

(1987) 03 AHC CK 0033

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 15545 of 1984

Surendra Pal singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 10-03-1987

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 157(1), 159, 173(2), 173(8)
Penal Code, 1860 (IPC) — Section 120B, 161, 165, 165A, 203
Police Act, 1861 — Section 3, 46(2), 7
Prevention of Corruption Act, 1947 — Section 5, 5(1), 5(2), 5(4), 5A
Treasure Trove Act, 1878 — Section 20, 4
Uttar Pradesh Police Regulations, 1948 — Regulation 397(5), 398, 486, 486(1)(3)

Citation : (1987) 11 ACR 499

Hon'ble Judges : B.N. Saprú, J;A.N. Dikshita, J

Bench : Division Bench

Advocate : Ambrish Kumar Sharma, for the Appellant; A.P. Singh, C.S.C. (Addl.), for the Respondent

Judgement

B.N. Saprú, J.—Surendra Pal Singh, the Petitioner, was a Station Officer of P.S. Shikohabad in the year 1977. On the 20th June, 1977, he was promoted as a Deputy Superintendent of Police.

2. On 8th June, 1980, a First Information Report was lodged at the P.S. Shikohabad by Sri Satish Chandra Yadav, the Deputy Superintendent of Police, Anti-Corruption, Agra Circle, against the Petitioner under Sections 409/392/203/218/M2/120-B of the Indian Penal Code read with Section 5(2) of the Prevention of Corruption Act as also under Sections 4/20 of the Treasure Trove Act. In the First Information Report the case set out was that on the 1st March, 1977 one Parasuram Jatav and Jaipal Jatav were digging some land. They found 20 gold bricks which were retained by them and not deposited with the Authorities. The brother of Parasuram Jatav, Hira Lal, and one Vinod Kumar came and informed the Petitioner about the discovery of the gold. It was said that the gold was

recovered by the Petitioner, but was misappropriated.

3. The investigation was originally carried on by Sri Janardan Singh Sharma, an Inspector of the Crime Branch of the Criminal Investigation Department. The Petitioner made a representation that the Investigating Officer was junior to him and, in 1981, the investigation was again transferred to Sri Devendra Singh, who again was an Inspector in the Crime Branch of the Criminal Investigation Department.

4. The Petitioner filed this writ petition questioning the legality of the investigation by an Officer Junior in rank to him and on 28-10-1984 an order was obtained from this Court restraining the Respondent No. 4, namely Sri Devendra Singh from filing a charge-sheet against the Petitioner.

5. In the counter affidavit, it is stated that the investigation has been completed and the charge-sheet is ready and sanction under the Code of Criminal Procedure for the prosecution of the Petitioner had been obtained from the State Government.

6. Therefore, the question that has to be decided in this case is whether an investigation by an Inspector of the Crime Branch of the Criminal Investigation Department against the Petitioner who is a Deputy Superintendent of Police is legal.

7. In Chapter XXIX of Part III of the U.P. Police Regulations, the Gazetted Officers of the Police Force are mentioned and in Regulation 397(5) we find a Deputy Superintendent. In Regulation 398 the non-Gazetted Officers of the Police Force are mentioned and at serial No. 1, we find Inspectors. It is, therefore, apparent that while the Deputy Superintendent of Police is a Gazetted Officer of the Police Force, an Inspector is only a non-Gazetted Officer. There can, therefore, be no manner of doubt that a Deputy Superintendent of Police is superior in rank to an Inspector of Police. This position has also not been contested on behalf of the Respondents by the learned Additional Chief Standing Counsel.

8. We are really concerned with the effect of Regulation 486 of the U.P. Police Regulations and in particular, Clause (I)(3) thereof. Regulation 486, in so far as it is relevant, is reproduced below:

486. When the offence alleged against a police officer amounts to an offence only u/s 7 of the Police Act, there can be no magisterial inquiry under the Code of Criminal Procedure. In such cases, and in other cases until and unless a magisterial inquiry is ordered, inquiry will be made under the direction of the Superintendent of Police in accordance with the following rules; I. Every information received by the police relating the commission of a cognizable offence by a police officer shall be dealt with in the first place under Chapter XIV (now Chapter XII), Code of Criminal Procedure, according to law, a case under the appropriate section being registered in the police station concerned provided that-

(1) ...

