
(2004) 05 AHC CK 0007

In the Allahabad High Court

Case No : Criminal Miscellaneous (Transfer) Application No. 113 of 2004

Uday Pratap Singh and Others (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 13-05-2004

Acts Referred:

Arms Act, 1959 — Section 25, 3
Constitution of India, 1950 — Article 136, 142, 21
Criminal Procedure Code, 1973 (CrPC) — Section 321, 407
Explosive Substances Act, 1908 — Section 4, 5
Prevention of Terrorism Act, 2002 — Section 23, 25(2), 34

Citation : (2004) 2 ACR 1979

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : V.B. Singh, S.P. Singh, B.D. Mandhyan and U.P. Singh, for the Appellant; A.K. Misra and Ravindra Singh, A.G.As., for the Respondent

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—Heard Sri V.B. Singh, senior advocate assisted by Sri Uday Pratap Singh for applicants and Sri Ravindra Singh, Additional Advocate General for the State of U.P. Sri A.K. Misra appears for Sri Satish Kumar Shukla, who has intervened in the matter.

2. This Criminal Misc. (Transfer) Application has been filed u/s 407, Cr.P.C. and Section 25 (2) (3) of the Prevention of Terrorism Act, 2002 (in short the Act No. 15 of 2002) for transfer of Case Crime No. 10 of 2003 u/s 3/4 POTA and the attached cases namely Crime No. 9 of 2003 u/s 25, Arms Act, 11 of 2003 u/s 4/5 Explosive Substances Act, 12 of 2003, 13 of 2003 ; 14 of 2003 and 15 of 2003 u/s 25 Arms Act, P.S. Kunda, district Pratapgarh pending before Special/Designated Court, Kanpur Nagar, constituted under the Act No. 15 of 2002, to any other Designated Court in the State and for any other or further orders.

3. In short the facts giving rise to this transfer application are that the applicants

are facing trial u/s 3/4 of the Act No. 15 of 2002 and the attached cases. The applicant Sri Uday Pratap Singh was arrested in January, 2003. All the cases are pending before the Designated Court, Kanpur Nagar, constituted as Special Court within the meaning of Section 23 of the Act No. 15 of 2002. The second bail application of applicant No. 3 was rejected by the Designated Court on 22.1.2004. The applicant No. 3 preferred a Criminal Appeal No. 1032 of 2004 against the order u/s 34 of the Act. The Criminal Appeal No. 1032 of 2004 was allowed by a Division Bench of this Court on 24.2.2004. The applicant No. 2 filed a bail application before the Designated Court on 5.3.2004. It is alleged in para 5 of the transfer application that after entertaining the bail application and after perusing the entire appellate order dated 24.2.2004, the Designated Judge expressed his inability to entertain the cases, as the learned Judge observed in open court that in view of the various observations made in the judgment against his order, it is not desirable for him to conduct the cases any further, and informed the counsel for the applicant that he was sending a fax message to Hon"ble the Chief Justice of Allahabad High Court through Registrar General for transferring these cases from his Court.

4. It is stated in para 6 of the affidavit that since the Designated Court has expressed his inability, unwillingness in conducting the case on his own after perusing the order of the High Court and has sent a fax message to the High Court, the applicants are seeking transfer of these cases, as there is no alternative for getting justice in reasonable time and that the applicants are languishing in jail. It is contended that apart from the Designated Court at Kanpur Nagar, the Special Courts have already been constituted at Lucknow, Moradabad, Meerut and Bareilly and that the High Court has jurisdiction u/s 25 (2) and (3) to transfer any pending case before Special Court situated in the State to any Special Court within the State.

5. Sri V. B. Singh, senior counsel for applicants submits that the applicants have suffered and are suffering heavily by undue delay in seeking justice and their liberty is at peril. He has pleaded for the protection of the right, life and personal liberties of the applicants u/s 21 of Constitution of India.

6. A supplementary-affidavit of Sri Shachindra Pratap Singh, advocate was filed on 16.3.2004, stating that Sri Sanjai Singh, who has affirmed the affidavit, was physically present before the Kanpur, POTA Court and that the learned Designated Judge had observed in open court that in view of various observations made in the judgment against his bail rejected order, it is not desirable for him to conduct the case any further.

