(1997) 01 AHC CK 0107

Allahabad High Court

Case No: Criminal Miscellaneous Writ Petition No''s. 2954 and 1818 of 1996

Ballabh Chaubey		APPELLANT
	Vs	
Addl. District Magistrate (Finance) and Another		RESPONDENT

Date of Decision: Jan. 22, 1997

Acts Referred:

- Constitution of India, 1950 - Article 19(1), 226, 32, 329
- Uttar Pradesh Control of Goondas Act, 1970 - Section 3(1)

Citation: (1997) 21 ACR 387

Hon'ble Judges: G.P. Mathur, J; D.C. Srivastava, J

Bench: Division Bench

Advocate: Tejpal and Vinod Prasad, for the Appellant; A.G.A., for the Respondent

Final Decision: Dismissed

Judgement

G.P. Mathur, J.
A large number of petitions have been filed challenging the notices issued by the District Magistrate u/s 3(1) of U.P. Control of Goondas Act, 1970 (hereinafter referred to as the Act). Two such petitions in which leading arguments have been advanced are being disposed of by a common order.

2. The only ground on which the validity of the notice has been assailed is that the general nature of the material allegations against the Petitioner in respect of Clauses (a), (b) and (c) of Sub-section (1) of Section 3 of the Act have not been mentioned therein and, therefore, in view of the Full Bench decision in Ramji Pandey Vs. State of Uttar Pradesh and Others, , the same was illegal. Learned state counsel has submitted that the Petitioners have been merely served with a notice and they have yet to appear before the District Magistrate in response to the same and, therefore, the writ petition at this stage is premature and should not be entertained. It may be pointed out that challenge to notice is not based upon want of jurisdiction.

3. In order to examine the contention raised by learned Counsel for the parties, it will be convenient to briefly refer to the provisions of the Act. Sub-section (b) of Section 2 defines "Goonda" and means 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 under Chapter XVI, XVII or XXII of the Indian Penal Code or has been convicted under the Suppression of Immoral Traffic in Women and Girls Act, or has been convicted not less than thrice under the U.P. Excise Act or is generally reputed to be a person who is desperately dangerous to the community. Sub-section (1) of Section 3 provides that wherever it appears to the District Magistrate that any person is a Goonda and that his movements or acts in the district or any part thereof are causing or are calculated to cause alarm, or harm to persons or property, or that there are reasonable grounds for believing that he is engaged or about to engage in the District or any part thereof in the commission of any offence punishable under Chapters XVI, XVII and XXII of the Penal Code or under Suppression of Immoral Traffic in Women and Girls Act or under the U.P. Excise Act or in the abetment of any such offence and that witnesses are not willing to come forward to give evidence against him by reason of apprehension on their part as regards safety of their persons or property, the District Magistrate shall by notice in writing inform him of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. Sub-section (2) of Section 3 provides that the person against whom an order is proposed to be made shall have the right to consult and be defended by a counsel of his choice and shall be given a reasonable opportunity of examining himself and also of examining any other witnesses that he may wish to produce in support of his explanation. Sub-section (3) provides that the District Magistrate on being satisfied that the conditions specified in Clauses (a), (b) and (c) of Sub-section (1) exist may by order in writing direct him to remove himself outside the district or part, as the case may be, and within such time as may be specified in the order and to desist from entering the District or specified part thereof until the expiry of such period not exceeding six months. The order may also require such persons to notify his movement or to report himself to such authority or person as may be specified and prohibit or restrict possession or use by him any such article as may be specified and to conduct himself in such manner as may be specified in the order until the expiry of such period but not exceeding six months. Section 4 empowers the District Magistrate to permit any person in respect of whom an order has been made u/s 3 to enter or return for a temporary period into or to the area from which he was directed to remove himself. Section 6 provides for an appeal against the order of the District Magistrate to the Commissioner who may either confirm the order with or without modification or set it aside and may pending disposal of the appeal stay the operation of the order. Section 9 provides that the District Magistrate or the Commissioner may at any time rescind an order made u/s 3 whether or not such order was confirmed on appeal u/s 6.