(2) ...

(3) unless investigation is refused by the Superintendent of Police u/s 157(1)(b), Code of Criminal Procedure, and not ordered by the District Magistrate u/s 159, or unless the District Magistrate orders a magisterial inquiry u/s 159, investigation u/s 159, Code of Criminal Procedure, shall be made by a Police officer selected by the Superintendent of Police higher in rank than the officer charged;

(4) ...

9. This Regulation came up for interpretation before the Supreme Court in the case of *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, . Babu Ram Upadhyaya, in the said case, was a police officer. A complaint was made against him that he had committed an act which was an offence u/s 405, IPC when the matter reached the Deputy Inspector General of Police he directed the Superintendent of Police to draw up the proceedings u/s 7 of the Police Act against Babu Ram Upadhyaya. After the enquiry, and after giving an opportunity to Babu Ram Upadhyaya, he was dismissed from the service. The High Court, in a writ petition filed by Babu Ram Upadhyaya, held that as Regulation 486 had not been complied with, the order of dismissal passed was illegal and invalid. The State of Uttar Pradesh appealed to the Supreme Court. The Supreme Court held that Regulation 486(1)(3) was mandatory, as held by the High Court, and dismissed the appeal preferred by the State of Uttar Pradesh. The Supreme Court held that, as an investigation as contemplated under Regulation 486(I)(3) had not been held, the entire departmental proceedings were bad.

10. The learned Counsel for the Petitioner, Sri A.K. Sharma, contends that as the investigation had to be conducted by an Officer higher in rank to the Officer charged, as provided under Regulation 486(I)(3), no charge-sheet could be submitted on the basis of the said investigation.

11. Sri A.P. Singh, the learned Additional Chief Standing Counsel appearing for the State, in a very able argument, points out that the U.P. Police Regulations had been made by the State Government u/s 46(2) of the Police Act. Section 46 of the Police Act, 1861, provides as follows:

46. Scope of Act-

(1)...

(2) When the whole or any part of this Act shall have been so extended, the State Government may, from time to time, by notification in the official Gazette, make rules consistent with this Act-

(a) ...

(b) ...

(c) generally, for giving effect to the provisions of this Act....

12. Sri A.P. Singh submits that Regulation 486 in general and Regulation 486(I) (3), in particular, which had been framed u/s 46(2) of the Police Act, should be read as dealing only with the departmental proceedings and not be interpreted to mean to laying down any fetter on the power of the police to investigate and send the accused officer for trial by a Criminal Court, if it is reiterated that a criminal case had been made out against the accused Officer.

Alternatively, he submits that the investigation of a crime and criminal prosecution are provided for by the Code of Criminal Procedure and the Police Act and the Regulations framed thereunder have no connection with investigation of a crime by the police under the Code of Criminal Procedure, which is a self contained Code.

13. He relies very strongly upon a decision of the Supreme Court in the case of State of Punjab Vs. Charan Singh, . In that case, it was held that a Police officer who was an accused and who was alleged to have committed an offence u/s 5(1) (d) read with Section 5(2) of the Prevention of Corruption Act, could not be acquitted by the High Court merely on the ground that there had been non-compliance of Rule 16.38 of the Punjab Police Rules. It was held that Rule 16.38 was found in the Chapter beginning with Rule 16.1 the first clause of which was as follows:

No police officer shall be departmentally punished otherwise than as provided in these Rules.

