Chapter provides that appeal shall be made in the form of petition in writing.

Section 383 of the Chapter provides procedure of appeal when appellant is in jail.

Section 384 of the Chapter provides provision for summary dismissal of appeal.

Section 385 of the Chapter provides procedure for hearing of appeals not dismissed summarily.

Section 386 of the Chapter provides provisions regarding powers of the appellate court.

Section 387 of the Chapter contains provisions regarding judgements of subordinate appellate court.

Section 388 of the Chapter provides that order of High Court on appeal shall be certified to lower court.

Section 389 of the Chapter provides provisions regarding suspension of sentence during pendency of appeal or release of appellant on bail.

Section 390 of the Chapter provides provisions regarding arrest of accused in appeal from acquittal.

Section 391 of the Chapter provides that appellate court may take further evidence itself or direct it to be taken by a Magistrate, or when the appellate court is a High Court, by a Court of Session or a Magistrate.

Section 392 of the Chapter provides procedure where Judges of Court of Appeal are equally divided.

Section 393 of the Chapter provides that judgements and orders passed by an Appellate Court upon an appeal shall be final, except in the cases provided for in Section 377, Section 378, sub-section (4) of Section 384 or Chapter XXX.

Section 394 of the Chapter provides provisions regarding abatement of appeals.

After having gone through Chapter XXIX of Criminal Procedure Code it is apparent that this Chapter provides provisions for appeal against judgement and order of conviction or acquittal or order requiring securing or refusal to accept or rejecting surety for keeping peace or good behaviour. In this Chapter there is no provision for appeal against order passed in respect of attachment, release or disposal of property. There is no provision either in Section 18 or anywhere in Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 also to provide right of appeal against order passed under section 17 of Act by trial court regarding release or disposal of property attached by District Magistrate under section 14(1) of the Act where as section 372 of Chapter XXIX of Criminal Procedure Code clearly provides that no appeal shall lie from any judgement or order of a criminal court except as provided by Criminal Procedure Code or by any other law for timing being in force. In view of section 18 of the Act and Chapter XXIX of Criminal Procedure Code order passed under section 17 of the Act is not an appealable order.

But in the case of Manzoora, Mumtaz, Mustafa @ Jyoti and Gavoora Vs. State of U.P. , Honourable Division Bench of this High Court in a writ petition filed against order passed by District Magistrate under section 14(1) of the Act has made a

remark to the effect that the order passed under section 17 of the Act is subject to an appeal to the High Court under section 18. This remark has been made casually without going through provisions of section 18 of the Act as well as Chapter XXIX of Criminal Procedure Code.

In the case of Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs., AIR 1975 SC 907 : (1975) 2 SCC 232 : (1975) 3 SCR 834 : (1975) 7 UJ 293 , Hon"ble Apex Court in para 7 of the judgement has observed as follows:

"Certainty of the law, consistency of rulings and comity of courts - all flowering from the same principle - converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents."

In the case of State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, (1993) 41 ECC 326 : (1991) 3 JT 268 : (1993) 2 SCALE 65 : (1991) 2 SCALE 110 : (1991) 4 SCC 139 : (1991) 3 SCR 64 : (1992) 87 STC 289 : (1991) 2 UJ 396 , Hon"ble Apex Court in para 40 of judgment has observed as follows:

"Incuria" literally means "carelessness". In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law" is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". (Young Vs. Bristol Aeroplane Co. Ltd. (1994) 1 KB 718 : (1944) 2 All ER 293. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

In view of above pronouncements of Honourable Apex Court I am of the view that the issue as to whether order passed under section 17 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 is an appealable order and appeal is maintainable under section 18 of the Act should be referred to Division Bench for consideration.

Let the records be placed before Hon"ble The Chief Justice for order."

23. We have been informed that the said reference is still pending before a division bench and has not yet been answered.

24. Since this issue has been raised before us by the learned A.G.A., we proceed to deal with the same in the light of the facts stated hereinabove. To us, it appears that the learned Single Judge who has made the reference on 28.1.2015 has not noticed the judgment in the case of Kailash Sahkari Avas Samiti Limited, Kanpur Nagar Vs. State of U.P. and others, (2012) ACR 2421 : (2012) 6 ADJ 231 . The other two judgments that have also not been noticed are the division bench judgment in the case of Krishna Murari Agrawal alias Deepak Vs. District