7. On 16.3.2004, the registry was directed to send a copy of transfer application to the District and Sessions Judge (Designated Court) Kanpur Nagar, to send his comments on the averment made in the affidavit. These comments from the Designated Court under POTA/Sessions Judge, Kanpur Nagar, were received by the Registrar General of the Court vide his letter No. 496/I dated March 22, 2004. The learned Judge after expressing respect and regard for the High Court

has drawn the attention of the Court to the adverse remarks that have been made against him in Criminal Appeal No. 1032 of 2004, Akshya Pratap Singh v. State of U.P. Criminal Appeal No. 1032 of 2004., decided on 24.2.2004. He has quoted these remarks as follows:

...It shows that he lacked the desire to do justice not only to a citizen but also to the pronouncement of the Supreme Court. He is required to be more careful in DISCHARGE OF HIS OBLIGATIONS" in future.....

8. The learned Judge writes that he is an officer of the lower subordinate judiciary and is bound to honour and implement the orders of the Hon"ble Court in letter and spirit. Their remarks have been made against him on judicial side as stigma and blot on his service record. He did not get any opportunity to represent against these adverse remarks and bring true facts to the knowledge of the High Court. After referring to certain observations of the High Court in the appellate order, which perhaps led to the passing of the remarks against him, he has stated that these facts were not brought to his knowledge and were not on the record of the case. The remarks of the Court relating to intention of the Government to keep the applicants confined in jail in utter disregard to the law, were not warranted as no bail application till date has been moved by accused Uday Pratap Singh. As a Designated Court, the learned Judge had decided several applications in the case by detailed orders on different dates which were challenged before the High Court and the writ petitions were dismissed. With regard to the report of Sri V. K. Diwan, Chief Secretary, U. P., he submits that the report was not considered because the authenticity of the report was doubtful and it was not clear as to whether it was correct and full report and how the accused has got hold of that report. The learned Judge has referred to the matter pending in Apex Court with regard to challenge of some persons to the authority of the State Government to withdraw the case u/s 321 of Cr. P.C. He has annexed various orders (thirteen in number) by which he had rejected bail applications, remand applications, and applications for release on the ground that detention was illegal, and challenge to the constitution of the Court as Special Court under the Act No. 15 of 2002, and with regard to verification of bail bonds and issued directions to prison authorities. The learned Judge has made a request to this Court to pass a proper order to expunge the adverse remarks made against him.

9. On 25.3.2004, an application was filed by Sri Satish Kumar Shukla through Sri Arun Kumar Misra, advocate stating that he is one of the applicants in the transfer application filed before the Supreme Court for transferring the cases against the applicant u/s 3/4 of the Act No. 15 of 2002 and the attached cases, and that on a mention made before the Chief Justice of India on 9.3.2004, the matter has been fixed on 22.3.2004. The record of proceedings dated 22.3.2004 in Transfer Petition (Criminal) No. 82084 of 2004 pending before the Supreme Court was annexed by which the matter was directed to be listed on 26.3.2004. In view of the statement the hearing of this transfer petition was adjourned on

29.3.2004. The hearing before the Apex Court was adjourned, and consequently this Court thought it appropriate to adjourn this transfer petition, until the transfer matter and other connected matters pending before the Supreme Court with regard to withdrawal of the cases against the applicants and the appeal against the bail order were heard by the Apex Court.

10. On 10.5.2004, a supplementary-affidavit of Sri Shachindra Pratap Singh, advocate was filed annexing the orders of the Supreme Court. An application was also filed by Sri Satish Kumar Shukla, with the prayer to hear this transfer application after decision of Supreme Court in the transfer cases. The record of proceedings dated 6.5.2004 of the Supreme Court in the Transfer Petition (Criminal) No. 82-84 of 2004 shows that the matters were tagged with the Writ Petition (Criminal) No. 132-134 of 2000, and were directed to be listed in July, 2004.

11. After addressing the Court at some length Sri V. B. Singh, senior advocate for the applicants made a request to adjourn the case for a day to enable him to file a proper affidavit to withdraw the transfer application. Today when the matter was taken up an application was presented to the Court on behalf of all the applicants supported by affidavit of Shachindra Pratap Singh, advocate with a prayer that the application may be permitted to be withdrawn and be dismissed accordingly with liberty to approach the Hon"ble Court at subsequent stage if necessary. The applicants have also prayed that suitable directions be issued to Designated Court of POTA, Kanpur, to proceed in accordance with law and/or pass such other order which may deem fit and proper in the circumstances of the case.

12. Both Sri Ravindra Singh, Additional Advocate General appearing for the State and Sri A. K. Misra appearing for Sri Satish Kumar Shukla did not raise any objection to the prayer made by applicants to withdraw transfer application.