14. Rule 16.38 was held to be laying down guidelines of the procedure to be followed when a Superintendent of Police received a complaint about the commission of a criminal offence by a police officer" in connection with his official relations with the public". The Superintendent of Police was enjoined to give immediate information to the District Magistrate who was thereupon to decide whether the investigation on the complaint should be conducted by the police officer or by a Magistrate. It laid down that though a judicial prosecution shall normally follow, the matter should be disposed of departmentally if the District Magistrate so orders, for reasons to be recorded. It was held by the Supreme Court that-

It is clear that Rule 16.38 is not designed to be a condition precedent to the launching of a prosecution in a criminal Court, it is in the nature of instructions to the Department and is not meant to be of the nature of a sanction or permission for a prosecution. Nor can it override the provisions of the Code of Criminal Procedure and the provisions of the Prevention of Corruption Act.

15. Sri A.P. Singh has also referred to a decision of a Single Judge of this Court in the case of V.P. Tyagi Vs. Ram Singh, . In that case, an application u/s 561-A of the Code of Criminal Procedure (old) had been instituted in the High Court for quashing the proceedings pending before the District Magistrate, Pithoragarh,

which had been initiated upon a complaint filed against V.P. Tyagi, who was a police officer, alleging that he committed an offence u/s 323/498 IPC. It was submitted by the counsel that the prosecution was bad, as it was in violation of the U.P. Police Regulations, and in this connection, the counsel had relied upon a decision of the Supreme Court in the case of *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, . It was observed by the learned Judge while dismissing the application u/s 561-A of the Code of Criminal Procedure (old) that-

Moreover, the Police Regulations cannot amend or modify the provisions of the Code of Criminal Procedure which prescribe the jurisdiction of Magistrate to take cognizance and try the offence under the Indian Penal Code. The trial before the Magistrate cannot, therefore, be deemed to suffer from any error or jurisdiction.

16. Sri A.P. Singh, the learned Additional Chief Standing Counsel, contends that this case also supports his contention that the U.P. Police Regulations cannot, in any manner, detract from, or add to, or modify the procedure in the Code of Criminal Procedure which alone governs the investigation and proposed trial in this case.

17. It is undisputed that in the State of Uttar Pradesh, an Inspector of the Crime Branch of the Criminal Department, who are superior in rank to the Station Officer, had been entrusted with the jurisdiction over the whole State to investigate into the cases under the provisions of the Prevention of Corruption Act.

18. Sri A.K. Sharma appearing on behalf of the Petitioner has submitted that whole of the Regulation 486 may not have been made under the powers conferred on the State Government u/s 46(2) of the Police Act, the Regulation which are not covered by Section 46(2) of the Police Act should be taken to have been made by the State Government under its power of Superintendence vested in it u/s 3 of the Police Act. It is settled law that if an authority making the rules or regulations has the power to frame the rules, the mention of a wrong head of power will not vitiate or invalidates the rules or the regulations. Section 3 of the Police Act came up for interpretation before the Supreme Court in the case of *State of Bihar and Another Vs. J.A.C. Saldanha and Others*, . In that case, a case was registered by the police and the investigation was done by the local police which submitted a final report in the case. Meanwhile the Government had passed an order that the matter should be investigated by Inspector General of Police (Vigilance) and a request was made to the Court not to pass orders on the final report but to await further investigation, which was acceded to by the Magistrate. A Full Bench quashed the order The matter was taken up in appeal to the Supreme Court by the State of Bihar, which allowed the appeal. It was noticed by the Supreme Court that by virtue of a notification issued by the State Government dated June 6, 1973, under Clause (s) of Sub-section (1) of Section 4 of the 1898 Code declaring that in respect of certain offence the Vigilance Department shall be deemed to be a police station having its jurisdiction throughout the whole State of Bihar. It was observed that-

Even apart from this, Inspector General appointed by the State Government has jurisdiction over the whole of the State unless the contrary is indicated. If he is thus an officer superior in rank to an officer incharge of a police station he could in view of Section 36 exercise the powers of an officer incharge of a police station throughout the local area to which he was appointed meaning thereby the whole of Bihar State as might be exercised by an officer incharge of a police station throughout the local area to which he was appointed meaning thereby the whole of Bihar State as might be exercised by an officer incharge of a police station within the limits of his police station. It was to him that the investigation of the case was ordered to be handed over by the State Government.

