
(2010) 02 AHC CK 0256

In the Allahabad High Court

Case No : Criminal Miscellaneous Case No. 45 of 2009, Criminal Miscellaneous Case No.3651 of 2009, Criminal Miscellaneous Case No. 3684 of 2009

Mohammad Mashkooor

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 11-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313, 407, 482
Penal Code, 1860 (IPC) — Section 306, 406, 506

Citation : (2010) 7 RCR(Criminal) 1545

Hon'ble Judges : Alok Kumar Singh, J

Final Decision : Dismissed

Judgement

Alok K. Singh, J.—Vide order of this Court dated 12.10.2009, this transfer petition under Section 407 Cr.P.C., has been clubbed with the two petitions filed by the same petitioner U/s 482 Cr.P.C. i.e. Crl. Misc. Case No. 3651 of 2009 and Crl. Misc. Case No. 3684 of 2009. Therefore, all the three petitions are being decided by a common judgement/order.

2. Heard Mohd. Naseerullah, learned counsel for the petitioner, Sri I.B. Singh, Senior Advocate, appearing on behalf of complainant, Sri R.K. Dwivedi, learned Additional Government Advocate for State and perused the material placed on record.

3. This transfer petition has been filed mainly on the ground that the learned Presiding Officer has made some remarks in the open court as mentioned in paragraph 6 of the petition to the effect that whatever efforts be made but accused would be convicted. These averments have been controverted in the short counter affidavit filed on behalf of the complainant. In his parawise comments, the Presiding Officer of the Court has also specifically denied those averments. It has been further mentioned in his report that after closing of the prosecution evidence on 06.06.2009, the trial was fixed for 16.06.2009 for recording the statements of the accused under Section 313 Cr.P.C. On that date,

on an application for adjournment given by one accused person, case was adjourned for 20.06.2009. Prior to that, nothing was ever said by the accused against the Court. On the aforesaid date the adjournment application was moved only by coaccused Saroj Jain and therefore, there was no question of saying anything in respect of the other coaccused persons (including the petitioner). Statements of accused persons were recorded after 12 noon, though after rising of the Court, the accused mentioned wrong time while signing the statements. Learned court below also mentioned in its report that the adjournment application No. 130 D was rejected by the court keeping in view the direction of the Hon''ble Court dated 02.02.2009 to decide the Sessions Trial within the stipulated time of three months. It appears that this order was not placed before the Court below by the accused persons on the contrary they kept on giving adjournment applications, as mentioned in the order dated 22.06.2009, passed by the learned Sessions Judge while deciding the transfer application moved earlier before him also (Annexure No. 4). It is also noteworthy that the present transfer petition has been filed only by one accused, namely, Mohd. Mashkoor. The other four coaccused have not joined it. The learned Sessions Judge, while rejecting the aforesaid transfer application has observed that after closing of the evidence on 18.05.2009, the trial was fixed for recording statements under Section 313 Cr.P.C. but on 22.05.2009, 27.05.2009, 01.06.2009, 04.06.2009, 06.06.2009 and on 16.06.2009, adjournment applications were moved on behalf of the accused persons. Besides on 27.05.2009, an application was also moved on behalf of the defence under Section 311 Cr.P.C. for recalling of the witness no. 3 which was disposed of in accordance with law. While rejecting transfer application the learned Sessions Judge also observed that from the perusal of the aforesaid ordersheets, it appeared that an effort was being made on behalf of the defence to prolong the proceedings on some ground or the other. In respect of the alleged observation made by the Presiding Officer in open court to the effect that whatever efforts may be made but conviction is inevitable, the learned Sessions Judge observed that till then no arguments were heard and it is only after hearing the arguments and going through the records, that a Presiding Officer reaches to any conclusion and forms any opinion. Therefore, the learned Sessions Judge did not believe that the learned Presiding Officer concerned made the alleged observation. Finally, he rejected the transfer application on 22.06.2009.

4. Now, on similar grounds this transfer petition has been moved on 23.06.2009 i.e. on the very next day of the rejection order passed by the learned Sessions Judge. The same petitioner also moved a petition under Section 482 Cr.P.C. for quashing the proceedings of aforesaid Session Trial itself arising out of the charge sheet no. 107 of 2008, dated 23.06.2008 filed in Crime No. 254 of 2008, under Sections 306, 406, 506 I.P.C., relating to Police Station Fatehpur, District Barabanki, pending in the Court of Additional Sessions Judge, Court No. 10, Barabanki, as S.T. No. 513 of 2008. This Sessions Trial is at a ripe stage. This petition under Section 482 Cr.p.c. also has not been joined by other coaccused.