13. In the present case, the comments of Judge, Designated Court of POTA and Sessions Judge, Kanpur Nagar require attention of this Court. He has made a prayer to expunge the adverse remarks made against him on judicial side in the appellate order dated 24.2.2004. His request deserves consideration by the Court.

14. I have gone through the appellate order, dated 22.3.2004, which has been annexed to this transfer application, and the remarks made against the Designated Judge quoted as above. It is apparent from the order, that the Designated Judge was not given any opportunity before the offending remarks was made against him. He did not have any opportunity to explain the facts and the circumstances in which he had rejected the bail application.

15. In the matter of "K" A Judicial Officer (2001) 3 SCC 54, the Supreme Court found that several cases were coming to its notice where some observations are being made against the members of subordinate judiciary, in the orders of superior forum made on the judicial side and that judicial officers are being

driven to the necessity of filing appeals to the Supreme Court or objections before the High Court seeking expunging of remarks or observations made and some time strictures passed against them behind their back. The Supreme Court in the said judgment has dealt with the aspects touching the making of the observations and adverse comments against judicial officer and the methodology to be followed if it becomes necessary. These observations are quoted as below:

7. A Judge entrusted with the task of administering justice should be bold and feel fearless while acting judicially and giving expression to his views and constructing his judgment or order. It should be no deterrent to formation and expression of an honest opinion and acting thereon so long as it is within four corners of law that any action taken by a subordinate judicial officer is open to scrutiny in judicial review before a superior forum with which its opinion may not meet approval and the superior court may upset his action or opinion, the availability of such fearlessness is essential for the maintenance of judicial independence. However, sobriety, cool, calm and poise should be reflected in every action and expression of a Judge.

8. The primary purpose of pronouncing a verdict is to dispose of the matter in controversy between the parties before it. A Judge is not expected to drift away from pronouncing upon the controversy, to sitting in judgment over the conduct of the judicial and quasi-judicial authorities whose decisions or orders are put in issue before him, and indulge in criticising and commenting thereon unless the conduct of an authority or subordinate functionary or anyone else than the parties comes of necessity under review and express of opinion thereon going to the extent of commenting or criticising becomes necessary as a part of reasoning requisite for arriving at a conclusion necessary for deciding the main controversy or it becomes necessary to have animadverted thereon for the purpose of arriving at a decision on an issue involved in the litigation, this applies with added force when the superior court is hearing an appeal or revision against an order of a subordinate judicial officer and feels inclined to animadvert on him. The wisdom of a superior Judge itching for making observations on a subordinate Judge before ventilating into express must pause for a moment and read the counsel of Cardozo:

Writ an opinion, and read it a few years latter when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech, or, if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course. Sometimes you will know that the fault is truly yours, in which even you can only smite your breast, and pray for deliverance thereafter.

9. The Court do have power to express opinion, make observations and even offer criticism on the conduct of anyone coming within their gaze of judicial review but the question is one of impelling need, justification and propriety. The following observation by Sulaiman, J., in Panchanan Banerji Vs. Upendra Nath

Bhattacharji, , was cited with approval before this Court in Niranjana Patnaik Vs. Sashibhusan Kar and Another, :

The High Court, as the supreme court of revision, must be deemed to have power to see that courts below do not unjustly and without any lawful excuse take away the character of a party or of a witness or of a counsel before it.

10. This Court went on to add: (SCC P. 576, paras 24-25):

24. It is, therefore, settled law that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before courts of law unless it is really necessary for the decision of the case, as an integral part thereof to animadvert on that conduct. We hold that the adverse remarks made against the Appellant were neither justified nor called for.

25. Having regard to the limited controversy in the appeal to the High Court on the hearsay nature of evidence of the Appellant it was not at all necessary for the appellate Judge to have animadverted on the conduct of the Appellant for the purpose of allowing the appeal of the first Respondent. Even assuming that a serious evaluation of the evidence of the Appellant was really called for in the appeal the remarks of the learned appellate Judge should be in conformity with the settled practice of Courts to observe sobriety, moderation and reserve. We need only remind that the higher the forum and the greater the powers, the greater the need for restraint and the more mellowed the reproach should be.