19. Dealing with the submission that the State Government had no power to direct further investigation that being the power of the officer-in-charge of a police station under Sub-section (8) of Section 173 of the Code, or the Magistrate to direct further investigation under Sub-section (3) of Section 156, and, therefore, the State Government under orders of the Chief Minister was not competent to direct further investigation in the case. The Supreme Court held that the State Government had such a power it noticed that the Superintendence of police vested in the State Government u/s 3 of the Police Act. It was held that by virtue of that Section, the State Government could invest the power of investigation on the Inspector General of Police (Vigilance). It was observed that:

Inspector General, Vigilance, being appointed for the whole of the State, is a police officer considered to be on duty for all purposes of the Act in the whole of the State and it is open to the State Government to employ him as police officer in any part of the general district. This would effectively answer the contention of Respondent 2 that Inspector General, Vigilance, being only in charge of bribery and corruption cases, could not be directed by the State Government in exercise of its executive administrative function to take over investigation of a cognizable offence registered at railway police station because when he was directed to take over the investigation it would mean that he was employed as a police officer in that police station for the detention of the crime.

As regards the extent of powers, it was observed that-

Accordingly Superintendence would comprehend the power to direct further investigation if the circumstances so warrant and there is nothing in the Code providing to the contrary so as to limit or fetter this power. Sub-section (8) of Section 173 was pressed into service to show that the power of further investigation after the submission of a report u/s 173(2) would be with the officer in charge of a police station. Sub-section (8) of Section 173 is not the source of power of the State Government to direct further investigation. Section 173(8) enables an officer incharge of a police station to carry on further investigation even after a report u/s 173(2) is submitted to Court. But if State Government has otherwise power to direct further investigation it is neither curtailed, limited nor denied by Section 173(8), more so, when the State Government directs an officer superior in rank to an officer incharge of police

station thereby enjoying all powers of an officer-in-charge of a police station to further investigate the case. Such a situation would be covered by the combined reading of Section 173(8) with Section 36 of the Code. Such power is claimed as flowing from the power of Superintendence over police to direct a police officer to do or not to do a certain thing because at the stage of investigation the power is enjoyed as executive power untrammelled by the judiciary.

20. As regards the argument before the Supreme Court that in view of the provisions of Section 173(8) of the Code of Criminal Procedure it was not open to the Court to so interpret the word "Superintendence" in Section 3 of the Police Act as to empower the State Government to direct investigation being done by some one other than the statutory authority envisaged by Section 173(8) of the Code, it was held that the argument was untenable. It had been submitted that a general Act, which in this case was the Police Act, must yield to a special Act dealing with a specific subject matter and that if an Act directs a thing to be done in a particular way, it shall be deemed to have prohibited the doing of that thing in any other way. The Supreme Court observed that-

There is no warrant for invoking this principle because Section 5 of the Code provides that nothing in the Code shall, in the absence of a specific provision to the contrary, effect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. Section 3 of the Act does not prescribe any special procedure for investigation contrary to one prescribed in the Code. It merely provides for conferment of certain powers which, when exercised, would project into the provisions of the Code which confers power on the officer in-charge of a police station to carry on further investigation u/s 173(8) after submission of a report and that too without any permission of the Magistrate. There is no conflict between the two provisions. Power to direct investigation or further investigation is entirely different from the method and procedure of investigation and the competence of the person to investigate Section 3 of the Act as interpreted by us deals with the powers of the State Government to direct further investigation into the case.

21. This case is a clear authority for the proposition that the State Government has the power of Superintendence and authority to direct that either in a particular case or class of cases or classes of cases investigation should be done by a officer other than a Station Officer who have, however, to be superior in rank to the Station Officer. It is also an authority for the proposition that such power flows from Section 3 of the Police Act and is not, in any manner, in conflict with the provisions of the Code of Criminal Procedure.

