
(2010) 02 AHC CK 0046
In the Allahabad High Court
Case No : Govt. Appeal No. 7544 of 2008

State of U.P.	Vs	APPELLANT
Ajay Kumar Misra and Another		RESPONDENT

Date of Decision : 09-02-2010

Acts Referred:

Citation : (2010) 2 ACR 1986

Hon'ble Judges : S.N.H. Zaidi, J

Bench : Single Bench

Advocate : A.G.A, for the Appellant; L.K. Dwivedi, Ashok Kumar Singh and Gopal Chaturvedi, for the Respondent

Judgement

S.N.H. Zaidi, J.—This is an appeal u/s 18 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, hereinafter referred to as the Act. filed against the judgment and order dated 15.10.2008 of Additional Sessions Judge/Special Judge (Gangster Act), Court No. 5, Allahabad, passed in Criminal Miscellaneous Application No. 9 of 2008, whereby the application of the Respondents has been allowed and order dated 21.8.2008 of the District Magistrate, Allahabad passed in Case No. 15 of 2008, so far as it relates to plot No. 114/10 of village Naini Dadri and the house built thereon, has been set aside and the said properties have been released from attachment.

2. A resume of the factual matrix of the case is that the District Magistrate, Allahabad, by order dated 24.7.2008, passed u/s 14(1) of the Act, attached certain movable and immovable properties of one Dilip Kumar Misra of village Lawayan Kalan, Police Station Audyogik Kshetra, district Allahabad, who was an accused of Case No. 219 of 2007 u/s 2/3(1) of the Act. Against that order, said Dilip Kumar Misra made a representation u/s 15(1) of the Act (Case No. 15 of 2008) to the District Magistrate (D.M.) who by a detailed order dated 21.8.2008, after refusing to release the said properties from attachment and dismissing the representation, referred the matter with his report to the Special Judge (Gangster) Allahabad u/s 16(1) of the Act. The Respondents, namely, Ajay

Kumar Misra and his wife Smt. Pushpa Misra, who are the elder brother and sister-in-law (bhabhi) of Dilip Kumar Misra, made an application on 2.9.2008 to the Special Judge for the release of plot No. 114/10 of village Naini Dadri and the house built thereon from attachment on the ground that they are its actual owners and the said plot measuring 0.410 hectare was purchased by them through a registered sale deed from Smt. Shobha Gupta in Rs. 3,20,000 on 19.8.1998 and thereafter they gradually got a house built thereon with their own funds and Dilip Kumar Misra has no concern with it. The Special Judge made an inquiry u/s 16 of the Act and after examining the area Lekhpal Mohd. Nasim, Pradhan Bachcha Lal Yadav and Gram Panchayat Adhikari Alok Kumar Singh of the concerned village and Station Officer of the concerned police station R. K. Sharma as Court Witness Nos. 1 to 4 respectively and taking the affidavit of Dilip Kumar Misra held that the Respondents are the actual owners of the said plot and house which they had purchased/ constructed from their own sources of income and it were not acquired by Dilip Kumar Misra. The application of the Respondents was accordingly allowed and the properties in question were ordered to be released in their favour by the impugned judgment and order, which have been challenged by the State Government in this appeal.

3. I have heard Shri D.R. Chaudhari, learned Government advocate for the Appellant, Shri Gopal Chaturvedi, learned senior advocate, assisted by Shri L.K. Dwivedi, for the Respondents and perused the impugned judgment and gone through the record of the lower court.

4. Learned Government Advocate (G.A.) has submitted that since 1991 Dilip Kumar Misra committed offences triable under the Act after forming a gang with other persons and as a result of those offences acquired several movable and immovable properties worth crores of rupees in his name as well as by way of benami transactions in the names of his wife and other relatives, including the Respondents. It is also submitted by him that when the properties were attached by the D.M., Dilip Kumar Misra alone made a representation to him and if the Respondents were having any claim on any of the attached properties, then they should have also made a representation to him as envisaged in Section 15(1) of the Act, but instead of making any representation they directly made an application to the Court of the Special Judge and the learned Judge, ignoring the contention of the State that the Respondents could not make such application without following the provisions of Section 15 of the Act and without looking into the locus standi of the Respondents, proceeded to hear the Respondents and committed serious error in allowing their application.

5. It has also been argued by him that the learned Special Judge, without calling for or taking any evidence from the Respondents decided the matter on the basis of the evidence of court's witnesses, who were summoned by him and also taking into account the affidavit of Dilip Kumar Misra, erroneously, ordered for the release of the properties in question and the State was not given any opportunity to produce any evidence.

