
(2006) 01 AHC CK 0095

In the Allahabad High Court

Case No : Criminal Miscellaneous Writ Petition No's. 10500, 12002, 12003, 12028, 12071, 12468, 12585, 12520, 12623, 12624, 12672, 12734, 12765, 12771 and 12805 of 2005 and 381, 444 and 449 of 2006

Kishan Pal @ K.P. Yadav

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 23-01-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 167, 482, 491, 561A
Penal Code, 1860 (IPC) — Section 171E
Public Gambling Act, 1867 — Section 3

Citation : (2006) 01 AHC CK 0095

Hon'ble Judges : Shiv Shanker, J; Amitava Lala, J

Bench : Division Bench

Advocate : U.C. Mishra, Sushil Kumar Dubey, Dharendra Singh Rajpoot, B.N. Singh, Rajesh Pathik, S.N. Verma, Pushpa Verma, Satyendra Narayan Singh, P.N. Tripathi, Ashwini Kumar Awasthi, Manish Tiwary, L.M. Singh, Kamal Krishna, Nisaruddin, Abhijit Mishra, Kapil Tyagi, Prakash Dwivedi, Sameer Jain, Sunil Kumar and Ajay Kumar Malviya, for the Appellant; Surendra Singh, Rajeev Sharma, Hemendra Kumar, N.K. Verma, A.N. Mulla, A. Bhanot, Indrajeet Yadav, S.N. Murtaza and M. Bajpai and A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

Amitava Lala, J.—The aforesaid cases are taken up for analogous disposal. In all the cases more or less similar prayers have been made for quashing first information reports under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 and stay of arrest of the accused in connection thereto. By and large four categories of cases are involved herein. First. category cases are those where several previous cases are initiated/pending prior to initiation of investigation under this Act. Second category cases are those where single case was initiated/pending prior to initiation of investigation under the Act. Third category cases are those where in spite of

acquittal under the Criminal Procedure Code investigation has been initiated or kept pending under this Act. Last category cases are those where no previous case was pending under any other law prior to initiation of investigation under this Act.

2. Therefore, in all the cases investigations by the police authorities under the Act are challenged under writ jurisdiction. A Full Bench judgment of this High Court reported in 24 (1987) ACC 164 (Ashok Kumar Dixit v. State of U.P. and Anr.) can not be avoided whenever any discussion is necessary in this respect. Let us see the ultimate ratio of such judgment hereunder:

137. These petitions had been filed mainly on the (ground that UP. Act 7 of 1986 was ultra vires the Constitution. We have not been able to find substance in any one of the grounds to attack of " the Act. So far as our power to quash the investigations and the proceedings pending before the, Special Judges challenged in some of the writ petitions before us are concerned, we are of opinion that this is not possible to be done in these cases. Judicial opinion seems to be settled and we have several authorities of the Supreme Court where interference fry the Court into police investigation has been disapproved. This question arose in connection with an application u/s 561A of the Code of Criminal Procedure in an appeal in State of West Bengal Vs. S.N. Basak, Kapoor, J. quoted with approval the observations of the Judicial Committee in the case of AIR 1945 18 (Privy Council) where the Privy Council observed:

The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to interfere in an appropriate case when moved, u/s 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus.

138. This view was followed by the Supreme Court in State of West Bengal and Others Vs. Sampat Lal and Others, and Eastern Spinning Mills and Virendra Kumar Sharda and Another Vs. Rajiv Poddar and Others, . In this case, the Supreme Court observed:-

We consider it absolutely unnecessary to make a reference to the decision of this Court and they are legion which have laid down that save in exceptional cases where non-interference would result in miscarriage of justice, the court and the judicial process should not interfere as the stage of investigation of offences.

139. Of course, the decisions cited, above were in connection with Section 482 Cr.P.C, but the scope of interference under Article 226" of the Constitution is narrower. The power of superintendence of the High Court under Article 226 being extraordinary is to be exercised sparingly and only in Appropriate cases. The power to issue certiorari cannot be invoked to correct an error of fact which a superior Court can do in exercise of its statutory power as a Court of appeal. The High court cannot in exercising its jurisdiction under Article 226 convert itself

into a Court of appeal when the legislature has not chosen to confer such a right. The High Court's function is limited to see that the subordinate court of Tribunal or authority functions within the limits of its power. It cannot correct errors of fact by examining the evidence.

