

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 22nd July, 2014

% Date of Decision: 22nd August, 2014

+ CRL. M.C. No.4182/2012 & CrI.M.A. No.7777/2014

KHALID MEHMOOD Petitioner

**Through: Mr. Vivek Sood & Mr. Prem Prakash,
Mr. Joydeep Tandon, Advocates.**

versus

STATE OF NCT OF DELHI Respondent

**Through: Mr. Navin Sharma, APP for the State
with SI G.D. Joshi, Special Cell.**

CORAM:

HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. The petitioner, Khalid Mehmood has filed the present petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against the judgment dated 24.09.1996 passed by learned Designated Court No.III, Karkardooma Courts, Delhi whereby the petitioner was convicted for the offences under Sections 3(1), 3(3), 5, 3(5) of The Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'TADA') Vide order on sentence dated 25.09.1996 the petitioner was sentenced to undergo life imprisonment under Sections 3(1) and 3(3) of TADA with a fine of Rs.1.00 lakh (Rupees one lakh) and in case of default of payment of fine, the petitioner was to undergo further imprisonment for three years and under Section 5 of TADA with a fine of

Rs.50,000/- (Rupees fifty thousand) and in default of payment of fine, the petitioner was to further undergo rigorous imprisonment for 1½ years and further sentenced to undergo life imprisonment under Section 3(5) of TADA and to pay a fine of Rs.1.00 lakh (Rupees one lakh) and in case of default of payment of fine, the petitioner was to further undergo rigorous imprisonment for three years. All the sentences were ordered to run concurrently and the benefit of Section 428 of Cr.P.C. was given to the petitioner.

2. Shorn off unnecessary details, the facts of the case are that one accused, Mehfooz Ali, son of Mehmood Ali, a Pakistan National was accused in FIR No.30/1994, P.S. Model Town. During interrogation, the accused made disclosure statement about other terrorists who had infiltrated into India across the border with the intention to spread terrorism. On the information disclosed by accused, Mehfooz Ali, a raid was conducted on the premises where Pakistan trained other terrorists were found. The other accused persons namely, Amjad Ali Mugal @ Mohammad Bilal, Khalid Mehmood (the petitioner herein) and Chand Mian were arrested by the police in the raid conducted at Dayal Pur premises near Bhajanpura, Delhi and large quantity of arms and ammunitions and explosives were recovered from the premises. During the raid, one of the accused namely, Amjad Ali @ Bilal tried to encounter the police party and he fired a round towards the police but was overpowered. The arms and ammunitions recovered from the premises of these three persons included 126 explosive sticks weighing approximately 16 kg 200 gms., two live hand grenades HA-36, 7

detonators. One foreign made pistol with four live cartridges loaded in it, was recovered from accused, Amjad Ali. The hand grenades were defused with the help of Bomb Disposal Squad and thereafter, hand grenades and other arms and ammunitions were sealed by the police. The other accused namely, Mohammad Ali Azmi was arrested after the disclosure statement made by three other accused persons and he was also found in possession of the incriminating documents concerning his relations with Pakistan and JKLF.

3. The petitioner along with co-accused persons namely, Amjad Ali and Mohammad Ali Azmi were tried for the offences under Sections 3(3), 3(5) and 5 of TADA. After completion of trial, the petitioner was convicted for the offences under Sections 3(1), 3(3), 3(5) and 5 of TADA vide judgment dated 24.9.1996 and order on sentence dated 25.9.1996 was passed by learned Designated Court, Karkardooma Courts, Delhi.

4. The petitioner challenged the judgment of conviction by filing an appeal bearing CrI. Appeal No.1992/1996 before the Hon'ble Supreme Court of India. The said appeal was dismissed by the Hon'ble Supreme Court of India.

5. Subsequently, the petitioner filed W.P.(C) No.5496/2012 and claimed that he was a juvenile on the date of commission of the offence and is entitled to protection under The Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'J.J. Act'). Vide order dated 3.9.2012, the petition was disposed of and the respondents were directed to carry out an ossification test of the petitioner.

6. A medical board of the Deen Dayal Upadhyay Hospital, New Delhi examined the petitioner and vide report dated 10.10.2012 opined that the petitioner was aged above 25 years and below 30 years.

7. The petitioner herein has filed the present petition praying for setting aside the judgment of conviction dated 24.9.1996 and order on sentence dated 25.9.1996 passed by learned Designated Court No.III, Karkardooma Courts, Delhi.

8. During the course of hearing, learned APP for the State placed on record the photographs of the petitioner at the time of arrest when his dossier was prepared, which clearly showed that he had beard and moustache at that time and thus was far above the age of 11 ½ years. Vide order dated 26.2.2013, this Court observed that report of Deen Dayal Upadhyay Hospital appears to be incorrect. The Designated Court of learned Additional Sessions Judge dealing with TADA/POTA cases relating to Gokulpuri was directed to conduct an inquiry which would include a detailed report of age of the petitioner from a Medical Board either from Safdarjung Hospital or AIIMS besides verifying other facts.