Alternatively, a prayer has also been made in this application that the Sessions Trial be transferred from the aforesaid Court to the Special Court of Gangster Act for trial along with the U.P. Gangster Act's case No. 221 of 2009 (State Vs. Mohd. Mashkooor).

5. On the other hand, the same petitioner has also filed a separate petition under Section 482 Cr.P.C. on 08.10.2009 i.e. just after two days of the filing of the aforesaid petition under Section 482 Cr.P.C. for quashing of the charge sheet dated 11.07.2009 of Case Crime No. 289 of 2008, under Section 3 (1) U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Fatehpur, District Barabanki, pending in the Court of Special Judge, Gangster Act, as Case No. 221 of 2004 (State Vs. Mohd. Mashkooor & others). It may be mentioned that out of the five accused facing trial under aforesaid substantive offence under Sections 306, 506 & 406 I.P.C., only four including the petitioner have been chargesheeted under the provisions of U.P. Gangster Act.

6. Firstly coming to the petition seeking transfer of Session Trial to some other court, it is worthwhile to mention that after considering the facts and circumstances of the case, learned Sessions Judge had already rejected a similar transfer application, by means of a well reasoned order. The learned Sessions Judge after considering the averments made in the transfer application before him and also the parawise reply received from the Presiding Officer concerned found that after closure of the evidence on 18.05.2009, the sessions trial was fixed for recording the statements under Section 313 Cr.P.C. but at least on six consecutive dates, adjournments were sought on behalf of the defence, for some reason or the other. Meanwhile with a view to delay the proceedings, an application was also moved on behalf of the defence, under Section 311 Cr.P.C. for recalling of the witness no. 3 on 27.05.2009 which was rejected by the trial court in accordance with law. That order does not appear to have been challenged till date. The learned Sessions Judge further observed that from perusal of the order sheet of the lower court, it appeared that an effort was being made on behalf of the defence to prolong the proceedings on some ground or the other. In respect of the alleged observation made by the trial court that "whatever efforts may be made by the defence the accused will be convicted", the learned Sessions Judge has observed, and rightly so, that till the final arguments are heard, a Presiding Officer of a court does not reach to any conclusion or form an opinion. Therefore, it cannot be believed that before hearing the arguments in the sessions trial, the learned Presiding Officer made the alleged observation. Moreover, there was no sufficient material before the learned Sessions Judge to believe this allegation particularly in view of the specific denial by the Presiding Officer. Considering the entire facts and circumstances and also having regard to the conduct of the defence in seeking several adjournments in the sessions trial which is at the ripe stage and particularly when trial has been expedited by this court with a direction to amend it within stipulated period of three months, the learned Sessions Judge rejected the transfer application. The averments of this transfer petition also have been controverted and specifically denied again by the

Presiding Officer of the court and also by the complainant of this case as already mentioned. Learned A.G.A. has also opposed it. There is no fresh material before this court to arrive at a different conclusion. This Court is also not sitting as an appellate court, in respect of the order passed by learned Sessions Judge. Nevertheless all the averments have been reappraised by this Court. It is really unfortunate that though this Court vide its order dated 02.02.2009, as mentioned herein above, has already directed the trial court to conclude the trial within a period of three months but the petitioner of this case is trying to subvert the aforesaid order of this Court by misusing process of law. He has moved several adjournment applications before the trial court and then two transfer applications one after another and not only this, during pendency of transfer application before this court he also moved two petitions under Section 482 Cr.P.C. contrary to each other. The aforesaid two petitions under Section 482 Cr.P.C. are contrary to each other because on one hand he has sought quashing of chargesheet of substantive offence at such a belated stage and on the other hand he has sought transfer of the trial of the substantive offence to the Court of Special Judge, Gangster Act. At the same time he has also sought quashing of the charge sheet under the Gangster Act itself. This shows that the petitioner is adamant to undermine this Court's order for expeditious conclusion of trial and prolong the hearing of the trial by any hook or crook by misusing process of law.

7. In view of the above, finally therefore, this transfer petition no. 45 of 2009 is dismissed with a cost/compensation of Rs.1000/ to be paid to the complainant opposite party no. 6 who has contested this petition. The interim order stands vacated. Inform the court concerned forthwith.

