

Court No. - 48

A.F.R.

Case :- CRIMINAL MISC. WRIT PETITION No. - 10241 of 2019

Petitioner :- Kailash Jaiswal

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Nipun Singh, Ravindra Kumar Tripathi

Counsel for Respondent :- G.A.

Hon'ble Suneet Kumar, J.

Hon'ble Syed Waiz Mian, J.

Heard learned counsel for the petitioner and learned A.G.A. for the State and perused the material placed on record by the respective parties.

Petitioner by the instant petition, inter alia, seeks the following relief:

"i. Issue a writ, order or direction in the nature of certiorari quashing the impugned notice dated 11.04.2019 issued by the District Magistrate, Gorakhpur against the petitioner under section 3/4 of U.P. Goonda Act (Annexure No. 1 to the writ petition)."

It is submitted by learned counsel for the petitioner that it is not only a case of malicious prosecution to by-pass the civil decree but at the same time to coerce the petitioner to release the property in dispute in favour of the district administration. It is further submitted that having regard to the definition of 'Goonda' under the Uttar Pradesh Control of Goondas Act, 1970 (for short 'U.P. Goondas Act'), the proceedings could not have been initiated merely on lodging of a single case.

The facts briefly stated is that nazool land, bearing plot no. 125, Bungalow No. 5, situated at Park Road, Gorakhpur, admeasuring 30000 sq. ft. was transferred by the State vide freehold deed dated 24/25 September 1999, duly registered in favour of the petitioner, by the Collector, Gorakhpur, on behalf of the State Government. At the time of execution of the freehold deed, the erstwhile Sales Tax Department, presently, Trade Tax Department was occupying the premises on rent. The

Trade Tax Department defaulted in payment of rent, aggrieved, petitioner instituted a SCC suit being Suit No. 33 of 2000 (Kailash Jaiswal Versus State of U.P. through Collector Gorakhpur and Trade Tax Department, through its Deputy Commissioner) seeking ejectment, as well as, recovery of arrears of rent. The suit came to be decreed partially directing ejectment of the Trade Tax Department vide order dated 01 December 2005. Aggrieved, the State of U.P. and the Trade Tax Department raised challenge to the ejectment order in revision being SCC revision No. 1 of 2006, which came to be dismissed vide judgment and order dated 29 March 2006. Thereafter, petitioner filed an execution application for possession of the premises and recovery of the decretal amount by way of attachment and sale of property of the Trade Tax Department, being Execution Case No. 1 of 2006. Before the execution court the Trade Tax Department gave an undertaking that they would vacate the premises but did not comply with their undertaking. Petitioner in Writ-C No. 5190 of 2010 (Kailash Jaiswal Versus State of U.P. and others) approached this Court, wherein, the Court disposed of the writ petition directing the executing court to complete the execution within a period of one month and further directed the Senior Superintendent of Police and Collector, Gorakhpur, to provide necessary police protection to the executing court to get the decree executed if there is any order to that effect passed by the executing court. The relevant portion of the writ court order dated 06 August 2010 is extracted.

“Upon hearing learned counsel for the petitioner and learned counsel for the respondents, the petition is being finally disposed of with a direction to the Executing Court to complete the execution after considering the objection, if any, within a period of one month from the date of production of certified copy of this order. If there has already been an order by the Executing Court to deploy the police for taking over the possession, the Superintendent of Police and Collector, Gorakhpur are directed to give the necessary assistance of the police protection to the Executing Court so that the order of decree, which has been confirmed upto Apex Court, may be executed and the arrears of rent shall also be paid to the petitioner within the said period.”

