

(2020) 07 J&K CK 0043
In the Jammu And Kashmir High Court
Case No : Ref(Crl) No. 04 Of 2020

Union Territory of J&K

APPELLANT

Vs

Suhail Ahmad Sheikh

RESPONDENT

Date of Decision : 29-07-2020

Acts Referred:

Unlawful Activities (Prevention) Act, 1967 — Section 13
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120(B), 148, 149, 307, 336, 353
National Investigation Agency Act, 2008 — Section 11(7), 16, 21, 22, 22(4)

Citation : (2020) 07 J&K CK 0043

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : B. A. Dar

Judgement

Sanjay Dhar, J

1) The instant reference has been made by the learned Special Court (Additional Sessions Judge TADA/POTA) Srinagar, designated under the National Investigating Agency Act (for short NIA Act) whereby it has been recommended that order dated 17.12.2009 passed by learned Principal Sessions Judge, Baramulla, be set aside.

2) Before coming to the instant reference, let me give a brief background of the facts leading to making of this reference.

3) FIR No.326/2016, for offences under Section 13 ULA(P) Act and Sections 307, 148, 149, 336, 353 and 120-B RPC was registered by Police Station, Baramulla, and accused Suhail Ahmad Sheikh S/o Nazir Sheikh R/o Towheed Gunj Baramulla, was booked for commission of the aforesaid offences.

4) The accused moved the Court of Id. Judicial Magistrate 1st Class, Baramulla, for grant of bail and the learned Magistrate, vide his order dated 08.11.2018, admitted the accused to bail. It seems that the said order was challenged by the

State by way of a revision petition before the Court of Principal Sessions Judge, Baramulla.

5) While the revision petition was pending before the Revisional Court, the Government of Jammu and Kashmir issued SRO 149 of 2019 dated 1st of March, 2019, whereby the Court of Additional Sessions Judge (TADA/POTA), Srinagar, was designated to try the cases pertaining to the under enactments mentioned in the Schedule to the NIA Act, which includes the offences under ULA(P) Act, for whole of Kashmir province.

6) Pursuant to issuance of the aforesaid SRO, learned Principal Sessions Judge, Baramulla, vide his order dated 17.12.2019 transferred the revision petition to the Designated Court i.e. the Court of Additional Sessions Judge (TADA/POTA), Srinagar. The learned Special Judge, after going through the record, has opined that the Designated Court has no jurisdiction to entertain a revision petition against the order of a Judicial Magistrate even in a case where the proceeding before the Magistrate are relating to offences under ULA(P) Act. The learned Special Judge has further made a recommendation that the order whereby the revision petition has been transferred by learned Principal Sessions Judge, Baramulla, to his Court, be set aside.

7) I have heard learned Senior AAG and perused the record of the case.

8) In order to determine the issue at hand, we need to understand the scheme of the NIA Act, 2008, where-under constitution of Special Courts for trial of offences under the enactments mentioned in the Schedule thereto has been provided for. Chapter IV of the NIA Act provides for constitution of Special Courts. Entry No.2 of the Scheduled to the said Act pertains to the Unlawful Activities (Prevention) Act, 1967.

9) Section 22 of the NIA Act empowers the State Government to constitute Special Courts. It reads as under:

22. Power of State Government to constitute Special Courts.-(1) The State Government may constitute one or more Special Courts for the trial of offences under any or all the enactments specified in the Schedule.

(2) The provisions of this Chapter shall apply to the Special Courts constituted by the State Government under sub-section (1) and shall have effect subject to the following modifications, namely-

(i) references to "Central Government" in sections 11 and 15 shall be construed as references to State Government;

(ii) reference to "Agency" in sub-section (1) of section 13 shall be construed as a reference to the "investigation agency of the State Government";

(iii) reference to "Attorney-General for India" in sub-section (3) of section 13 shall be construed as reference to "Advocate-General of the State".

(3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is constituted by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.

(4) On and from the date when the Special Court is constituted by the State Government the trial of any offence investigated by the State Government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is constituted.

10) From a perusal of the afore-quoted provision, it emerges as under:-

(a) The State Government has power to constitute Special Courts for trial of offences under the enactments specified in the Schedule which includes the offences under ULA(P) Act, 1967;

(b) Until a Special Court is constituted by the State Government, the power of a Special Court is to be exercised by the Court of Sessions of the division in which the offence has been committed;

(c) Once a Special Court is constituted by the State Government, trial of the cases pertaining to offences under the enactments specified in the Schedule shall stand transferred to the Special Court;

(d) The Special Court or the Sessions Court while holding trial of offences relating to an enactment under the Schedule has to follow the procedure prescribed under Chapter IV of the Act.

