

Nand Kishore Gupta vs State Of U.P. And Another on 13 January, 2023

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Judgement Reserved On 16.12.2022

Judgement Delivered on 13.01.2023

Court No. - 88

Case :- APPLICATION U/S 482 No. - 12297 of 2021

Applicant :- Nand Kishore Gupta

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Preet Pal Singh Rathore, Anil Tiwari (Sr. Advocate)

Counsel for Opposite Party :- G.A., Ashok Kumar Dwivedi

Hon'ble Syed Aftab Husain Rizvi, J.

1. Heard Sri Preet Pal Singh Rathore, learned counsel for the applicant and learned A.G.A. for the State of U.P.-opposite party no.1.

2. This application under Section 482 Cr.P.C. is filed to quash the order dated 8.02.2021 passed by Additional Session Judge, Court No.04/Gangsters Act, Gorakhpur in G. T. No.148 of 2011 arising out of Case Crime No.406 of 2010 under Sections 419, 420 I.P.C. and 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Khorabar, District Gorakhpur as well as entire proceedings of aforesaid case.

3. First Information Report dated 25.03.2010 was lodged by opposite party no.2 bearing Case Crime No.406 of 2010 under Sections 419, 420, 272, 273 I.P.C. and 7/16 of Food Adulteration Act, 1954 at Police Station Khorabar, District Gorakhpur. As per the allegations of the F.I.R. a police party led by Inspector, Rajendra Prasad Pandey on information received from informer that spurious Khoya obnoxious to health is being prepared in Ahata of Ram Dulare Paswan by Nand Kishor Gupta for making sweets and supplying it to Gorakhpur city and other cities, conducted a raid at about 2 p.m., Pramod Kumar, Ramesh Kumar Kewat, Ranjeet Verma, Rameshwar Giri and Zaiki Verma were

arrested. One vehicle U.P. 53 AT 0995 Tata Magic was also found on the spot on which 11 bundles milk cake, 30 bundles of barfi and packing box on which Shiv Shanker Sweets Special P.G. Group was scribed and on the cartons Barfi, Muskan Ka Deshi Ghee, Dry Fruit Kaju and Pistawala Donda Barfi is printed was recovered. The arrested persons told that they are workers. They also informed that in process of sweet making Suji mixed with sugar and refined is used for making spurious Khoya from which milk cake and Doda barfi is prepared and packed for supplying by Nand Kishor Gupta. Utensils and gas cylinder used for preparation of spurious Mawa along with Suji, sugar, refined, milk powder, empty cartons and empty sweetmeat packets were also recovered, no date of manufacturing was printed on the packets. Arrested persons could not show the license. The arrested persons also informed that Nand Kishor Gupta is involved in business of manufacturing spurious Khoya and milk cake and Doda barfi prepared from it, which he used to supply as pure sweetmeat of Desh Ghee and it is harmful for health. The sample was collected and recovery memo was prepared on the spot. A report dated 31.03.2010 was forwarded to the District Magistrate for initiation of proceeding under Section 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act. After its approval by District Magistrate vide order dated 06.04.2010, Section 3(1) of U.P. Act No. 7 of 1986 was also added. The sample collected was sent for chemical examination. In chemical examination report it was noted that sample is not adulterated. The Investigating Officer recorded statements of witnesses and after investigation submitted charge sheet under Sections 419, 420 I.P.C. and 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act only. Before the trial court a discharge application 12-Kha under Section 227 of Cr.P.C. was filed by accused Nand Kishor Gupta. It is alleged in the application that the applicant-accused is innocent, there is no evidence on record that accused was arrested on the spot or anything incriminating was recovered from his possession, the offence of U.P. Gangsters and Anti Social Activities (Prevention) Act has been added without any evidence, there is no evidence to frame charge against the accused for the offence under Sections 419 and 420 I.P.C., in the gang chart no other case is mentioned, at the time of approval of gang charge only single case under Sections 419, 420, 272, 273 I.P.C. and 7/16 of Food Adulteration Act, 1954 is mentioned and approval is granted without obtaining chemical examiner's report, there is no evidence against the applicant for offence under Sections 16, 17 and 22 of Food Adulteration Act, no sanction has been obtained from District Magistrate for filing the charge-sheet, the name of the applicant-accused has been added on the basis of confessional statement of arrested accused, while proceeding under Gangsters Act has been initiated only against two accused persons without any satisfactory and sufficient explanation. On the aforesaid grounds the discharge was claimed. Learned trial court vide order dated 08.02.2021 has rejected the discharge application.