(Emphasis supplied)

3. In the aforesaid judgment the Full Bench also held that the Act is punitive in nature unlike the U.P. Control of Goondas Act, 1970, which is otherwise preventive in nature. In view of the ratio of the aforesaid judgment and having its binding effect no further discussion is necessary, but because of following Division Bench judgment it appears to us that discussion is yet open. However, there is no room for further discussion about the vires of the Act admittedly.

4. In 1998 JIC 405 (Subhash v. State of UP. and Anr.) a Division Bench of this Court considered the matter basically on the four following questions:-

(1) There could not be a prosecution under the Act for a single incident as the Act spoke of "anti-social activities" (in plural).

(2) Prosecution under the Act for past offences was not thought of.

(3) If at all the Act created a new concept of an offence, there must be some allegation that any act or omission towards the commission of the offence was there.

(4) The words "indulges in" as used u/s 2 of the Act would only mean that there should be habituality of the acts covered by Section 2.

5. In considering such questions the Division Bench held all the anti-social activities enumerated under the definition of "ganga" are not covered as offence, but were certainly unlawful activities having serious reflection on the society, though not termed as offences. The law, thus, never required that" offence must have been committed in the past for a proper prosecution under this Act. Ultimately, from the bunch of the cases" the Court selected six cases to prescribe that the first information reports do not indicate any act or omission on the part of the accused persons named in the first information report and are based on solely reading of records. So far as the others are concerned, the Court was pleased to held that investigations will proceed but till collection of credible evidence beyond the mere allegations of their involvement in the past cases no arrest could-be made.

6. Therefore, the Division Bench under writ jurisdiction scrutinized the individual cases of investigation, to grant relief in direct conflict with Full Bench decision. It is a departure from the ratio of the Full Bench judgment and as such has no binding effect. That apart, the aforesaid judgment was also distinguished by another Division Bench of this Court in 1999 (1) JIC 804 (Shamsul Islam v. State of U.P.). There the Court held that original relief"s quashing of the first information report. Additional" relief is in the nature of stay of arrest. If the

original relief can not be granted, the order of stay can not be granted. The Act creates a new and distinct Offence. The protection of Article 20(2) of the Constitution of India would not be available at all at any stage and there can be no bar in arresting the person, who has committed an offence, which is punishable) under the Act. Therefore, as we understood question of double jeopardy or double conviction or double protection or double arrest may not hit the cause since the source of investigation is the separate law introduced by the State. In a further judgment reported in 2000 A LJ 1035 (Rinku alias Hukku v. State of U.P. and Anr.) a Division Bench of this High Court held that singular includes plural and vice versa, thereby single act of antisocial activities" is sufficient to trap a person as a gangster. Hence, the basis of the judgment reported in Subhash (supra) is no more available in view of the successive judgments and these being later judgments have binding effect upon this Court. There is no occasion to forward the matter to the Larger" Bench in view of the discussion made herein.

7. So far as the Act is concerned, we quote some of the important parts of it hereunder;

2 (b) "Gang? means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Pena Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or disturbing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law for setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable u/s 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or

tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section, 171E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

Section 2(c) of the Act is giving definition of "gangster", which is as follows;-

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in Clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities.

Apart from others, Section 3 of the Act prescribes for various penalties, which are as follows:-

3. Penalty.-- (1) A gangster, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:

Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.

(2) Whoever being a public servant renders any illegal help or support in any

manner to a gangster, whether before or after the commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superior officers, in this, respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine.

8. Under such Act special courts were formed. It has jurisdiction, power and procedure. Jurisdiction, power and procedure of the special courts are provided under Sections 7, 8 and 10 of the Act, which are quoted hereunder:-

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

(2) All cases triable by a Special Court, which immediately before the constitution of such Special Court were pending before any Court, shall on creation of such Special Court having jurisdiction over such cases, stand transferred to it.

(3) Where it appears to any Court in the course of any inquiry or that in respect of any offence that the case is one which should be tried by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by the Special Court in accordance with the provisions of this Act:

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

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

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

8. Power of Special Courts with respect to other offences.-- (1) When trying any offence punishable under this Act a Special Court may also try any other offence with which the accused may, under any other law for the time being in force, be charged at the same trial.