Thereafter, it appears that possession of the premises was handed over to the petitioner on 30 November 2010. Since then, the petitioner is in peaceful possession of the said property. It appears that thereafter, the Tax Advocate Association filed an objection under Order XXI Rule 97 C.P.C. before the trial court which came to be rejected vide order dated 25 September 2010. The matter was carried in civil revision and the revisional court dismissed the revision on 23 October 2010. Aggrieved, Association approached this Court in Writ-C No. 65183 of 2010 (Tax Advocate Association and another Versus State of U.P. and others). This Court vide order dated 2 November 2010, dismissed the writ petition. The operative portion of the order reads thus:

In this view of the matter, even if the petitioners are licensee of the tenant, they are bound by the decree notwithstanding the fact that they were not impleaded in the suit for ejection. Also there is nothing on record to show that any allotment etc. was made in favour of the petitioners. In absence of any title to the property in dispute, the Courts below have rightly rejected the objections filed under Order 21 Rule 97 C.P.C.

It has come on record that the Sales Tax Office has been shifted elsewhere. It follows that there is no Sales Tax Office presently on the spot. In this fact situation, the petitioners are unnecessarily keeping in their possession the disputed property. The object and purpose, if any, to grant a license to them has come to an end due to shifting of the Sales Tax Office.

The petitioners claim themselves that they are lawyers. If that is so, they should abide by law and follow the law and not to commit its breach. It is hoped that good-sense will prevail upon them.

There is no merit in the petition. The petition lacks merit and it is dismissed.”

Aggrieved, Association carried the matter in appeal before the Hon'ble Supreme Court which came to be dismissed vide order dated 13 December 2010.

It appears that thereafter the petitioner started making construction on the property which was being objected by the District authorities. Aggrieved, petitioner approached this Court in Writ-C No. 17431 of 2015

(Kailash Jaiswal Versus State of U.P. and others). This Court after recording the history of the litigation, inter se, parties restrained the City Magistrate to interfere with the peaceful possession of the property and quashed the order of the City Magistrate, restraining the petitioner from raising construction. The operative portion of the order reads thus:

“In such circumstances, the impugned order dated 14 September 2015 passed by the City Magistrate cannot be sustained. It is, accordingly, set aside. A direction is issued to the District Magistrate, Gorakhpur as also the Senior Superintendent of Police, Gorakhpur to ensure that no hindrance is caused in the raising of constructions by the petitioner if they are in accordance with the plan sanctioned by the Gorakhpur Development Authority.

The writ petition is, accordingly, allowed.”

It appears that the District administration was not satisfied that the petitioner had obtained/purchased the property in dispute which is on prime location, District Magistrate instituted a suit being Suit No. 259 of 2002 for cancellation of freehold deed dated 24/25 September 1999 (State of U.P. through Collector, Gorakhpur Versus Kailash Jaiswal and others). During pendency of the suit, F.I.R. being case Crime No. 212 of 2019, under sections 189, 332, 504, 506 I.P.C. came to be lodged at Police Station Cantt. District Gorakhpur by Deputy Commissioner (Administration) Trade Tax Department Gorakhpur, alleging that after recording his statement in the court while returning, petitioner threatened him. Petitioner approached this Court by filing Misc. Writ Petition No. 7526 of 2019, seeking quashing of the first information report. This Court granted protection to the petitioner till the submission of the charge sheet under Section 173(2) of Cr.P.C. vide order dated 28 March 2019. After investigation, police report (charge sheet) came to be submitted in the aforementioned Case Crime No. 212 of 2019 against the petitioner. The charge sheet and entire proceeding was subjected to challenge by the petitioner in an petition being Application No. 26502 of 2019 filed under Section 482 Cr.P.C., wherein, this Court vide order dated 9 July 2019, directed that no

coercive action shall be taken against the petitioner. It is further asserted in paragraph 54 of the writ petition that on 10 April 2019, at about 10.00 in the night, 10-12 police officials in uniform, alongwith 6-7 officers in plain dress, visited the house of the petitioner. On enquiry, it is alleged that they started abusing the petitioner and threatened him to come out from the house otherwise they would kill him in a fake encounter. It is further alleged that the petitioner's daughter was present at the relevant time and informed the police officials that they are restrained from adopting coercive measure against the petitioner. It is submitted that the presence of the officers has been recorded in CCTV camera.