9. Pursuant to order dated 26.02.2013 passed by this Court, learned Additional Sessions Judge, North East, Karkardooma, Delhi submitted an inquiry report dated 27.04.2013. During inquiry, the petitioner was examined by Medical Board of AIIMS. After recording the statements of Chairman and members of the Medical Board and other material on record, learned Additional Sessions Judge, Delhi opined that on the date of examination on 22.03.2013, the petitioner was between the age

of 33 to 35 years, no other conclusion can be drawn and the petitioner's statement could not bring any other fact to disprove the opinion given by the Medical Board.

10. Learned counsel for the petitioner urged that the petitioner was arrested on 03.03.1994 and was a juvenile at that time. Learned counsel for the petitioner has referred to an Emergency Passport No.SS 526 800 issued on 18.6.2010 by Government of Pakistan which clearly shows that the age of the petitioner was 33 years in the year 2010.

11. Counsel for the petitioner also submits that during ossification test conducted by Deen Dayal Upadhyay Hospital on 10.10.2012, the age of the petitioner was between 25 years to 30 years. According to the said ossification test, the petitioner was aged about 11 years and five months on the date of arrest. According to the medical ossification test conducted on 22.03.2013 by the AIIMS, the petitioner was aged 33 to 35 years. The petitioner was medically examined in AIIMS hospital and as per the report of the Medical Board of AIIMS, the age of the petitioner was 33 to 35 years as on 22.3.2013.

12. Per contra, learned APP for the State contended that at the time of arrest of the accused a detailed dossier was prepared wherein on the basis of the interrogation of the petitioner, the age of the petitioner is mentioned as 24 years. The said dossier also contained photograph of the petitioner and it is quite clear from the physical features of the petitioner that the age of the petitioner was much higher than the person aged between 6 – 11 ½ years. In the conviction slip prepared at the time of arrest the age of the petitioner was mentioned as 23

years. Learned APP has also contended that after conviction of the petitioner /accused a descriptive roll of the petitioner was prepared on 25.9.1996 and his photograph was taken as per rules. In the descriptive roll the age of the petitioner was mentioned as 25 years. The photograph of the petitioner shows that the age of the petitioner was much higher than the age opined by the Medical Board of Deen Dayal Upadhyay Hospital.

13. I have given my thoughtful consideration to the submissions made by learned counsel for the petitioner and learned APP for the State and also gone through the material placed on record.

14. As per status report filed on behalf of State, the petitioner filed a petition bearing W.P. (Crl.) No.1504/2011 praying for issuance of a writ in the nature of mandamus directing the respondents to take the petitioner to Pakistan High Commission, Chanakyapuri, New Delhi on custody parole. In paragraph 2 of the said petition, it was stated that when the petitioner was arrested on 17.02.1994, he was only 18 years of age and was studying in Class XI. The petitioner had also filed another writ petition W.P. (Crl.) No.808/2011 and in para 2 of the said petition also it has been mentioned that when he was arrested, he was only 18 years of age and was studying in Class XI. Learned APP for the State contended that the petitioner was not juvenile at the time of his arrest.

15. At this juncture, it is relevant to reproduce the provisions of J.J. Act. Section 1(4) of the J.J. Act was brought into the statute book with effect from 22.8.2006 which reads as under: -

“Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under any such law.”

16. Section 2(k) of the Act defines that ‘Juvenile’ or ‘child’ means a person who has not completed 18 years of age. Section 2(l) of the Act defines ‘Juvenile in conflict with law’ means a juvenile who is alleged to have committed an offence and has not completed 18 years of age as on the date of commission of such offence.

Section 15 and Section 16 read as under;

“15. Order that may be passed regarding juvenile. –

(1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it thinks so fit:-

(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;

(b) direct the juvenile to participate in group counselling and similar activities;

(c) order the juvenile to perform community service;

(d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

(e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(g) make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recoded, reduce the period of stay to such period as it thinks fit.]

(2) The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognized voluntary organisation or otherwise, and shall take into consideration the findings of such report before passing an order.

(3) Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein, and may in such supervision order impose such conditions as it

deems necessary for the due supervision of the juvenile in conflict with law:

Provided that if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.

(4) The Board shall while making a supervision order under sub-section(3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be, under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer.

16 . Order that may not be passed against juvenile.-

(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death [or imprisonment for any term which may extend to imprisonment for life], or committed to prison in default of payment of fine or in default of furnishing security:

Provided that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is of so serious in nature or that his

conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government.