4. Learned counsel for the applicant submitted that the applicant is doing business of sweetmeat/mawa which is registered in accordance with law and he has valid license. The applicant has been falsely implicated by the opposite party no.2 and his associates misusing their power and position. Just after lodging the F.I.R. opposite party no.2 submitted a report to the District Magistrate for seeking recommendation for initiation of proceeding against the applicant under Section 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act which was recommended by him on 06.04.2010 and Section 3(1) of U.P. Act No.7 of 1986 was added. The sample collected by the Investigating Officer was sent for chemical examination. The report of Public Analyst submitted on 27.04.2010 confirms that no adulteration was reported. Thereafter the Investigating Officer interrogated prosecution witnesses. He examined first informant on 08.05.2010, Sub Inspector

Suraj Nath Singh on 24.05.2010 and other police personnel and Food Inspector Ajit Kumar Mishra, Shiv Kumar Gupta on 05.06.2010 and Food Inspector Chandra Bhan, Amardeo Maheshwari, Constable Amaresh Yadav on 05.12.2010, but their statement does not corroborate the prosecution case and there is considerable contradiction amongst them. After 05.06.2010 no further investigation was conducted and on the basis of material available the Investigating Officer filed charge-sheet. It is further contended that no recovery memo was prepared on the spot and it has no signature of independent witness. There is no independent witness in the entire charge-sheet. Learned counsel further submitted that initially F.I.R. was lodged under Sections 7/16 of Food Adulteration Act also while this Act was repealed by the new Act i.e. Food Safety and Standards Act, 2006. Once Food Adulteration Act was replaced by Food Safety and Standards Act, no F.I.R. ought to have been lodged under Sections 7/16 of Food Adulteration Act. Further in chemical examination no adulteration was found by the Public Analyst and the Investigating Officer removed Sections 272, 273 I.P.C. and 7/16 of Food Adulteration Act and filed charge-sheet only under Sections 419, 420 I.P.C. and 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act. When in recovered articles no adulteration was found, then there was no reason to file charge-sheet against the applicant. It is further contended that no offence under Sections 419 and 420 I.P.C. against the applicant is made out. In chemical examination report it is mentioned that sample in question is only plain cake and not of milk cake. The applicant never forged and claimed so called cake to be a milk cake but at the most it may be a case of misbranding which is covered by Section 52 of Food Safety and Standards Act and can be adjudicated under Section 68 of Food Safety and Standards Act and is compoundable under Section 69 of the Act. An order passed under Section 52 is appealable under Section 70 of the Act before Food Safety Appellate Tribunal and second appeal lies to the High Court. Learned counsel submitted that the Food Safety and Standards Act, 2006 is complete Code for that very purpose. This is special law while Indian Penal Code is general law. Sections 419 and 420 I.P.C. cannot be attracted for misbranding. Only a complaint can be filed in accordance with law and the provisions provided in Food Safety and Standards Act. It is also contended that except confessional statement of co-accused, there is no evidence against the applicant and confessional statement of co-accused is not admissible in evidence. It is next contended that there is no cogent, credible and concrete evidence in support of prosecution case, even then learned court below without properly considering facts and circumstances of the case and without carefully scrutinizing the material on case diary has rejected the discharge application. The impugned order is illegal and has been passed without application of judicial mind. While rejecting the discharge application, learned court below has completely relied on prosecution case and has completely ignored and discarded the plea taken by the applicant without recording any reason of doing so. Learned court below has failed to consider that no proper investigation has been conducted and without collecting sufficient material, charge-sheet has been submitted. Learned trial court has also not considered legal aspect of the matter and has not recorded any finding on it. Throughout the case diary there is no material against the applicant with regard to his connection with any gang or his indulgence in gangster activities. The Investigating Officer has misused his power and invoked the provisions of Gangsters Act against the applicant on the basis of a solitary case which was under investigation. The whole prosecution case is false and baseless. The story set up is cooked one and motivated. The entire proceedings of the case are illegal, arbitrary, unjust and manifestly discriminatory and erroneous. Learned counsel has placed reliance on following case laws:

(1) . Smt. Shiv Kumari Versus State of U.P. 2012 (78) ACC 605, (2) . Ajay Singh and another Versus State of Chhattishgarh and another (2017) 3 SCC 330, (3) . P. Vijayan Versus State of Kerala and another (2010) 2 SCC 398, (4) . Yogesh alias Sachin Jagdish Joshi Versus State of Maharashtra (2008) 10 SCC 394, (5) . Pancho Versus State of Haryana (2012) (77) ACC 269, (6) . Sharat Babu Digumarti Versus Government (NCT of Delhi (2017) 2 SCC 18, (7) . CBI Versus Akhilesh (2005) 1 SCC 478, (8) . Pradeep Kumar alias Pradeep Kumar Verma Versus State of Bihar and another (2007) 7 SCC 413, (9) . Siyaram alias Shiva Ram Versus State of U.P. 2022 (118) ACC 877, (10). Smt. Shila Devi Versus State of U.P. and another 2022 (119) ACC 482.