In the counter affidavit filed on behalf of the second respondent, District Magistrate, Gorakhpur, the contents of paragraphs 54 and 55 have been denied, but, in paragraph no. 35, it has been stated that the proceedings initiated against the petitioner is just and proper which does not suffer from any illegality, infirmity or defect. On the very next day of the above noted incident i.e. 11 April 2019, the impugned notice under Section 3/4 of U.P. Goondas Act was issued to the petitioner.

In this backdrop, it is relevant to take notice of the communication dated 9 May 2003, issued by the Special Secretary, Government of U.P. addressed to the second respondent, District Magistrate, Gorakhpur, wherein, the State directed the District Magistrate to withdraw the suit instituted on behalf of the State against the petitioner regarding cancellation of free hold deed. In response, District Magistrate, vide communication dated 2 June 2006, addressed to the Deputy Secretary, Government of U.P. sought recall of the aforementioned direction. The Special Secretary, Government of U.P. vide communication dated 28 February 2006, addressed to the Principal Secretary, Tax and Registration, stated that the direction issued by the State Government to withdraw the suit, is legal and requires no reconsideration. Thereafter, State Government vide communication dated 2 June 2006, addressed to the District Magistrate conveyed that the recall of the earlier State Government order to withdraw

the suit filed against the petitioner being lawful and proper cannot be reconsidered. Despite the communication of the State Government, the suit has not been withdrawn by the District Magistrate.

In this backdrop, it is submitted that the notice under the U.P. Goondas Act is not only malicious but misuse of the power vested upon the District Magistrate, the proceedings have been initiated in colourable exercise of power to coerce the petitioner to vacate the premises which admittedly does not vest with the State. Further, it is submitted that on a single case, proceedings under the U.P. Goondas Act cannot be initiated as the petitioner is not a habitual offender.

Reliance has been placed on the decision of this Court rendered in **Suresh Tewari Versus State of U.P. and others, 2018 (5) ALJ 1.**

In the counter affidavit, there is no specific denial of the assertions made in the writ petition and the legal issues raised by the petitioner. It is also not the case of the respondent authorities that the reputation of the petitioner is dangerous to the community. The undisputed facts reflect high handedness and gross misuse of the power by the District Magistrate. The conduct of the District Magistrate in not complying the repeated orders of the State Government to withdraw the suit against the petitioner tantamounts to gross indiscipline and insubordination.

Learned counsel for the petitioner submits that impugned notice is not in conformity with the Rule 4 of the U.P. Control of Goondas Rules, 1970. He further submits that Section 3 of the U.P. Control of Goondas Act, 1970 (hereinafter to be referred to as the "Act") confers powers on the concerned District Magistrate to extern anyone, who is the Goonda outside the district or to place restriction on his movement. If the District Magistrate is satisfied that the matters set forth in clauses (a), (b) and (c) of sub-Section (1) of the Goondas Act are made out he may issue notice to the Goonda informing him of the general nature of material allegations against him in clause (d) of the Act. He further submits that in the instant

case clause (d) mentions about the only case registered against the petitioner being Case Crime No. 212 of 2019, thus the second respondent has mechanically noted the case pending against the petitioner in the prescribed proforma without applying its mind, as well as, without recording satisfaction about the matter set out in clauses (a), (b) and (c) of Act. Learned counsel for the petitioner has placed reliance upon paragraph no.5 of the Full Bench decision of this Court rendered in the matter of **Ramji Pandey Vs. State of Uttar Pradesh and others, 1981 SCC Online All 305**, which reads as under:-