4. Rule 11 provides that the District Magistrate may while making an order of extension of the period specified in the order made u/s 3 take into consideration the conduct of the person concerned during the period of the enforcement of the order u/s 8 and any fresh material that may be produced or brought to his notice. The Scheme of the Act thus shows that after notice is issued, the person concerned has got a right to consult and to be defended by a counsel of his choice. He has also a right to examine himself and other witnesses in support of his explanation. Thus, the District Magistrate can pass an order of externment only after the person has been given full opportunity of defending himself. The order passed by the District Magistrate is not final as the person concerned can prefer an appeal to the Commissioner and during the pendency of the appeal, the Commissioner has the power to stay the operation of the order. Both the authorities, namely, the District Magistrate or the Commissioner have a full power to rescind the order made u/s 3. Thus, the Act is self contained Code which ensures a fair trial to the person against whom proceedings are initiated and also gives a right of appeal against the order of District Magistrate, who had commenced the proceedings by issuing a notice, to a higher authority. Rule 3 shows that proceedings cannot be initiated at the instance of every one but only upon the report in writing of two responsible Government Officers, namely, Superintendent of Police or Magistrate incharge of a sub-division. Two respectable citizens of the locality can also make a report but in such a case, before issuing notice, enquiry has to be made that the same was not motivated by private grudge. This is in sharp contrast to a criminal case where a Sub-Inspector of Police can file a charge-sheet or any one can file a complaint for prosecution for a most serious offence and the accused is summoned to face trial. So the Act provides a safeguard both at the stage of initiation of proceedings and then after the proceedings have been initiated by means of a notice during the course of trial by giving full opportunity of defence by a counsel and also of leading evidence.

5. Article 226 of the Constitution confers power upon the High Court to issue writs, directions or orders for enforcement of the fundamental rights conferred by Part HI of the Constitution and also for any other purpose. The remedy provided under Article 226 of the Constitution is a discretionary one and the High Court is not always bound to grant relief even though a legal right may have been infringed. The existence of an alternative remedy is an important consideration which the High Court takes into consideration while deciding the question whether discretion should be exercised or not. The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions but the exercise of Jurisdiction is discretionary. The very implitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to this Jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by Statute. Thus, the Court will refuse to exercise its discretion in favour of a litigant who has an alternative remedy for redress of his grievances.

6. It is settled principle that if proceedings are initiated under a Statute which creates a liability and also provides for a remedy, the remedy provided by that Statute only must be availed of and not a writ petition under Article 226 of the Constitution. This question was considered in considerable detail by a Constitution Bench soon after the enforcement of the Constitution in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, . In this case, the Appellant challenged the order of the Returning Officer rejecting his nomination paper for election to the Legislative Assembly by filing a writ petition under Article 226 of the Constitution. It was held that Representative of Principles Act is a self-contained enactment so far as the elections are concerned and that it provided for one remedy, that remedy being by an election petition to be presented after the election is over and there is no remedy provided at any intermediate stage. This was held on the principle that where a right or liability is created by a Statute which gives a special remedy for enforcing it, the remedy provided by that Statute only must be availed of. The judgment of the High Court dismissing the writ petition on the ground of alternative remedy was affirmed. In Nanhoo Mal and Others Vs. Hira Mal and Others, , a full Bench of our Court allowed the writ petition filed under Article 226 of the Constitution challenging the validity of the procedure adopted by the District Magistrate, who had issued notice to the members of the Municipal Board, to fill up a casual vacancy which had occurred in the office of the President of the Board. The Supreme Court reversed the judgment of the High Court holding that the election of the office of the President of the Municipal Board could be challenged only in accordance with the procedure prescribed by the U.P. Municipalities Act and that is by means of an election petition presented in accordance with the provisions of the Act and in no other way. It was further held that there was no room for the High Court to exercise its power under Article 226 of the Constitution in order to set aside the election. The same principle was reiterated in S.T. Muthusami Vs. K. Natarajan and Others, , wherein it was held as follows:

It is not appropriate for the High Court to interfere with an election process at an intermediate stage after the commencement of the election process and before the declaration of the result of the election held for the purpose of filing a vacancy in the office of the Chairman of a Panchayat Union under the provisions of the Tamil Nadu Panchayats Act, 1958 on the ground that there was an error in the matter of allotment of symbols to the candidates contesting at such election. The parties who are aggrieved by the result of the election can question the validity of election by an election petition which is an effective remedy.

It may be pointed out here that Nanhoomal and Muthu Swami (supra) did not relate to cases where Article 329 of the Constitution had any application and the principle of availing of the remedy provided under the Statute and not that under Article 226 of the Constitution was laid down independent of the said Article. The following passage in Nanhoomal''s case was quoted with approval in Mathu Swami''s case (supra):

After the decision of this Court in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, , there is hardly any room for courts to entertain applications under Article 226 of the Constitution in matters relating to elections.

