
(2010) 02 AHC CK 0291
In the Allahabad High Court

Kailash Sahkari Awas Samiti

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 02-02-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 263, 264, 265, 341, 351

Citation : (2010) 02 AHC CK 0291

Hon'ble Judges : Vinod Prasad, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Vinod Prasad, J.—Although instant appeal was admitted on 10.7.2003 and was listed for final hearing on 21.1.2010 but, arguendo, a legal preliminary objection was mooted for judicial determination by the two counsels for the respondents 2 to 18 Sri R.K. Awashthi and Sri Srikant, regarding maintainability of instant appeal against the impugned order dated 19.5.2003 passed by Special Judge (Gangster's Act), Kanpur Nagar, recorded in S.T. No. 96 of 1987, Kailash Sahakari Awas Samiti v. Nand Lal and Ors. and they submitted that their objection be judicially determined first as a preliminary question and then the appeal be heard on merits, if at all it becomes necessary, as according to their objection instant appeal is not maintainable against the impugned order purported to have been passed u/s 17 of the U.P. Gangster's and Anti Social Activities (Prevention) Act 1986, herein after referred to as the Act. In their submissions no appeal lay u/s 18 of the Act against an order passed u/s 17 thereof. According to the objectors an appeal is maintainable only against a conviction and sentence recorded u/s 3 of the Act and against no other order. Appellee's counsels drove support from some observations made in a decision of this Court in Badan Singh v. State of U.P. and Ors. 2001 (43) ACC 1133. Since the objectors hankered and prayed the raised question to be decided ab initio, therefore, in agreement with both the sides, they were heard on 21.1.2010 for and against the objection and order was reserved, which is being delivered now.

2. Before judging to the mooted question, a resume of background facts, as is borne out from the record of the appeal, shorn off un-necessary details, are registered below.

3. In trial of S.T. No. 96 of 1987, Kailash Sahkari Awas Samiti v. Nand Lal Gupta and Ors., u/s 16 of the Act several properties were attached under the orders passed by Special Judge, Gangsters Act vide it's order dated 24.12.1987. Five different sets of persons including the appellant moved to the court of Special Judge for release of the attached properties. Besides appellant, rest of the fragmented groups consisted of many persons who are respondent objectors 2 to 18, in this appeal. Respondents 10 to 14, Jagmohan, Bhola, Genda Lal, Smt. Usha and Kanhaiya Lal conglomerated in one group, Ganga Prasad and Ram Krishna Verma respondents No. 8 and 9 joined in third group, Nand Lal Gupta, Smt. Pramila @ Urmila Agarwal and Basudha Agarwal respondent Nos. 2 to 4 joined in 4th group and the last group consisted of Smt. Sant Kumari, Vijay Kumar, Abhai Kumar and Jayant Kumar respondent Nos. 15 to 18. Objection of the group of respondent Nos. 10 to 13 was in respect of Plot Aaraji No. 78 shown in the written argument of the appellant Samiti under the heading DA. Special Judge, Gangsters Act in respect of the said property recorded a finding that as per the case of both the parties, no order of release of said property is required as according to the case of appellant Samiti itself, the said landed property was not involved in the case. In respect of the other properties also the claim of the appellant was rejected by the Special Judge, who ordered the release of those properties to respondents 2 to 18 vide his impugned order dated 19.5.2003 in the light of the observations made therein.

4. Hence this appeal by the appellant Samiti, which was admitted and the notices were issued to all the respondents on 10.7.2003 and the operation of the impugned order passed by Special Judge (Gangsters Act) in S.T. No. 96 of 1987 was stayed. After years when the appeal was listed for final hearing that an objection regarding it's maintainability was raised as is already noted above, which is now being determined.

5. According to learned Counsels for the appellee's no appeal is maintainable u/s 18 of the Act against an order passed u/s 17 thereof, as according to them Section 18 applies only to a conviction and sentence recorded against an accused u/s 3 of the Act. Their argument is that only provisions of chapter XXIX of the code (Cr.P.C.) has been made applicable mutatis mutandis under the Act therefore, the said chapter of Cr.P.C. has to be strictly applied. They submitted that since, there is no other section providing for an appeal under the Act therefore, the Court has to tread within the ambit of Section 18 of the Act only. Learned Counsels argued that Section 3 of the Act, which provides for penalty in case of a gangster or in case of public servant who renders any illegal help or support in any manner to a gangster is only appealable u/s 18 of the Act. They further submitted that an order of attachment or confiscation or disposal of property to any person entitled to possession thereof u/s 17 of the Act has not

been made appealable and, therefore, Section 18 will have no application in respect such orders. They relied upon chapter XXIX of the Code and on the decision of Badan Singh (Supra).

6. Sri R.K Saksena, learned Counsel for the appellant refuting the objection of the respondents conversely contended that the appeal is maintainable u/s 18 of the Act against all those orders which are appealable under the code including an order passed u/s 17 of the Act and in support of his argument he referred to various sections of chapter XXIX of the code. Appellant counsel further submitted that the decision relied upon by the respondents is of no help to them as that decision does not countenance the objection of the respondent's counsels.

7. 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 voluminising, 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 - 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. 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 u/s 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 u/s 14(1) of the Act to attach the property, or releases the property u/s 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 u/s 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 CPC 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.

8. 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.

9. What is noticeable here is that an order under Sections 452 and 453 of the Code is appealable u/s 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 u/s 454 thereof. For a ready reference Section 454 Cr.P.C. is reproduced below:

454. Appeal against orders u/s 452 or Section 453.-(1) Any person aggrieved by an order made by a Court u/s 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 Sub-section (1) was made.

10. 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? u/s 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 fillup 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?

11. 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 u/s 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 u/s 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)....

12. 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 u/s 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 u/s 18 of the Act takes into its purview all the appeals which are provided for under the Code of Criminal Procedure.

13. 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.

14. Thus the aforesaid judgment Badan Singh (Supra), does not rule out maintainability of an appeal against an order passed u/s 17 of the Act.

15. 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 u/s 17 of the Act and therefore I reject the preliminary objection raised by the counsels for the respondents 2 to 18.

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