22. In the instant case, the investigation had been done by an Inspector of the Crime Branch of the Criminal Investigation Department, who is admittedly superior in rank to a Station Officer, though not to the charged officer, namely Surendra Pal Singh.

23. A question remains whether the phrase "investigation u/s 159, Code of Criminal Procedure, shall be made by the police officer selected by the Superintendent of Police and higher in rank than the officer charged" are made u/s 3 of the Police Act. We are of the view that this part of the Regulation 486(I)(3) had not been made u/s 46(2) of the Police Act, but had been made under the power of Superintendence vested in the State Government u/s 3 of the Police Act.

24. This answer immediately lead to another question as to whether by investing an Inspector of the Crime Branch of the Criminal Investigation Department with power to investigate into cases under the provisions of Section 5 of the Prevention of Corruption Act the State Government, by necessary implication, modified the quoted part of Regulation 486(I)(3).

25. Before answering this question, it must be stated that Section 5(1) of the Prevention of Corruption Act (hereinafter to be referred to as "the Corruption Act"), as originally enacted, had a clause that-

No officer below the rank-

(a)...

(b)...

(c)...

(d) elsewhere, of a Deputy Superintendent of Police, shall investigate any offence punishable u/s 161, Section 165 or Section 165A of the Indian Penal Code or u/s 5 of this Act without an order of a Presidency Magistrate or a Magistrate of the First Class.

26. The effect of an investigation by an officer below the rank of the Deputy Superintendent of Police came up for consideration before the Supreme Court in a number of cases.

27. In the case of H.N. Rishhud v. State of Delhi AIR 1955 SC 196 the Supreme Court, at page 203, observed that-

We are, therefore, clear, in our opinion, that Section 5(4) and proviso 3 of the Act and the corresponding Section 5A of the Act 59 of 1952 are mandatory and not directory and that investigation conducted in violation thereof, bears the stamp of illegality.

The Supreme Court held as follows:

It does not follow, however, that the validity of the investigation is to be completely ignored by the Court during the trial when the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court while not declining cognizance will have to take necessary steps to get the illegality cured and defect rectified by ordering such reinvestigation as the circumstances of an individual case may call for.

28. In another case, namely *The State of Madhya Pradesh Vs. Mubarak Ali*, the facts were that a Sub-Inspector of Special Police Establishment at Gwalior received an information that a Railway official was asking for a gratification. A trap was arranged by that Inspector and the Railway Police arrested him. Subsequently, after 10 days of the start of the investigation, the Sub-Inspector(?) for a permission of the Magistrate to investigate which is provided for in Section 5-A. The High Court had held that the permission was granted by the Magistrate without applying his mind to the facts of the case and directed further investigation by the Deputy Superintendent of Police. In appeal to the Supreme Court, the order of the High Court was upheld. The decision in the case of *H.L. Rishhud (Supra)* was relied upon by the Supreme Court.

29. In the case of *A.R. Antulay Vs. Ramdas Srinivas Nayak and Another*, the Supreme Court after reviewing the law on the subject observed that-

Having carefully examined these judgments in the light of submissions made the only conclusion that unquestionably emerges is that Section 5-A is a safeguard against investigation of offences committed by public servant by petty or lower rank police officer. It has nothing to do directly or indirectly that the mode and method of taking cognizance of the offences by the Court of Special Judge. It also follows as a necessary corollary that provisions of Section 5-A is not a condition precedent to initiation of proceedings before the Special Judge who acquires power u/s 8(1) to take cognizance of offence enumerated in Section 6(1) (a) and (b) with this limitation alone that it shall not be upon commitment to him by the Magistrate.

30. Thereafter the Supreme Court went on to hold that the Special Judge could entertain a case u/s 5-A on a private complaint.