Taking statutes also provide a complete Code like passing of an assessment order after notice to the Assessee and then right of appeal to higher authorities. In these matters also, it has been held that the person aggrieved by the orders of the authorities should avail of the remedy provided under the Statute and it will not be proper exercise of discretion to entertain a writ petition under Article 226 of the Constitution. In Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, , it was held as follows:

The Income Tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to approach the High Court directly against the action.

Similar view had been taken in Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, ; C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, and in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, . Again inDr. G. Sarana v. Lucknow University AIR 1976 SC 2426, a writ petition against the recommendation of the Selection Committee was held to be not maintainable as the Petitioner had an alternative remedy by way of making representation to the Executive Council and a representation to the Chancellor u/s 68 of the State Universities Act.

7. Sri Vinod Prasad, learned Counsel for the Petitioner has contended that exhaustion of alternative remedy or a remedy provided under the Statute is not an absolute rule and in many cases High Courts have interfered under Article 226 of the Constitution with an illegal notice or order even at thereshold. In support of this proposition he has placed reliance on Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, ; Kharak Singh Vs. The State of U.P. and Others, ; D.A.V. College, Bhatinda, etc. Vs. The State of Punjab and Others, ; Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, and Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, . In our opinion the authorities cited by learned Counsel are clearly distinguishable. In Kochani''s case a petition under Article 32 of the Constitution had been filed on the ground that the Act in question violated the fundamental rights of the Petitioner. It was observed that even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs on an application under Article 226 of the Constitution, the Supreme Court cannot, on a similar ground, decline to entertain a petition under Article 32 for the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a

guaranteed right. It was further held that the Act in question immediately on its coming into force took away or abridged the fundamental rights of the Petitioner by its very terms and without any further overt act being done and the infringement of the fundamental right was complete and, therefore, the petition was maintainable. In Kharag Singh (supra), a petition under Article 32 of the Constitution had been filed in Supreme Court and it was observed that once it is proved to the satisfaction of the Court that by State action the fundamental rights of a Petitioner had been infringed, it is not only the right but the duty of the Supreme Court to afford relief to him by passing appropriate orders in that behalf. The other two cases, namely, D. A. V. College, Bhatinda and Coffee Board, Bangalore also relate to the petitions under Article 32 of the Constitution for enforcement of fundamental right. In Express Paper Ltd. (supra), petition challenging notice of re-entry upon forfeiture of lease and threatened demolition of building was entertained on the ground that the same means to silence the voice of the Indian Express and constituted a direct and immediate threat to the freedom of Press and was thus violative of Article 19(1)(a) of the Constitution. Thus all the cases cited by learned Counsel relate to petitions under Article 32 of the Constitution which had been filed on the ground of invasion of fundamental rights of the Petitioner. It may be pointed out that under Article 32, the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is guaranteed and this itself is a fundamental right. Here we are dealing with petitions under Article 226 of the Constitution. That apart a notice issued by the District Magistrate u/s 3 of the Act, by itself, neither infringes nor constitutes a threat to fundamental rights. The notice merely initiates the proceedings and if after a full trial where the Petitioner will get opportunity to appear through a counsel of his choice and to lead evidence in his defence, an order of externment is passed, only then it can be said that his right to move freely or to reside and settle anywhere in India guaranteed by Article 19(1)(a)(e) of the Constitution may be affected but that will be done according to the procedure established by law, namely, U.P. Control of Goondas Act. The validity of the Act has not been assailed before us and in fact it has been upheld in Raja Sukhnandan Vs. State of U.P. and Another, . The provisions of the Act are similar to that of City of Bombay Police Act, whose vires has been upheld in Gurbachan Singh Vs. The State of Bombay and Another, and also to Bombay Police Act, 1951 whose vires has been upheld in Hari Khemu Gawali Vs. The Deputy Commissioner of Police, Bombay and Another, . Thus, the contention raised by the learned Counsel that the writ petition should be entertained at the stage of notice itself cannot be accepted.

8. The detention laws like National Security Act, or Conservation of Foreign Exchange and Prevention of Smuggling Activities Act make serious inroad in the liberty of a person. Under these laws a person is detained without any prior notice and that too on the subjective satisfaction of the detaining authority which satisfaction cannot be challenged on merits. The person detained gets only a right to make representation against his detention but that too after he has been

detained and he has been deprived of his liberty. The decision of the representation naturally takes time. The principle that the machinery provided by the Act should not be permitted to be by-passed by taking recourse to proceedings under Article 226 of the Constitution prior to execution of the detention order was reiterated even in such cases. In Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, , the submission on behalf of the detaining authority is noticed in Para 25 of the Report which is as under:

It was contended by Sri Sibbal, learned Additional Solicitor General, on behalf of the Appellants that since the detention law is constitutionally valid, the order passed under it can be challenged only in accordance with the provisions of, and the procedure laid down, by it. In this respect there is no distinction between the orders passed under the detention laws and those passed under other laws. Hence, the High Court under Article 226 and this Court under Article 32 of the Constitution should not exercise its extraordinary jurisdiction in a manner which will enable a party to by-pass the machinery provided by the law.