On receipt of a report from a Board under subsection (1), the State Government may make such arrangement in respect of the juvenile as it deems proper and may order such juvenile to be kept under protective custody at such place and on such conditions as it thinks fit:

[Provided that the period of detention so ordered shall not exceed in any case the maximum period provided under Section 15 of this Act.]”

17. Section 28 of the J.J. Act deals with Alternative Punishment, which reads as under:

“28 . Alternative punishment.- Where an act or omission constitute an offence punishable under this Act and also under any other Central or State Act, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offences shall be liable to punishment only under such Act as provides for punishment which is greater in degree.”

18. A perusal of provisions of Section 28 of the J.J. Act and Section 25 of TADA Act 1985 reveals that both the Sections contained the provisions providing overriding effect on any other law for the time being in force.

19. The TADA provides for a deterrent measure to deal with the menace of serious offences like ‘terrorism’ and ‘disruptive activities’ and for the matters connected therewith. Therefore, the object of the Act is to deal with the security of State as well as the citizens.

20. Section 25 of the TADA has a *non obstante* clause providing for an overriding effect to the provisions over anything inconsistent therewith contained in any other enactment or any instrument having effect by virtue of any other enactment. Thus, TADA contained many other *non obstante* clauses as well. The punishments provided by Sections 5 and 6 of TADA are to be imposed notwithstanding anything to the contrary in any other law. Section 7 of TADA enables the State to confer the power of arrest to certain persons. The Designated Court alone has the jurisdiction to try offences under TADA as prescribed under Section 9 of TADA. Section 20 of TADA provides that irrespective of any provision of the Cr.P.C. or any other law, every offence punishable under TADA would be deemed to be a cognizable offence.

21. The question whether J.J. Act would be applicable in case of TADA is no more *res integra*. In view of the law laid down in ‘**Essa @ Anjum Abdul Razak Memon vs. State of Maharashtra**’, 2013 (4) SCALE 1, the Apex Court, after considering the relevant provisions of TADA and the J.J. Act, 2000 observed as under: -

“379. Section 4(1) of JJ Act was added by amendment with effect from 22.08.2006. In fact, this provision gives the over-riding effect to this Act over other statutes. However, it reads that the Act would override “anything

contained in any other law for the time being in force". The question does arise as to whether the statutory provisions of JJ Act would have an over-riding effect over the provisions of TADA which left long back and was admittedly not in force on 22.8.2006. Thus, the question does arise as what is the meaning of the law for the time being in force. This Court has interpreted this phrase to include the law in existence on the date of commencement of the Act having over-riding effect and the law which may be enacted in future during the life of the Act having over-riding effect. (Vide: Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd., AIR 1999 SC 3923; and Management of M.C.D. vs. Prem Chand Gupta & Anr., AIR 2000 SC 454).

380. Thus, we do not think that the JJ Act would have an over-riding effect on TADA which was not in existence on the date of commencement of the provisions of Section 1(4) of JJ Act.

381. TADA, being a special act, meant to curb the menace of terrorist and disruptive activities will have effect notwithstanding the fact that JJ Act is general and beneficial legislation. On perusal of aims and objects of TADA, it is clear that the act is brought into the statute books to deal with a special category of persons, viz., Terrorists.

382. In Madan Singh vs. State of Bihar, (2004) 4 SCC 622, this Court upheld the convictions made by the Designated Court in respect of accused persons who had killed several police officers in combat. While affirming that the offence committed was rightly charged under Section 3 of TADA, this Court made detailed observations in respect of terrorist activities and held as follows:

“19. Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt

against a civilised and orderly society. "Terrorism" though has not been separately defined under TADA there is sufficient indication in Section 3 itself to identify what it is by an all inclusive and comprehensive phraseology adopted in engrafting the said provision, which serves the double purpose as a definition and punishing provision nor is it possible to give a precise definition of "terrorism" or lay down what constitutes "terrorism". It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb the harmony of the society or "terrorise" people and the society and not only those directly assaulted, with a view to disturb the even tempo, peace and tranquility of the society and create a sense of fear and insecurity."

TADA, thus, being an act enacted for special purposes, as stated above, will have precedence over any other act."

22. Considering the above provisions and the judgment, the plea of petitioner that J.J. Act would override the provisions of TADA in all circumstances without any exception cannot be accepted and in case

the legislature itself has carved out an exception not to grant relief to a juvenile under the J.J. Act, it cannot be held that it would prevail over TADA under all possible circumstances.

23. In view of the aforesaid discussion and the law laid down in **Essa @ Anjum Abdul Razak Memon's** case (surpa) the petition deserves to be dismissed and the same is hereby dismissed.

Crl.M.A.No.7777/2014

The application is dismissed as infructuous.

**(VED PRAKASH VAISH)
JUDGE**

AUGUST 22, 2014

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