11. A subordinate Judge faced with disparaging and undeserving remarks made by a court of superior jurisdiction is not without any remedy. He may approach the High Court invoking its inherent jurisdiction seeking expunction of objectionable remarks which jurisdiction vests in the High Court by virtue of its being a court of record and possessing inherent powers as also the power of superintendence. The view is settled by the law laid down in Dr. Raghubir Sharan Vs. The State of Bihar, . However, if a similar relief is sought for against remarks or observations contained in judgment or order of the High Court the aggrieved judicial officer can, in exceptional cases approach this Court also invoking its jurisdiction under Articles 136 and/or 142 of the Constitution with the law laid down by this Court in The State of Uttar Pradesh Vs. Mohammad Naim, , it is well-settled that the power to expunge remarks exists for redressing a kind of grievance for which the law does not provide any other remedy in express terms though it is an extraordinary power. Any passage from an order or judgment may be expunged or directed to be expunged subject to satisfying the following tests: (i) that the passage complained of is wholly irrelevant and unjustifiable ; (ii) that its retention on the records will cause serious harm to the person to whom it refers and (iii) that its expunction will not affect the reasons for the judgment or order.

12. That the power to make remarks or observations is there but on being questioned, the exercise of power must withstand judicial scrutiny on the touchstone of following tests: (a) whether the party whose conduct is in question

is before the Court or has an opportunity of explaining or defending himself ; (b) whether there is evidence on record bearing on that conduct justifying the remarks ; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. The overall test is that the criticism or observation must be judicial in nature and should not formally depart from sobriety, moderation and reserve (Mohd. Naim).

13. It was so said by a Special Bench of three Judges presided over by Tek Chand, J. in Philip William Ravanshawe Hardless v. Gladys Isabel Hardless, AIR 1940 Lah 82: (AIR Headnote).

A passage which is not necessary to the conclusion of the Judge nor even necessary to his argument and is likely to militate seriously against party's earning a living in his profession should be expunged from the judgment.

14. In A.M. Mathur Vs. Pramod Kumar Gupta, , this Court sounded a note of caution emphasizing a general principle of highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct and said: (SCC P. 538-39 para 13).

13. Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility, of function should be constant theme of our Judges. This quality in decision making is as much necessary for Judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the Court as well to other coordinate branches of the State, the executive and the legislative. There must be mutual respect. When these qualities fail or when litigants and public believe that the Judge has failed in these qualities, it will be neither good for the Judge nor for the judicial process.

16. In para 15 of the report, the Supreme Court observed that the role of the High Court in respect of subordinate courts is also of a friend, philosopher and guide of judiciary subordinate to it. The strength of power is not displayed solely in cracking a whip on errors, mistakes or failures ; the power should be wielded so as to have propensity to prevent and to ensure exclusion of repetition if committed once innocently or unwittingly. "Pardon the error but not its repetition", the power to control is not to be exercised solely by wielding a teacher's cane ; the members of subordinate judiciary look upto the High Court for the power to control to be exercised with parent-like care and affection. The existence of power in higher echelons of judiciary to make observations even extending to criticism incorporated in judicial orders cannot be denied, however, the High Courts have to remember that criticism and observations touching a subordinate judicial officer incorporated in judicial pronouncement, have their own mischievous infirmities. The Supreme Court has held that a methodology of

dealing with matter on administrative side as a safer and advisable course available to choose, in such case the Judge will not be remediless and may not have to file petitions to become a litigant arrayed as a party before the superior courts.

17. In the present case, the methodology laid down by Supreme Court "In the matter of "K" A Judicial Officer (supra) was not followed. The remarks were made against the Designated Judge on judicial side without hearing him, which has led to the impasse in this matter. The offending remarks are "per incuriam" the law laid down by the Apex Court. In Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, ; State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, and Government of Andhra Pradesh and Another Vs. B. Satyanarayana Rao (Dead) by Lrs. and Others, , the Supreme Court while explaining the principle of "per incuriam" which in practice means "per ignoratum", held that the "quotable in law", is avoided and ignored if it is rendered in ignoratum of a statute or a binding authority. It is not appropriate for this Court to dwell on this matter any further except in observing that the request prayer made by Designated Judge in his letter dated 22.3.2004 in his comments on the averments in this transfer application addressed to the Court on judicial side is justified.

18. The appellate order dated 24.2.2004 in Criminal Appeal No. 1032 of 2004 is subject-matter of special leave to appeal pending in Supreme Court, with the matters with regard to withdrawal of prosecution, and transfer of cases to another State, and the matters have been fixed for hearing by the Apex Court in July, 2004. For these reasons it will be appropriate that the remarks/adverse comments made in the appellate order date 24.2.2004, be not acted upon, and shall not be placed on the service record of the Designated Judge until the disposal of the matters by the Hon"ble Supreme Court.

19. The application for withdrawal dated 11.5.2004, is allowed. The transfer application is dismissed as withdrawn with the observations, made in the order.