6. It has further been contended by the learned G.A. that under Sub-section (5) of Section 16 of the Act the burden of proving that the properties in question were not acquired by Dilip Kumar Misra, a gangster, by committing offences triable under the Act, was upon the Respondents who were claiming those properties, but as they did not produce any evidence, whether oral or documentary, therefore, they had utterly failed in discharging their legal burden and they could also not sufficiently prove their alleged sources of income for the acquisition of the properties in question.

7. It is also the submission of learned G.A. that the D.M. had passed the order of attachment dated 24.7.2008 as well as subsequent order dated 21.8.2008 refusing to release the attached properties in question on sufficient and cogent grounds wherein he has specifically stated that the attached properties were acquired by Dilip Kumar Misra by committing offences under the Act and the learned Special Judge has erred in rejecting those grounds and upholding the claim of the Respondents over the properties in question.

8. Per contra, Shri Gopal Chaturvedi, the learned senior counsel, has contended that Dilip Kumar Misra has not been declared a gangster as yet as the case relating to Crime No. 219 of 2007 registered u/s 2/3 of the Act is pending. It has also been contended that both the Respondents were having their independent sources of income as the father of Respondent Ajay Kumar Misra is giving him half of the income from his agriculture, tube well and flour mill and Respondent Smt, Pushpa Misra was adopted by her uncle Ram Sajeewan Pandey and whatever income he was having from the agriculture he is giving it to her and both the Respondents had saved sufficient funds from these sources to purchase the plot in 1998 and thereafter they gradually raised a house thereon from these sources and started living with their family in that house. It is also submitted that Dilip Kumar Misra has a separate house in village Lawayan Kalan and he has no concern with the properties in question which have not been acquired by him.

9. I have given my thoughtful consideration to the submissions of the learned Counsel for the parties.

10. An objection against the maintainability of the appeal was initially raised by the Respondents but it was subsequently given up and not pressed. None of the parties 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 u/s 17 of the Act, hence the appeal is maintainable.

11. For better appreciation of the questions of law involved in this appeal, the relevant provisions of the Act may be summed up as under:

12. Sub-section (1) of Section 14 provides that if the District Magistrate has reasons to believe that any movable or immovable property, which is in possession of any person, has been acquired by a gangster, as a result of commission of an offence triable under this Act, he may order attachment of

such property, notwithstanding the absence of cognizance of such offence by any Court.

13. Sub-section (1) of Section 15 enables the claimant of any property attached u/s 14 to make representation to the D.M. concerned showing the circumstances in and the source by which he had acquired those properties and Sub-section (2) thereof provides that if the D.M. is satisfied about the genuineness of the claim, he shall forthwith release the property from attachment and thereupon such property shall be made over to him.

14. Sub-section (1) of Section 16 makes it explicit that where no representation is made in accordance with Section 15 or the D.M., on representation, refuses to release the property, he shall refer the matter with his report to the Court having jurisdiction to try an offence under the Act. Sub-section (2) provides that if the D.M. has refused to attach any property under Sub-section (1) of Section 14 or has released 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 such Court for inquiry as to whether the property in question was acquired by or as a result of the commission of an offence triable under the Act. Sub-section (3) provides that the Court on receipt of the reference by the D.M. or an application under Sub-section (2) shall make the inquiry after fixing date and giving notices to the person making the application or to the person making the representation and to the State Government and also to any person whose interest appears to be involved in the case and after hearing the parties, receiving the evidence produced by them or taking such further evidence as it considers necessary decide whether the property was acquired by a gangster as a result of commission of any offence under the Act. Sub-section (4) deals with the powers of the Court for the purposes of making the inquiry and Sub-section (5) lays down that in the proceedings under this section, the burden of proving that the properties in question were not acquired by any gangster as a result of committing any offence triable under the Act, shall be upon the person claiming the property, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872.

15. So far as the locus standi of the Respondents in making the application directly to the Court is concerned, the contention of the learned G.A. that the Respondents could have made the application only after making the representation to the D.M. u/s 15(1) of the Act, is not tenable in view of the scheme of Section 16 of the Act, according to which, the Court in making the inquiry is required to issue notices not only to the person making the representation or application or to the State Government but also to any other person whose interest appears involved in the case. Since in his representation Dilip Kumar Misra had asserted that the District Magistrate had attached the properties of his brother and brother's wife (the Respondents), therefore, the Court was required, under Sub-section (3) of Section 16, to issue notices to the Respondents as their interests were apparently involved in the case. The

Respondents were, therefore, well within their right in making the application for release of the properties in question to the Court as the D.M. had not accepted their title over it in his order dated 21.8.2008.