Magistrate, Jhansi and Others, (2001) CriLJ 949 and the decision of the learned Single Judge in the case of State of U.P. Vs. Manoj Kumar Pandey and Others, (2010) 2 ACR 1982 . We also find that the learned Single Judge while making the reference has not referred to the provisions particularly Sections 5, 451, 452 and 457 of the Criminal Procedure Code that have been compared with analogous provisions in the case of Kailash Sahkari Avas Samiti Limited, Kanpur Nagar Vs. State of U.P. and others, (2012) ACR 2421 : (2012) 6 ADJ 231 along with the provisions of appeal under Section 454 of the Code read with Section 18 of the 1986 Act. In our opinion, the learned Single Judge in the case of Kailash Sahkari Avas Samiti Limited, Kanpur Nagar Vs. State of U.P. and others, (2012) ACR 2421 : (2012) 6 ADJ 231 has rightly distinguished the case of Badan Singh (supra), 2001 ALJ Page 2852 by observing that it does not rule out the maintainability of an appeal against an order passed under Section 17 of the Act. The conclusion drawn in the case of Kailash Sahkari Avas Samiti Limited, Kanpur Nagar Vs. State of U.P. and others, (2012) ACR 2421 : (2012) 6 ADJ 231 finds our approval for all the reasons given therein inasmuch as, even if an appeal is a creature of statute, yet in view of the provisions of Section 18 of the 1986 Act read with Chapter XXIX of the Criminal Procedure Code we find that a provision of appeal is necessary and has to be interpreted as such because the property attached in such proceedings can be confiscated as well under Section 17 of the 1986 Act. This provision, therefore, is plenary and peremptory in nature thereby depriving a person of his property by operation of law. The power of confiscation is positively imperious, even though the order of the District Magistrate or the court concerned before whom the reference is made does not appear to be final. In the circumstances they are subject to recall or otherwise appealable.

25. In such a situation, where there is a constitutional mandate under Article 300-A that no person should be deprived of property save by authority of law, then the provision of an appeal against an order of confiscation is necessary, inasmuch as, to allow the order of the court to become final in a matter of confiscation of property would be depriving a person to question and contest this matter before a higher forum that is inbuilt intentionally by the legislature in the Statute. We say this because it will not be possible for a person to claim the property in question through any other mode or source of law except through a writ petition. There is no doubt that property acquired through unlawful means and being an outcome of crime cannot be claimed as a matter of right but at the same time a law that provides for attachment, release or confiscation of such property should be capable of, and visited with a procedure, so as to adjudicate any claim arising therefrom in a fair and reasonable manner.

26. The 1986 Act therefore has to be read as a complete Code in itself so as to provide such benefit of appeal which the legislature appears to have intended under Section 18. Applying the interpretive tool, Section 18 categorically provides an appeal against any judgment or order and then mutatis mutandis applies Chapter XXIX of the Cr.P.C. to such an appeal. Judges while interpreting such provisions have to adopt the legalistic method as well as the pragmatistic

method as they are said to wear two hats. This distinguishes them from mere umpires and they enjoy a more certain interpretive freedom by applying reasoning through analogy in order to interpret and explain canons of statutory construction. Applying the said principles, we are also of the opinion that Section 18 does not contain any prohibitive language nor does it give a restrictive meaning to the right of appeal against any judgment or order under the Act which is a special act. This therefore includes the right of an appeal against an order refusing to release attached property. The interpretation has to be meaningful and that which advances the cause of justice. That also checks infallibility and rules out any possibility of failure or miscarriage of justice. There is yet a dimension to ponder. If ultimately the prosecution ends in acquittal or there is a probability of acquittal then a release of attached property has to be adjudicated. There is yet another grey area, namely what happens to attached property if the proceedings abate due to the death of an under trial under the Gangsters Act. Should the property be automatically refused to be released or released to the heirs of the deceased. In the former case if the trial fails to end up in conviction in such a contingency due to the death of an under trial, then the question of release has to be determined but in the latter case can the attached property be released automatically even if no proof is provided by the heirs of the mode of acquisition of the property. In both cases an adjudication has to be made at the instance of the State Government or any interested person. In such a situation if release is refused, then an appellate forum with co-extensive powers should be available and that is what Section 18 purports to do when it recites the words any order or judgment. This is analogous to Section 452 of the Cr.P.C. and therefore the legislature was conscious of also making a provision that Chapter XXIX will mutatis mutandis apply.

27. Even though the writ jurisdiction may not be barred in appropriate matters as held in Badan Singh's case (supra) but if the statutory remedy of appeal is available, then filing of writ petitions stands obviated for at least two reasons. First that in an appeal all questions of fact and law can be pleaded, evidence led and be adjudicated. Secondly, ordinarily questions of fact that may be disputed, cannot be gone into in the exercise of jurisdiction under Article 226 of the Constitution. This has been held in a short judgment in the case of Krishna Murari Agrawal alias Deepak Vs. District Magistrate, Jhansi and Others, (2001) CriLJ 949 , extracted hereinunder:-

"1. The property of the petitioner was attached under Section 14(1) of the U.P. Gangsters and Anti Social (Activities) Prevention Act, 1986 by order of the District Magistrate, Jhansi.