5. Learned A.G.A. contended that F.I.R. has been lodged against six named accused including the applicant accused and substance of prosecution story is that they were preparing spurious Mawa and adulterated sweets dangerous for human life. Various articles have been recovered and co-accused has been arrested on the spot. The first informant and his companions have supported the prosecution case in their statements under Section 161 Cr.P.C. The Investigating Officer has also recorded the statements of various Food Inspectors. After thorough investigation credible and cogent evidence has been collected showing the complicity of the accused-applicant and charge-sheet has been submitted in the relevant sections. It is further contended that chemical examiner's report corroborates the prosecution case that the applicant was involved in business of sweetmeats which were not of prescribed standards as printed on its packaging. So, the offence under Sections 419, 420 I.P.C. and under Section 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act is made out against the applicant. Considering the evidence and material available on record cognizance has been taken on charge-sheet. The discharge application has rightly been rejected by the trial court after recording specific finding that there is sufficient evidence against the accused-applicant for framing of charge. The impugned order dated 8.02.2021 passed by Additional Sessions Judge, Court No.02 (Gangsters Act), Gorakhpur is just, legal and proper and it does not suffer from any illegality or infirmity.

6. The allegations of F.I.R. are that police party took action on information that spurious mawa is being prepared for supplying and preparation of adulterated and obnoxious sweetmeats. Initially F.I.R. was lodged under Sections 419, 420, 272, 273 I.P.C. and 7/16 of Food Adulteration Act, 1954. This fact is uncontroverted that after lodging of the F.I.R. on 25.03.2021 the Investigating Officer submitted a report to District Magistrate on 31.03.2021 seeking his approval for implication of the accused for the offence under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act. Approval was granted on 06.04.2010 and aforesaid section was added. It is also not disputed that the sample sent for chemical examination has not been found to be adulterated. It only indicates that the sample was not milk cake but only simple cake. The Investigating Officer has omitted Sections 272, 273 I.P.C. and 7/16 of Food Adulteration Act, 1954 and has submitted charge-sheet under Sections 419, 420 I.P.C. and under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act. It is also not disputed that at the time of lodging of the F.I.R. provisions of Food Adulteration Act was not in force and it was replaced by Food Safety and Standards Act, 2006. Misbranding of food articles has been dealt with under the provisions of Food Safety and Standards Act and it is punishable under Section 52 of the Act. The Act is a complete Code itself and

it being special law will override provisions of Indian Penal Code. The proceeding under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act has been initiated on the allegations of the F.I.R. that the applicant is involved in preparation and sale of spurious mawa and sweetmeats obnoxious to human health. Except present case no other case is shown in the gang-chart. The chemical examiner's report has not corroborated the prosecution case of adulteration of food articles obnoxious for health. At the most it only points towards misbranding.

7. Learned trial court while rejecting the discharge application by the impugned order has only narrated the allegations of prosecution version as per the F.I.R. and without properly appreciating the evidence available on case diary has observed that at this stage the case is not being considered on merits, only prosecution evidence is to be considered for framing of charge, it is to be seen whether on the basis of evidence available on record, the prima case is made out or not and even only on the basis of suspicion charge can be framed, has rejected the discharge application. Learned trial court has not dealt with any of the factual and legal points raised by the accused-applicant in his discharge application. Learned trial court has also failed to appreciate the legal aspect of the entire matter.

8. It is settled law that trial court while considering the discharge application is not acting as mere post office. It is to sift through evidence in order to find out whether there is sufficient grounds to try a suspect, the court has to consider the broad probability, total effect of evidence and basic infirmities. The Apex Court in *P. Vijayan Versus State of Kerala and another* (2010) 2 SCC 398 has held that the words "no sufficient ground for proceeding against the accused" clearly show that judge is not a mere post-office to frame the charge at the behest of prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution.

9. In *Yogesh alias Sachin Jagdish Joshi Versus State of Maharashtra* (2008) 10 SCC 394, the Apex Court in para-16 has observed as follows:

"It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible."

10. Learned court below has not considered each and every relevant contents of the discharge application and rejected the same in a cursory manner. Although while disposing of discharge application the trial court may not appreciate the defence of the accused, but at the same time it is incumbent upon the trial court to consider and adjudicate the contents and contentions of the discharge application after perusing the material available on record. If any specific plea has been taken, the trial court must consider it and address the same by speaking and reasoned order. The trial court may accept or reject the pleas, but it should be clear and unambiguous and it should be seen that the trial court has applied its judicial mind while disposing of discharge application. The trial court while disposing discharge application by the impugned order has not considered the relevant contentions and has rejected the same in a mechanical manner, therefore, a fresh order is required to be passed by the trial court on the discharge application.

11. Accordingly, this application under Section 482 Cr.P.C. is allowed. The impugned order dated 8.02.2021 passed by Additional Session Judge, Court No.04/Gangsters Act, Gorakhpur in G. T. No.148 of 2011 arising out of Case Crime No.406 of 2010 under Sections 419, 420 I.P.C. and 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Khorabar, District Gorakhpur is hereby set aside. The trial court is directed to pass a fresh order on the discharge application of the applicant by a speaking and reasoned order, expeditiously strictly in accordance with law, after affording an opportunity of hearing to the parties.

Order Date :- 13.01.2023 MN/-