(2) If in the course of any trial under this Act of any offence, it is found that the accused has committed any other offence under this Act or any rule thereunder or under any other law, the Special Court may convict such person of such other

offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof.

10. Procedure and powers of Special Courts.- (1) A Special Court may take cognizance of any offence triable by it, without the accused being committed to it for trial upon receiving a complaint of facts which constitute" such offence or upon a police report of such facts.

(2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained In Sub-section (1) of Section 260 or) Section 262 of the Code, try the offence in a summary may In Accordance with the procedure prescribed in the Code and the provisions of Section 263 to 265 of the Code, shall, so far as may be, apply to such trial:

Provided that when in the course of a summary trial under this Sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to rehear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to and in relation to a Special Court as they apply to and in relation to a Magistrate:

Provided further that in the case of any conviction in a summary trial under this Sub-section, it shall be lawful for a Special Court to pass sentence of imprisonment for a term not exceeding two years.

(3) A Special Court, may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to an offence, tender a pardon to such person, on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned whether as principal or abettor in the commission, thereof, and any pardon so tendered shall, for the purposes of Section 308 of the Code, be deemed to have been tendered u/s 307 thereof.

(4) Subject to the, other provisions of this Act a Special Court for the purpose of trial of any offence, have all the powers of a Court of Session and shall follow the procedure prescribed in the Code for the trial of warrant cases by the Magistrate.

(5) Subject to the other provisions of this Act every case transferred to a Special Court under Sub-section (3) of Section 7 shall be dealt with as if such case had been transferred u/s 406 of the Code to such Special Court.

9. Therefore, when the Special Courts are empowered to summary disposal, there is hardly anything to be interfered with by the writ Court. The Act is, by and large, a complete code for effective and expeditious disposal. If there is any lacuna, that can be filled up by the general procedural law i.e. Code of Criminal Procedure.

10. Coming back to the question of double jeopardy we say that the same will be applicable when "one has been prosecuted and punished for the same offence more than once following the Article 20(2) of the Constitution of India, meaning thereby more than one same offence under the same Act. If the Acts are different, source of action should have to be different. Hence, even if actions are similar in nature but when arises out of two different Acts, can not be held to be a same defence to attract the Question of double jeopardy. In further the stage of investigation Is a pre cognizance stage which can not be equated with prosecution and punishment being post cognizance stage which exists where a criminal charge is made before a Court. Pre cognizance stage will be ended by filing charge-sheet or final report. According to us, in delivering the judgment in Subhash (supra) the Court was definitely influenced by the principle of personal liberties as discussed in the case of Joginder Kumar v. State of U.P. and Ors. reported in 31 (1994) ACC 431. A three Judges Bench of the, Supreme Court held as follows:-

A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the Officer effecting the arrest that such arrest is necessary and justified Except in heinous offences, an arrest must be avoided if a police Officer issues notice to person to attend the Station House and not to leave Station without permission would do.

11. The ratio of the judgment in connection with Joginder Kumar (supra) is based on altogether a different situation. A person was detained for few days in the police custody without formal arrest. For few days whereabouts of the person was unknown. When Supreme Court intervened, it was contended by the Police that he was not detained at all, Some informations were being collected from him during such period in connection with a case of abduction and the person was helpful in cooperating with the police. Under such circumstances, the Court had not granted any relief in the nature of habeas corpus but instead of putting the end of the writ petition made certain observations as regards question of personal liberties. The Court held that the horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, the Court has been receiving complaints about violation of human rights because of indiscriminate arrests. A realistic approach should be made in this direction. Factual basis of the judgment is apprehension of custodial violence. The Supreme Court expanded the scope of personal liberties in connection with custodial violence even if one is not formally detained. We have no quarrel with such judgment nor we can do so. On the contrary, we say that one of us (Hon'ble Amitava Lla. J.) already held in a case similar situation as reported in Mahendra Jain Vs. Union of India (UOI), that even if a person is detained in the name of investigation without taking into custody formally, he is entitled to get protection under the Protection of Human Rights Act, 1993 and, therefore, the Human Rights Commission was directed to enquire into the matter and furnish a report before the appropriate Government. Factually the petitioners were taken in the custody in the name of interrogation and detained for one or two days and physically tortured. It is to be remembered