16. The Court, for the purposes of making an inquiry u/s 16 of the Act has power to take any evidence and summon any person as a witness as it considers necessary under Sub-sections (3) and (4) thereof. Therefore, examination of certain persons as Court witnesses is in accordance with law and the impugned judgment is not suffering with any legal defect on account thereof. Moreover, since R.K. Sharma C.W. 4 was summoned on the application of the Prosecution Officer, therefore, Appellant's contention cannot be accepted that opportunity was not given to it to produce the evidence.

17. Much stress has been laid by the learned G.A. on the contention that as the Respondents have not produced any evidence, oral or documentary, in support of their claim of ownership or to show that the properties in question were not acquired by a gangster as a result of commission of any offence triable under the Act, therefore, they have failed in discharging their burden under Sub-section (5) of Section 16 of the Act. In my opinion, this burden can be sufficiently discharged if the Respondents succeed in proving their claim over the properties in question by showing the source by which they have acquired it, because then it can be said that the properties have not been acquired by Dilip Kumar Misra by committing any offence.

18. The properties in question in this case are plot No. 114/10 of village Naini Dadri of Tehsil Karchhana, district Allahabad and a double storied house built on it. The Respondents have not produced any evidence either in support of their title over the properties in question or to show the sources by which such properties were acquired by them. The admission of D.M. made in the attachment order as well as in the order dated 21.8.2008 that the plot in question is recorded in names of the Respondents cannot be said to be sufficient to hold the Respondents' claim over it unless the Respondents succeed in showing the circumstances under and the sources by which they have acquired it in view of the observation of the D.M. that the plot has been purchased by Dilip Kumar Misra in the names of the Respondents. C.W. 1 has only admitted that a double storied house is built on that plot and C.W. 2 and C.W. 3 have said that the Respondents were living with their children in that house but these witnesses have not said that by which source the house was built. In his affidavit Dilip Kumar Misra has asserted that the Respondents are the owners of the properties in question and has denied his concern with it. It appears that the learned Special Judge merely on the basis of the averments of the Respondents made in their application and in the affidavit of Dilip Kumar Misra has found the ownership of the Respondents over the house and plot proved and without referring to or discussing any evidence in this behalf, held that the Respondents were having sufficient means to acquire those properties. The Respondents have not examined themselves to disclose their sources of income by which the plot

was purchased or the house was built. The averments made in the application cannot take the place of evidence referred to in Section 16(3)(b) of the Act. According to the representation made to the D.M. by Dilip Kumar Misra, the Respondents had spent Rs. 3,20,000 in purchasing the plot and invested Rs. 4,00,000 in constructing the ground floor of the house from 19.8.1998 to 31.3.2002 and further invested Rs. 7,00,000 from 1.4.2002 to 31.3.2005 in the construction of the first floor thereof and thus a total amount of Rs. 14,20,000 was invested by them in acquiring those properties. Though he has also tried to explain as to how the Respondents got that amount, but since he has not produced any documents in support thereof, therefore, the D.M. did not accept it.

19. Since the properties in question were attached by the D.M. on the assertion that it were acquired by Dilip Kumar Misra, an alleged gangster, by committing the offences triable under the Act and the plot in question was purchased by him in the names of the Respondents who were his close relatives and the house thereon was got built by him, hence, the burden of refuting that allegation and proving, u/s 16(5) of the Act, that the properties in question were not acquired by Dilip Kumar Misra as a result of committing any offence triable under the Act, was on the Respondents who were claiming those properties. As stated earlier, this burden could only be discharged by the Respondents by proving their title over the properties in question by producing sufficient evidence in support thereof as well as by proving the sources by which such properties were acquired by them. The standard of proof required for the purposes of the enquiry u/s 16 of the Act is not so high as is needed for proving the guilt of an accused in a criminal trial as in the later case the guilt has to be proved beyond any doubt. However, since the Respondents have not produced any evidence and the ownership of the Respondents over the properties in question and their source of income in its acquisition are not proved from the testimony of the Court's witnesses, therefore, the contention of the learned G.A. has merit and is acceptable that the Respondents have utterly failed in discharging their legal burden. The learned Special Judge has committed serious mistake by ignoring the provisions of Sub-section (5) of Section 16 of the Act as well as in accepting the averments of the Respondents made in their application as evidence and also relying upon the affidavit of Dilip Kumar Misra without giving any opportunity of cross-examination to the Prosecution Officer, who was participating in the enquiry on behalf of the State. The learned court below has also erred in misreading the testimonies of C.W. 1 to C.W. 3 in holding the claim of ownership of the Respondents over the properties in question. As the Respondents have failed to establish their claim over the properties in question, therefore, they are not entitled to get such properties released from attachment in their favour. The impugned judgment and order, therefore, cannot be sustained and are liable to be set aside and the appeal is deserved to be allowed.

20. The appeal is accordingly allowed and the judgment and order dated 15.10.2008 are set aside.