8. Now I propose to deal with the CrI. Misc. Case No. 3651 of 2009, under Section 482 Cr.P.C. for quashing of charge sheet under Sections 306, 406, 506 I.P.C., pending in the Court below as S.T. No. 513 of 2008. This charge sheet has been filed on the basis of material collected during investigation including the statements under Section 161 Cr.P.C. This chargesheet has now been substantiated by the substantive evidence which has already been recorded in the court. The trial has almost concluded and there is also an order of this Court dated 02.02.2009 to conclude the trial within three months. It is at a ripe stage and the statements of accused under Section 313 Cr.P.C. are to be recorded. Further this petition also has not been joined by other four coaccused. Finally, therefore, I regret in not finding any cogent reason to invoke the inherent power of this court to quash the aforesaid charge sheet at such a belated stage. The Criminal Miscellaneous Case No.3651 of 2009 is also dismissed.

9. Lastly as far as quashing of the charge sheet dated 11.07.2009, under Section 3 (1) U.P. Gangster Act, vide Cr. Misc. Case No. 3684/05 is concerned, the allegations are mostly factual in nature which cannot be looked in to by this Court. This charge sheet has been filed on the basis of the accusations made in the F.I.R., statements recorded under Section 161 Cr.P.C. and the material collected during the investigation.

10. It is also noteworthy that the above charge sheet has been filed against four persons including the petitioner while quashing of the charge sheet, by means of this petition, has been sought by the petitioner Mohd. Mashkooor only. Since the provisions of the Gangster Act have been slapped mainly on the ground of the petitioner being one of the members of the gang consisting of four persons, therefore, it would not be possible to partly quash the charge sheet filed against the petitioner only. Moreover, the petitioner has been shown to be the Chairman of the district body and an influential person and also the gang leader. It is true that against him only one case under Crime No. 2541 of 2008, under Sections 306, 406, 506 I.P.C. has been shown but merely on this ground charge sheet cannot be quashed. The other accused, namely, Maksood who is also one of the members of the gang, has one more serious case to his credit under Case Crime No. 106 of 2000, under Sections 396/412 I.P.C., Police Station Itaunja, District Lucknow. It is needless to say that the word "Gang" means a group of persons, 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, indulges in antisocial activities, as mentioned under Section 2 (b) of the Act. The offences of the I.P.C. shown against him concededly fall within the category of the cases defined under the aforesaid provisions, in support of which there is also sufficient prima facie material on record. Therefore, I regret in not finding any ground for quashing of the charge sheet in question. Consequently this prayer is rejected.

11. In the alternative, the learned counsel for the petitioner has requested that the aforesaid sessions trial be transferred to the Court of Special Judge, Gangster Act, where the charge sheet under Section 3 (1) of U.P. Gangster Act has been filed against four out of the five accused, who are facing trial, in respect of the substantive offence.

12. Learned counsel referred to Section 7 (3) of U.P. Gangsters and AntiSocial Activities (Prevention) Act, 1986, which reads as under:

"7 (3). Where it appears to any court in the course of any inquiry or trial 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 resummon any such witness and after such

further examination, crossexamination and reexamination, if any, as it may permit, the witness shall be discharged."

13. Learned counsel for the petitioner also referred to Section 12 of the U.P. Gangsters and AntiSocial Activities (Prevention) Act, 1986, which reads as under:

"12. Trial by Special Court to have precedence. The trial under this Act of any offence by Special Court shall have precedence over the trial of any other case against the accused in any other court (not being a Special Court) and shall be concluded in preference to the trial of such other case and accordingly the trial of such other case shall remain in abeyance."

14. The aforesaid provisions envisaged under Section 7 (3) of the Gangster Act are primarily meant for the trial court. From perusal of the record, it appears that till date only chargesheet under the Gangster Act has been filed in the court of the Special Judge. But charges have not been framed which means the trial has not commenced in the Court of Special Judge (Gangsters Act), Faizabad.

15. The trial in a warrant case commences only when the charge is framed and read over to the accused and he is called upon to answer the charge. This proposition of law has been laid down by Hon"ble the Apex Court in the case of Ghani Bandar and others Versus State of U.P. and others reported in AIR 1960 Jammu & Kashmir 71 (Full Bench).