2. The petitioner made a representation against the order of attachment under Section 16(1) of the said Act. The District Magistrate by his order dated 12.10.2000 rejected the representation and referred the matter with his report to the Special Judge (Gangsters Act) in accordance with Section 16(1) of the Act. It is this order which is subject-matter of challenge in the present writ petition.

3. We have heard Sri UK Saxena, learned counsel for the petitioner at considerable length and have perused the record.

4. The question whether the property attached has been acquired by a gangster as a result of the commission of an offence under U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 is a pure question of fact. The claim of the petitioner that the property has not been acquired by commission of an offence or that it is an ancestral property can only be established by appraisal of the evidence. It will be open to the petitioner to lead oral and documentary evidence in support of his claim before the Special Judge (Gangsters Act) where the matter has been referred. Such appraisal of evidence is not possible in the present proceedings under Article 226 of the Constitution of India. The Act provides a complete machinery as against the decision of the Court an appeal lies under Section 18 of the Act.

5. In these circumstances we do not consider it a fit case for interference under Article 226 of the Constitution of India.

6. Learned counsel for the petitioner has submitted that the house of the petitioner has been attached and he is suffering great hardship and, therefore, a direction may be issued to the Special Judge concerned to decide the proceedings at an early date.

7. Taking into consideration the entire facts and circumstances of the case, it is directed that the proceedings referred to the Special Judge by the District Magistrate under Section 16(1) of the Act shall be concluded as expeditiously as possible preferably within three months of the filing of a certified copy of this order before the Court concerned. It is understood that the petitioner will co-operate with the enquiry and will not seek adjournments unless absolutely necessary.

8. Subject to the observations made above, the writ petition is dismissed."

28. The reasoning given by the learned Single Judge in the case of Kailash Sahkari Avas Samiti Limited, Kanpur Nagar Vs. State of U.P. and others, (2012) ACR 2421 : (2012) 6 ADJ 231 appears to be perfect and sound whereas the apprehension expressed in the referring order dated 28.1.2015 does not appear to have noticed the same. For all the reasons given hereinabove and for the reasons given by the learned Single Judge, referred to hereinabove, we approve of the ratio of the decision in the case of Kailash Sahkari Avas Samiti Limited, Kanpur Nagar Vs. State of U.P. and others, (2012) ACR 2421 : (2012) 6 ADJ 231 .

29. Why is a statutory appeal necessary and what is the purpose of providing an appeal has been very elaborately dealt with by the Apex Court explaining its philosophy in the celebrated decision of AIR 1979 SC 745 . Thus, the importance of a provision of appeal cannot be diluted and the learned Single Judge in the case of Kailash Sahkari Avas Samiti Limited, Kanpur Nagar Vs. State of U.P. and others, (2012) ACR 2421 : (2012) 6 ADJ 231 was fully justified in interpreting

Section 18 to be available for such purpose. Retention of property may not be a guaranteed fundamental right, but it is reasonable to construe that deprivation of property without authority of law is unconstitutional and leads to civil consequences of a permanent nature. We, therefore, extract para 25, portion of para 31, paras 41, 42 and 45 of Sita Ram's case (supra), (1979) 2 SCC Page 656 to the following effect:-

25. At the threshold, we have to delineate the amplitude of an appeal, not in abstract terms but in the concrete context of Article 134 read with Article 145 and order XXI Rule 15 and s. 384 of the Criminal Procedure Code, 1973. The nature of the appeal process cannot be cast in a rigid mould as it varies with jurisdictions and systems of jurisprudence. This point has been brought out sharply in "Final Appeal". The learned authors ask:

But what does "appeal" really mean : indeed, is it a meaningful term at all in any universal sense ? The word is in fact merely a term of convenient usage, part of a system of linguistic shorthand which accepts the need for a penumbra of uncertainty in order to achieve universal comprehensibility at a very low level of exactitude. Thus, while "appeal" is a generic term broadly meaningful to all lawyers in describing a feature common to a wide range of legal systems, it would be misleading to impute a precise meaning to the term, or to assume, on the grounds that the word (or its translated equivalent) has international currency, that the concept of an appeal means the same thing in a wide range of systems.

On any orthodox definition, a appeal includes three basic elements: a decision (usually the judgment of a court or the ruling of an administrative body) from which an appeal is made; a person or persons aggrieved by the decision (who is often, though by no means necessarily party to the original proceedings) and a reviewing body ready and willing to entertain the appeal.

