
(1998) 07 AHC CK 0135

In the Allahabad High Court

Case No : Criminal Miscellaneous W.P. No. 2588 of 1998

Shamsul Islam alias Afroz

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 28-07-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 20, 20(2), 226

Citation : (1999) 1 ACR 398

Hon'ble Judges : K.D. Shahi, J;G.P. Mathur, J

Bench : Division Bench

Advocate : V.P. Srivastava, for the Appellant; A.G.A., for the Respondent

Judgement

G.P. Mathur and K.D. Shahi, JJ.—This petition Under Article 226 of the Constitution has been filed for quashing the F.I.R. dated 10.5.1998 lodged u/s 2(b)(i) and Section 3, U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to as the Act) against the Petitioner which has been registered as Case Crime No. 53 of 1998 of P.S. Gangeeri, district Aligarh.

2. We have perused the F.I.R. and the allegations made therein clearly make out a case under the Act against the Petitioner. In these circumstances, it is not possible to quash the F.I.R. in exercise of jurisdiction under Article 226 of the Constitution.

3. Sri V.P. Srivastava, learned Counsel for the Petitioner has urged that view of the law laid down by a Division Bench in Subhash v. State of U.P. 1998 JIC 405. The F.I.R. deserves to be quashed. We have carefully examined the aforesaid decision and in our opinion, no such principle has been laid down therein on the basis of which the F.I.R. of the present case may be quashed.

4. Learned Counsel has next submitted that even if the F.I.R. is not quashed, the arrest of the Petitioner may be stayed till the Conclusion of the investigation. In support of his submission, learned Counsel has placed strong reliance on the

following observations made in paras 19 and 48 of the judgment which are being reproduced below:

"19. In our considered opinion if a person had, upon a certain set of facts, had once been arrested the same process may not be repeated to his harassment simply because another offence is made out on the same facts. While it is open for the prosecution to include that new offence in the charge-sheet to be filed against the offender, it would be against the concept of liberty that for the same act or set of acts a person would be arrested twice over. Protection against double jeopardy may not only mean protection against double conviction. It would also mean protection against being doubly arrested."

"48. Under these circumstances, in the cases mentioned from the paragraph (last paragraph at page 18) dealing with Criminal Misc. Writ Petition No. 870 of 1998 onwards, it is directed that, while investigation would proceed, till collection of credible evidence in each case concerning involvement of the respective Petitioners in offences under the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, beyond the mere allegations of their involvement in past cases, no arrest be made. No coercive process be also issued executive against the respective Petitioners in this case till such credible evidence is collected. The Petitioners, however, will have to co-operate in investigation in all manner reasonably demanded of them."

Shri Mahendra Pratap, learned A.G.A. has however, contended that if the Court is of the opinion that the F.I.R. discloses commission of a cognizable offence and there is no ground for quashing the same or the investigation of the case, then no direction for staying the arrest of the accused can be made.

5. In the case of Subhash (supra), the Bench was of the opinion that the protection against double jeopardy may not only mean protection against double conviction but would also mean protection against being doubly arrested. With profound respect to learned members of Division Bench, we are unable to agree with the principle laid down in Para 19 of the reports. The doctrine of double jeopardy was introduced by way of amendment in the American Constitution though it was not there in the original Constitution as it was adopted on July 4, 1776. The Fifth Amendment to the American Constitution which came into effect on November 3, 1791 provides as under:

"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

In English Law, the maxim "Nemo debet bis vexari" is followed which means a man must not be put twice in peril for the same offence. Though framers of our Constitution borrowed heavily from English and American Constitution but the principle was incorporated in an altogether different form in the Chapter relating to Fundamental Rights in Para III of the Constitution. Article 20(2) of the Constitution reads as follows:

20(2). No person shall be prosecuted and punished for the same offence more than once."

The import of this constitutional guarantee has been explained by a Constitution Bench in *S.A. Venkataraman Vs. The Union of India (UOI) and Another*, , which as follows ;

"The ambit and contents of the guarantee of the fundamental right given in Article 20(2) are much narrower than those of the Common Law rule in England or the doctrine of "Double Jeopardy" in the American Constitution. Article 20(2) of the Constitution of India does not contain the principle of "autrefois acquit". In order to enable a citizen to invoke the protection of Clause (2) of Article 20 of the Constitution there must have been both prosecution and punishment in respect of the same offence. The words "prosecuted and punished" are to be taken not distributive so as to mean prosecuted or punished. Both the factors must co-exist in order that the operation of the clause may be attracted."

Similar view has been taken by another Constitution Bench decision in *Maqbool Hussain Vs. The State of Bombay*, , and in a catena of other decisions. Therefore, in order to attract the constitutional guarantee as enshrined in Article 20(2) of the Constitution, it is necessary that there should have been both prosecution and punishment in respect of the same offence. The U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, creates an altogether new offence and it is different from the offences described in Clause (i) of Sub-section (b) of Section 2 of the Act. This view has been taken by a Full Bench in *Ashok Kumar Dixit Vs. State of U.P. and Another*, , wherein the vires of. the Act was also upheld. In fact, Sri V.P. Srivastava learned Counsel for the Petitioner has fairly conceded that the Act creates a new and distinct offence. If the Act creates a new and distinct offence, the protection of Article 20(2) of the Constitution would not be available at all at any stage and there can be no bar in arresting a person who has committed an offence which is punishable under the Act.

6. The prayer made by Sri Srivastava that the arrest of the Petitioner be stayed till the conclusion of the investigation can be granted only if the Court is prima facie of the opinion that the F.I.R. does not disclose commission of a cognizable offence and the Court entertains the petition and enquires into the matter. However, if the Court is of the opinion that the F.I.R. discloses commission of a cognizable offence and there is no ground for entertaining the petition, no interim relief of the nature prayed for can be granted. It is important to note that the Petitioner has invoked the jurisdiction of this Court under Article 226 of the Constitution for quashing the F.I.R. and investigation of the case and these proceedings are not meant only for granting interim relief. If the Court is of the opinion that no final relief can be granted to the Petitioner, the petition has to be rejected outright and no other direction in his favour touching the merits of the case can be issued. This principle was enunciated by Kania, C.J., while rendering decision on behalf of the Constitution Bench in *The State of Orissa Vs. Madan Gopal Rungta*, , and it was held as follows ;

"Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application. The directions had been given here only to circumvent the provisions of Section 80, Code of Civil Procedure, and that was not within the scope of Article 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the Petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the Petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature ; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Article 226 of the Constitution. The language of Article 226 does not permit such an action."

7. In view of the settled position of law, we are clearly of the opinion that if the Court is of the opinion that the F.M.R. discloses commission of a cognizable offence and there are no grounds for quashing the same, no direction for staying the arrest of the accused can be issued.

8. For the reasons mentioned above, there is no merit in the writ petition and it is accordingly dismissed summarily at the admission stage.