16. The condition precedent for application of Section 12 of the Gangsters Act is that there ought to have been some "trial" under the Gangster Act. Subject to this condition only the Special Court will have precedence over the trial of any other case against the accused in any other court. As said above here the trial has not started in the court of Special Judge, Gangster Act. On the contrary in the present case the trial under the substantive offence under Section 306, 406, 506 I.P.C. is already at a ripe stage and under the orders of this Court dated 02.02.2009 it was supposed to have conclude by May, 2009. The order of this Court for conclusion of the trial within the stipulated period, was passed even before the filing of the charge sheet under the Gangsters Act in July, 2009 and therefore, also the question of keeping the aforesaid trial under the substantive offence in abeyance does not arise. This order for expeditious trial has never been challenged. The aforesaid provisions cannot be construed to mean that in any situation the Special Court will have precedence and particularly when trial of substantive offence has been expedited by High Court even before filing of the chargesheet under the provisions of Gangster Act. Moreover, out of several accused only one is the petitioner of this case who has raised this issue and that too with an ulterior object to delay the trial. He cannot be treated as representative of all the left over accused. He has also not come before this court with clean hands for invoking inherent powers. Similarly out of the five accused facing trial under the substantive offence, the provisions of Gangsters Act have been slapped only against four accused and it is not ascertainable as to whether the case of 5th accused can be separated form rest of the accused. Therefore on

account of this reason of feasibility also the aforesaid provisions of the Gangsters Act under Section 7 (3) or 12 are not attracted in this case.

17. Learned counsel for the petitioner also placed reliance on the following two case laws:

(i) Ajai Rai Vs. State of U.P. & others, reported in 1995 CRI.L.J. 2801: The facts of this case are different from the present case and therefore, this case law has no application here. In that case, the Division Bench of this Court held that habitual commission of offence is not necessary for applicability of Gangster Act and also explained that term "Indulgence in" in Section 2 (b) carries same meaning as word does or commits. It cannot be interpreted to mean "Habitually commits." It was further held in this case that even if the cases are pending in ordinary Court, the accused can be tried by Special Court under the Act. There is no quarrel on that point. But it is only an enabling provision. There is no mandate that in any eventuality substantive offences would have to be tried by the Special Court only if a case under the Gangster Act is pending there.

(ii) Imran and others Vs. State of U.P., reported in Lucknow Criminal Reporters 2004 (2): This case law also does not give any strength to the petitioner. On the contrary, it appears to be against the own conduct of the petitioner for not bringing the relevant material before the concerned Sessions Judge as was observed in this case law.

17. From the other side, reliance has been placed on the case of Devi Bux Singh Vs. State of U.P., reported in 1990 Cri.L.J. 2140 (by Hon"ble Mr. Justice S.S. Ahmad and Hon"ble Mr. Justice S.N. Sahay). In this case it was held that Special Court of Gangster Act can try an accused also for an offence of murder if the case is transferred to him by the criminal court. But such Special Court does not get jurisdiction to try other case on mere requisition. In respect of offence punishable under the Gangster Act, a Court of Special Judge has exclusive jurisdiction and it may take cognizance of every such offence upon receiving a complaint or a police report directly. But no such provision has been made in respect of the other offence, which means that if there is any other offence which is being tried by Court of Sessions then the Special Court cannot take the cognizance of such offence unless that case is committed to it as a Court of Sessions in accordance with law or if it has already been committed to the Court of Sessions but then it is transferred to the Special Court in accordance with law. Undoubtedly there is a special provision in Section 7 (3) of the Gangster Act as quoted herein above for transfer of a case in respect of the other offence to the Special Court. But it should appear to such court that the case is one which should be tried there. The word appears is indicative of the discretion which requires to be exercised after considering all the relevant facts and circumstances. Moreover as mentioned above in the Special Court only a charge sheet has been filed. The trial has not started as yet.

18. Therefore, I regret for not finding any substance to accept the alternative

prayer also which has been made in this petition. It may be emphasized here that the inherent powers of this Court under the aforesaid provisions are meant to (i) give effect to any order under this Court or (ii) to prevent abuse of the process or (iii) otherwise to secure the ends of justice. None of the conditions are present here. These powers have to be exercised only when it is justified by the tests specifically laid down in the section itself. These powers have to be exercised sparingly and that too in the rarest of rare cases in order to do real and substantial justice but not to stifle legitimate prosecution. In the present case this petition rather deserves to be dismissed (1) in order to prevent abuse of process and (ii) to give effect to order dated 02.02.2009 for expeditious conclusion of trial within three months. In the conspectus of above this Criminal Miscellaneous Case No.3684 of 2009 is also dismissed.