The elasticity of the idea is illumined by yet another passage which bears quotation:

"Appeals" can be arranged along a continuum of increasingly formalised procedure, ranging from a condemned man in supplication before his tribal chief to something as jurisprudentially sophisticated as appeal by certiorari to the Supreme Court of the United States. Like Aneurin Bevan's elephant an appeal can only be described when it walks through the court room door The nature of a particular appellate process-indeed the character of an entire legal system-depends upon a multiplicity of interrelated (though largely imponderable) factors operating within the system. The structure of the courts; the status and rule (both objectively and subjectively perceived) of judges and lawyers, the form of law itself-whether, for example it is derived from a code or from judicial precedent modified by statute; the attitude of the courts to the authority of decided cases; the political and administrative structure of the country concerned-whether for example its internal sovereignty is limited by its

allegiance to a colonizing power. The list of possible factors is endless, and their weight and function in the social equation defy precise analysis."

In short, we agree in principle with the sum-up of the concept made by the author:

Appeal, as we have stressed, covers a multitude of jurisprudential ideas. The layman's expectation of an appeal is very often quite different from that of the lawyer and many an aggrieved plaintiff denied his "just" remedy by judge or jury has come upon the disturbing reality that in England a disputed finding of fact can seldom, if ever, form the basis of an appeal. Similarly, a Frenchman accustomed to a narrowly legalistic appeal in cessation, subject to subsequent re-argument in a court below, would find little familiarity in the ponderous finality of the judgment of the House of Lords. And a seventeenth-century lawyer accustomed to a painstaking search for trivial mistakes in the court record, which formed the basis of the appeal by writ of error, would be bewildered by the great flexibility and increased sophistication of a jurisprudential argument which characterize a modern appeal.

31. x x x x x A single right of appeal is more or less a universal requirement of the guarantee of life and liberty rooted in the conception that men are fallible, that Judges are men and that making assurance doubly sure, before irrevocable deprivation of life or liberty comes to pass, a full-scale re-examination of the facts and the law is made an integral part of fundamental fairness or procedure.

41. Going to the basics, an appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below.... An appeal, strictly so called, is one "in which the question is, whether the order of the court from which the appeal is brought was right on the materials which that court had before it" (per Lord Davey, *Ponnamma v. Arumogam*, (1905) A.C. at p. 390) A right of appeal, where it exists, is a matter of substance, and not of procedure (*Colonial Sugar Refining Co. v. Irving*, (1905) AC 369 and *Newman v. Klausner*, (1922) 1 K.B. 228). Thus, the right of appeal is para mount, the procedure for hearing canalises so that extravagant prolixity or abuse of process can be avoided and a fair workability provided. Amputation is not procedure while pruning may be.

42. Of course, procedure is within the Court's power but where it pares down prejudicially the very right, carving the kernal out, it violates the provision creating the right. Appeal is a remedial right and if the remedy is reduced to a husk by procedural excess, the right becomes a casualty. That cannot be.

45. An appeal is a re-hearing, and as Viscount Cave laid down, it was the duty of a court of appeal in an appeal from a judge sitting alone to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly."

30. Having considered the above, we therefore find ourselves in full agreement with the judgment of the learned Single Judge in the case of Kailash Sahkari Avas Samiti Limited, Kanpur Nagar Vs. State of U.P. and others, (2012) ACR 2421 : (2012) 6 ADJ 231 which lays down the law correctly and an appeal against an order refusing to release attachment under Section 17 of the 1986 Act would be maintainable under Section 18 of the same Act.

31. After having held that, we partly allow this petition with a direction to the District Magistrate to proceed to refer the matter to the court concerned and to that extent the impugned order dated 18.12.2014 stands modified. The District Magistrate ought to have reflected on the provisions of Sections 15 and 16 of the 1986 Act carefully but such errors may keep on recurring as Rules do not appear to have been framed inspite of the query raised by this Court in Akbar's case (supra), 2012 (76) ACC Page 187. Once the reference is made to the court concerned, as indicated above, then the matter shall be disposed off by the court in accordance with the provisions quoted hereinabove and the law indicated in this regard. The aforesaid process be completed expeditiously and the District Magistrate shall pass appropriate orders preferably within four weeks" from the date of production of a certified copy of this order before him. Once the matter reaches the court, the court shall endeavour to dispose of the same under the provisions of the 1986 Act read with Criminal Procedure Code preferably within three months thereafter.

32. A copy of this judgment may also be placed on the record of Government Appeal No. 6042 of 2010 for information and the Reporting Section of the High Court shall also take notice of this judgment to proceed for reporting such appeals filed under Section 18 of the 1986 Act. The learned Government Advocate may apprise the State Government as well the learned Advocate General of this judgment so as to expedite considering framing of appropriate Rules as observed hereinabove.