“Now coming to the provisions of the Act, it would be seen that Section 3 confers power on the District Magistrate to extern any one who is a Goonda outside the district or to place restrictions on his movement. If the District Magistrate is satisfied that the matters set forth in Clauses (a), (b) and (c) of Sub-section (1) are made out he may issue notice to the Goonda informing him of the "general nature of material allegations" against him in respect of those matters. The District Magistrate is further required to give him reasonable opportunity of tendering his explanation regarding those matters. The notice issued by the District Magistrate must contain the general nature of material allegations on the baggies of which the District Magistrate may have formed his opinion under Section 3(1) of the Act. In the absence of material allegations the person to whom notice is issued will be denied opportunity of explanation. It is therefore, mandatory to set out the general nature of material allegations in the notice issued under Section 3(1) of the Act. If the notice fails to contain the general nature of material allegations it would be vitiated and the proceedings taken in pursuance thereof would be rendered null and void. We are in agreement on this question with the view taken by the Division Bench in Harsh Narain's case 1972 All LJ 762.”

This Court in **Bhim Sain Tyagi Vs. The State of U.P. and others, 1999 SC Online All 1403**, observed as under:-

“22. Before concluding this matter it may be useful to mention that the right of the petitioners to offer explanation would have to depend upon the material allegations consequently, the reasonable opportunity which is afforded by sub-Section (2) of producing his evidence in support of his explanation, which is guaranteed to the petitioner shall not be exercisable if the petitioner does not come to know the general nature of allegations against them.”

The Division Bench of this Court in **Suresh Tewari** (supra), held relying upon the Supreme Court judgment that on one stray incident only petitioner could not be deemed to be habitual offender on the basis of that single incident. Para nos. 19 and 23 reads thus:

19.....The requirement of applicability of the clause (i) is that Goonda means that a person who either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of offences punishable referred to in the said clause. In the impugned show cause notice there is a description of only one criminal case against the petitioner, while as per the definition and the law settled by this Court as well by the Hon'ble Apex Court, one cannot be treated to be a habitual offender unless and until there is recurrence of offences. Since there is a reference of one stray incident only in the notice, the petitioner could not be deemed to be a habitual offender on the basis of that single incident only and so the notice fails to satisfy the legal requirement.

*23. The Hon'ble Apex Court in the case of **Vijay Narain Singh versus State of Bihar and others (1984) 3 SCC 14** has been pleased to hold that it is essential to refer to at least two incidents of commission of crime for applicability of Clause (i) of section 2(b) of the Act. Since there is reference of one incident only in the notice, it falls short of the legal requirement as provided in Clause (i) of section 2(b) and in this way the notice being illegal could be challenged before this Court as laid down by the Full Bench of this Court in the case of **Bhim Sain Tyagi v. State of U.P. And others 1999 (39) ACC 321**.*

Having regard to the facts and circumstance of the case, prima-facie, we are convinced that the proceedings initiated against the petitioner is not only malicious but to harass the petitioner in respect of the property in dispute which admittedly vests with the petitioner lawfully. Further, the conduct of the respondent, in particular, the second respondent, District Magistrate, Gorakhpur, clearly demonstrates that he has no respect for the rule and law and has become law unto himself. The second respondent declines to comply the directions of the State Government, the orders passed by the trial court, High Court, as well as, the Supreme Court. Failing to obtain the property in dispute in legal proceedings, the second respondent has now resorted to invoke U.P.

Goondas Act against the petitioner misusing the forum of criminal administration. The facts, noted herein above, in no uncertain terms, justifies the conduct of the second respondent. The second respondent has exposed himself to civil and criminal consequences.

In the circumstance, we are constrained to quash the impugned notice dated 11 April 2019, issued by the District Magistrate, Gorakhpur. A cost assessed at Rs. 5 lacs is imposed upon the second respondent, District Magistrate, Gorakhpur, to be deposited with the High Court Legal Services Committee within 10 weeks from date. The first respondent Principal Secretary (Home Department), Government of U.P., Lucknow, is directed to get the matter inquired and initiate disciplinary enquiry against the then delinquent District Magistrate, Gorakhpur.

The writ petition is allowed.

Order Date :- 14.11.2022

K.K. Maurya