The Court after considering the submissions of the parties held as follows in Para 30:

... The power under Articles 226 and 32 are wide, and are untrammelled by any external restrictions and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraint for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to evoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available....

This decision has been subsequently followed in N.K. Bapna Vs. Union of India (UOI) and Others, ; State of Tamil Nadu Vs. P.K. Shamsudeen, and Subhash Muljimal Gandhi Vs. L. Himingliana and Another, . The provisions of detention laws are far more stringent than the Control of Goondas Act as here order is passed after notice and trial and the person against whom order is passed does not lose his liberty. He is merely deprived of his right to live in a particular area from where he is externed but is free to reside any where else in the country. There is no reason why the same principle should not apply in the present case as well. The law being well-settled that where a Statute provides a machinery of its own, the aggrieved person should first

exhaust the remedies provided under the Statutes before approaching the High Court under Article 226 of the Constitution and the High Court would not normally entertain a petition straightaway, the present petition challenging the notice is liable to be rejected on the ground of alternative remedy.

9. In Raja Sukhnandan Vs. State of U.P. and Another, , the writ petition was filed at the stage of notice. The Division Bench examined the contention based upon the constitutional validity of U.P. Control of Goondas Act but refused to consider the submission regarding illegality of the notice on the ground that the same could be agitated before the District Magistrate and if the decision went against the Petitioner, in appeal before the Commissioner. In Kabir Chawla v. State of U.P. 1994 SCC 577 , the validity of the notice u/s 3 of the Act was assailed but the Supreme Court declined to go into this question on the ground that the Petitioner could satisfy the District Magistrate who was seized of the matter. It may be mentioned here that in all the cases where validity of notice issued under similar Statute relating to externment of Goondas was assailed before the Supreme Court, the matter had been taken in appeal against final orders of externment see Gurbachan Singh Vs. The State of Bombay and Another, ; Hari Khemu Gawali Vs. The Deputy Commissioner of Police, Bombay and Another, ; Bhagubhai Dullabhabhai Bhandari Vs. The District Magistrate, Thana and Others, and State of Gujarat v. Mehboob Khan AIR 1968 SC 1468.

10. There is another reason for not entertaining the writ petition at the stage of notice. As the preamble of the Act shows, it has been enacted to make special provisions for the Control and Suppression of Goondas with a view to the maintenance of Public Order. The provisions of the Act are intended to prevent further mischief by a Goonda and not to secure his conviction in a pending case. If a person is permitted to challenge the notice at the initial stage and seek stay of the proceedings, the very purpose for which notice is issued and the law under which it is issued will be frustrated as the externment order remains in operation only for a limited period.

11. Learned Counsel has next submitted that in Ramji Pandey Vs. State of Uttar Pradesh and Others, , writ petition had been filed challenging the notice u/s 3 of the Act and the writ petition was allowed by a Full Bench of this Court and, therefore, the present petition also deserves to be entertained. The judgment of the Full Bench shows that the question whether a writ petition should be entertained against a notice was not at all considered. The only question which was canvassed and was considered by the Bench was whether the notice was in accordance with the requirement of Section 3 of the Act. No such argument that a writ petition under Article 226 of the Constitution should not be entertained at the stage of notice seems to have been canvassed and, therefore, no decision has been given on this point. It is well-settled that a decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found

therein nor what logically flows from the various observations made in it. See M/s. Orient Paper and Industries Ltd. and another Vs. State of Orissa and others, . Doctrine of precedent is limited to the decision itself and as to what is necessarily involved in it. Judicial authority belongs not to the exact words used in this or that judgment, nor even to all reasons given, but only to the principle accepted and applied as necessary grounds of decision see Krishena Kumar and Others Vs. Union of India and others, . The Full Bench having not considered the question of maintainability of the writ petition at the stage of notice, the decision rendered by it cannot be held to be an authority or binding precedent for holding the writ petition to be maintainable.

12. In view of the reasons discussed above the writ petitions are dismissed on the ground of alternative remedy.