that at the time of hearing of such matter a judgment reported in *Poolpandi Vs. Superintendent, Central Excise and others etc. etc.*, was cited to establish that there is a sharp distinction between an accused in a criminal case and a person called for interrogation. Therefore, protection of an accused can not be available to others. However, the Court at the time of delivering such judgment observed that the persons not being accused have better position in the society, therefore, if any protection is available to the accused, can also be made available to such persons who are in the name of interrogation restrained by the appropriate investigating authorities in such manner. Fortunately, protection of such persons is the ratio of the judgment of *Joginder Kumar (supra)*. In the instant cases no body has been taken into custody formally or informally. Nothing more than apprehension of arrest is available. At the stage of investigation the Court should not interfere with it. We are well aware that the people are apprehensive about long-lasting investigation of the police and Court proceedings. They are also apprehensive about unnecessary police rigour. This is the real agony but not the quashing of F.I.R. (First Information Report). Therefore, the real purpose is to get stay of arrest. That can not be granted by the Court since in the appropriate cases one can get expeditious disposal of bail application following the ratio of (5) 2004 ACC 742 (*Smt. Amarawati and Anr. v. State of U.P.*) Apart from the question of bail, in these days protection of personal liberties are far more secured. The horizon of human rights is not expanding but expanded. The police authorities are very much aware about the human rights activities. Section 2(d) of the Protection of Human Rights Act, 1993 provides as follows:

(d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.

12. Therefore, if an innocent person is victimised, he can get benefit of the same. Similarly, habeas corpus writ proceedings are available where now-a-days Courts are not showing any latitude in considering the appropriate issues. Even in the appropriate cases the Court is interfering under public interest litigation. But scrutinization of individual facts of investigation under writ of certiorari is not permissible. Both Full Bench of this High Court in *Ashok Kumar Dixit (supra)* and the Supreme Court in *State of Haryana and others Vs. Ch. Bhajan Lal and others*, observed that the power of the writ court will be sparingly exercised in the rarest of the rare cases. Here, the object of the Act is that gangsterism and anti-social activities influenced the State legislature in making; introduction of such Act. The statement of objects and reasons of the Act is that gangsterism and anti-social activities were on the increase in the State posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with new menace. With a view to break the gangs by punishing the gangsters and to nip their conspiratorial designs it was considered necessary to make special provisions for the prevention of, and for coping with gangsters and anti-social activities in the State. Therefore, desire of the legislature in introducing the Act was pious. Hence, the only question is about misuse of power. Therefore, if

the Court streamlines the process by giving guidelines following the ratio of the Supreme Court judgment reported in 2002 SCC 110 (Mahendra Lal Das v. State of Bihar and Ors.) persons concerned will be benefited at the appropriate stages. The ratio of the Supreme Court judgment is as follows:

It is true that interference by the court at the investigation stage is not called for. However, it is equally true that the investigating agency cannot be given the latitude of protracting the conclusion of the investigation without any limit of time.

13. Following the ratio of such judgment we can formulate certain guidelines for the future, as under:

a) It is expected that the investigation will be completed by the police within the prescribed limit under the general law i.e. Section 167 of Code of Criminal Procedure, 1973 by filing the charge-sheet or final report, if the accused is in custody within that period;

b) It is expected that the Special Court will conclude the hearing of the cases, where rate of crime is not so higher by applying a summary procedure preferably within a period of 3-6 months from the date of filing the charge-sheet before the Court depending upon, the facts and circumstances of each case;

c) In case of pendency of Appeal/Revision/Review by an accused, Special Court will be empowered to split up the file in respect of other, co-accused to avoid delay in hearing the case;

d) If any person applied or surrendered or produced before the Court in connection with the matters where rate of crime is not higher, the Special Court expeditiously dispose it of following the principles as laid down in Smt. Amarawati (supra);

e) In case the Special Court found that the crime case is not so negligible nor the rate of crime is lower in nature, it will proceed strictly in accordance with law;

f) It will be solemn duty of the Special Courts and the police authorities to follow the guidelines for the sake of investigation viz-a-viz personal liberties.

14. All earlier order/s passed by this Court is reviewed hereunder and will be bound by this latest view. However, no relief can be granted directly to the petitioners individually by this Court. Therefore, the writ petitions stand dismissed. Interim order, if any, stands vacated.

15. However, no order is passed as to costs.

16. Office is directed to keep a copy of this judgment in the file of all the writ petitions decided with this writ petition.