11) Section 16 of the NIA Act provides the procedure and powers of a Special Court. It reads as under:

16. Procedure and powers of Special Courts.-

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts.

(2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of sections 263 to 265 of the Code shall, so far as may be, apply to such trial:

Provided that when, in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is not desirable to try it in a summary way, the Special Court shall recall any witnesses

who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to, and in relation to, a Special Court as they apply to and in relation to a Magistrate:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding one year and with fine which may extend to five lakh rupees.

(3) Subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session.

(4) Subject to the other provisions of this Act, every case transferred to a Special Court under sub-section (2) of section 13 shall be dealt with as if such case had been transferred under section 406 of the Code to such Special Court.

(5) Notwithstanding anything contained in the Code, but subject to the provisions of section 299 of the Code, a Special Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination.

12) From a perusal of the afore-quoted provision, it is clear that a Special Court, whether constituted by the State Government or a Sessions Court exercising powers of a Special Court, has jurisdiction to take cognizance of the offences without the accused being committed to it for trial on the basis of a complaint or on the basis of a police report. It shows that a Special Court exercises powers of a Judicial Magistrate under the Code of Criminal Procedure in respect of the proceedings relating to offences under the enactments mentioned in the Schedule. It is also clear from the afore-quoted provision that a Special Court is vested with the powers of a Court of Session for the purposes of trial of offences and it has to adopt the procedure prescribed in the Code of Criminal Procedure for trial before a Court of Session.

13) Section 11(7) of the NIA Act which forms part of Chapter IV of the Act, provides the qualification for appointment of a Judge of a Special Court. As per the said provision, a judge of a Special Court has to be either a Sessions Judge or an Additional Sessions Judge.

14) From the aforesaid scheme of the provisions contained in Chapter IV of the NIA Act, it is clear that a Special Court exercises powers of a Magistrate under the Code of Criminal Procedure so far as taking of cognizance of offences on the basis of a complaint and police report is concerned. So far as trial of offences is concerned, it has to adopt the procedure prescribed by the Code of Criminal

Procedure in respect of trial of cases before a Court of Session but the NIA Act nowhere confers the appellate or revisional powers upon a Special Court.

15) In fact, a Special Court is a Court of first instance in respect of all proceedings pertaining to offences under ULA(P) Act which is a Scheduled enactment. The appeal against the orders of a Special Court lies before the High Court in terms of Section 21 of the NIA Act. The revisional and appellate jurisdiction in respect of orders and findings recorded by an ordinary Judicial Magistrate cannot be exercised by a Court specially constituted under Section 22 of the NIA Act. The Special Court functions as a Sessions Court only for the purpose of trial of the specified offences by adopting the procedure prescribed under the Cr. P. C. for Sessions trial cases. It does not possess any appellate or revisional powers.

16) Section 22(4) of the NIA Act makes it abundantly clear that once a Special Court is constituted, the trial of cases pertaining to the specified offences stands transferred to the said Court. It does not provide for transfer of any other proceedings.

17) The revisional powers in respect of an order passed by an ordinary Judicial Magistrate even in proceedings which pertain to offences under ULA(P) Act are exercisable by a Court of Session having jurisdiction over the said Magistrate. It is for the said Court of Session to test the legality and propriety of the findings of the orders recorded by a Magistrate under his jurisdiction even in the proceedings pertaining to the offences under ULA(P) Act. The question, whether an ordinary Magistrate has jurisdiction to pass an order of bail in an offence under the provisions of ULA(P) Act, is for the concerned Sessions Court to determine in exercise of its revisional jurisdiction. This Court refrains from expressing any opinion on the said issue lest it may prejudice the mind of the Sessions Court.

18) For the foregoing reasons, it is clear that the order dated 17.12.2019 passed by learned Principal Sessions Judge, Baramulla, is illegal and untenable in law. The same appears to have been passed in a mechanical manner without even having a bare perusal of the relevant provisions of NIA Act. The order, therefore, deserves to be set aside.

19) Accordingly, the reference made by the Special Court (Additional Sessions Judge (TADA/POTA), Srinagar, is accepted and the order dated 17.12.2019 passed by learned Principal Sessions Judge, Baramulla, is set aside. The revision petition is remanded back to the Court of learned Principal Sessions Judge, Baramulla, for its decision on merits.

20) Record of the case along with a copy of this order be sent to the Court of Principal Sessions Judge, Baramulla. A copy of this order be also sent to the Special Court (Additional Sessions Judge (TADA/POTA), Srinagar.