31. The view of the Supreme Court is that while the trial before the Special Judge will not be vitiated if the investigation has been conducted by a public officer of rank lower than the prescribed rank unless prejudice is asserted and proved by the accused. However, the Supreme Court has held that if any illegality is brought to the notice of the Court at the commencement of the trial, it is incumbent on the Court to order a fresh investigation while keeping the case pending. In other words, the accused should not be tried and at the conclusion of the trial to prove prejudice, if he brings to the notice of the Court the illegality at the commencement of the proceedings.

32. In the case in hand, the alleged illegality in the investigation has been brought to the notice of this Court even before a charge-sheet has been filed.

33. It is necessary to mention here that Section 5-A of the Corruption Act was amended by the Anti-Corruption Laws (Amendment) Act, 1964 and it is not provided as follows:

Provided that an investigation may be conducted by an Inspector of Police authorised by the State Government in this behalf, by a general or special order,

and such an Inspector does not require an order of a Presidency Magistrate or a Magistrate of I Class.

34. The amendment, however, will not effect the principle of law as declared by the Supreme Court that if any illegality is brought to the notice of the Court at the earliest, the Court will take steps to have the illegality rectified.

35. Coming back to the question as to whether Regulation 486(I)(3) stands amended or superseded by virtue of the powers conferred by the State Government on an Inspector of the Crime Branch of the Criminal Investigation Department to investigate a case u/s 161, Section 165 or Section 165A of the Indian Penal Code or Section 5 of the Prevention Act, we find that the State Government's order only enables an investigation of an offence under sections mentioned above by an Inspector of the Crime Branch. Offences under these sections may be committed by any class of Government Servants including police officers. The notification conferring the power issued by the State Government does not either say that Regulation 486(I)(3) need not be complied with where Police Officers are involved under these Sections. It is a general power. Regulation 486(I)(3) deals with those cases where police officers are involved and as such is a special provision. A general law does not normally detract from a special law unless it expressly or impliedly repeals the special law. We find no indication of such an intention on the part of the Government when it conferred power of investigation on an Inspector of the Crime Branch to investigate offences under these sections. We are therefore, of the opinion that the latter part of Regulation 486(I)(3) is made under the power of Superintendence vested in the State Government u/s 3 of the Police Act and continues to cover the investigation against a police officers including the offence committed by them u/s 5 of the Corruption Act.

36. We are unable to accept the argument of Sri A.P. Singh that anything in Regulation 486 (I)(3) which is in conflict with the provisions of the Code of Criminal Procedure will not prevail. The only effect of Regulation 486(I)(3) is that a particular type of offences need to be investigated by an officer of a specified rank. It has already been held by the Supreme Court in *State of Bihar and Another Vs. J.A.C. Saldanha and Others*, that such is the position, as the Supreme Court had upheld the further investigation conducted by the Inspector General of Police on the orders of the State Government where a final report had been submitted by the Investigating Officer.

37. We are also satisfied that the Supreme Court in the case of *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, had held that whole Regulation 486(I)(3) is mandatory and the investigation in violation of the said Regulation would be either irregular or illegal.

38. We are satisfied that since the illegality in the investigation has been brought out at the earliest this Court should, in its power under Article 226 of the Constitution of India, order a fresh investigation into the alleged crime

committed by the Petitioner as if the charge-sheet is allowed to be submitted and the Special Judge takes cognizance and an objection as to the legality of the investigation is raised, the Special Judge, under the law as declared by the Supreme Court, is bound to direct reinvestigation.

39. We must place on record our appreciation of the very able arguments addressed to us by Sri A.K. Sharma appearing for the Petitioner and Sri A.P. Singh Additional Chief Standing Counsel, on behalf of the Respondents.

40. In the result, the writ petition succeeds and is allowed to the extent that a writ of mandamus is issued commanding the Respondents not to submit any charge-sheet on the basis of the investigation conducted by the Inspector of the Crime Branch, but we leave it open to the Respondents to get the investigation conducted by an Officer competent to investigate under Regulation 486(I)(3) of the U.P. Police Regulations, who may submit a charge-sheet. In the circumstances of the case, there will be no order as to costs.