

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:25.09.2018

Delivered on:23.01.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P(PD).No.4306 of 2010

&

M.P.No.1 of 2010

1.Manmatharajan

2.Thirupathi

3.Perumal Devan

4.K.T.Rathinavel

...Petitioners

State, represented by
Deputy Superintendent of Police
'Q' Branch CID,
Dharmapuri.

... Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India against the Impugned order in CrI.M.P.No.24 of 2010 in C.C.No.6 of 1993 dated 07.10.2010 on the file of the Presiding Judge Designated Court-II Chennai,

dismissing the application filed under Section 227 of Criminal Procedure Code.

For Petitioners : Mr.Sankara Subbu

For Respondent : Mr.Vijayanarayan
Advocate General
assisted by
Ms.A.Madhumathi
AGP, CCS

Order

The accused are the petitioners before this Court. The Civil Revision Petition has been filed invoking the superintending powers of this Court under Article 227 of the Constitution of India challenging the order passed by the Designated Court No.II, Chennai in Crl.M.P.No.24 of 2010 in C.C.No.6 of 1993, in and by which the learned Tribunal has dismissed the petition filed by the revision petitioners seeking a discharge under Section 227 of the Criminal Procedure Code.

2. The facts in brief necessary to dispose of this Civil Revision Petition is herein below narrated:

2.1. On 02.10.1992 and 03.10.1992 a plot to blow up the Railway bridge between 268/13 and 269/10-9 Dharmapuri Railway Station and Palacode Railway Station was hatched. In furtherance of this conspiracy, A3 Sundaramoorthy planted a country made bomb on the southern end of the girder bridge No.165. As a result of this the Rail to a length of about 2 feet was blown off on the Southern end of the bridge and the guard side lifted upwards due to the explosion.

2.2. The following dates and events would in a nutshell put the events there after in perspective:

"05.10.1992 - Members of a Naxal Organization - one Sundaramoorthy and two other accused planted country made bomb and blasted the Railway track.

05.10.1992 - Case in R.P.Crime No.80/92 registered, for an offence U/s 120 (b) IPC r/w Section 3(2), 3(3), 4 and 5 of TADA (p) Act, 1987, Section 150 (ii) (A) Railway Act, 1999, and Section 3, 4 and 5 of Explosive Substances Act, 1908.

December 1992/January 1993 - Charge-Sheet filed case split up as C.C.No.3/93 against Sisubalan and 2 others - and as C.C.No.6/93 against absconding Accused Sundaramoorthy.

08.03.1993 - Sundaramoorthy (A3) was declared

proclaimed offender.

22.05.1995 – Act Expired, with saving clause U/s 1(4)

09.07.2007 – Sundaramoorthy (A3) in Crime No.80/92 was arrested in other cases.

14.08.2007 – Produced under Prisoner's Trial warrant in Crime No.80/92.

19.08.2007 – Confession made by Sundaramoorthy in Crime No.80/92 (Confessed that the petitioners herein had harboured him while he was an absconding/Proclaimed offender since March 1993 until his arrest).

23.09.2007 – Petitioners arrested for harbouring Sundaramoorthy absconding Accused.

20.03.2008 – On completion of further investigation charge sheet filed.

24.03.2008 – Cognizance taken by TADA Court.

23.04.2008 – Petitioners released on bail.

24.06.2008 – Copies furnished to Accused.

27.08.2010 – Sundaramoorthy convicted under TADA (p) Act.

15.09.2010 – Representation to Chief Secretary, Government of Tamil Nadu.

27.09.2010 – Discharge Petition filed.

07.10.2010 – Discharge Petition dismissed.

15.10.2010 – Charges were framed against Tirupathy, KTR

Rathinavel and Perumal Devan.

26.11.2010 – TADA Review committee rejected the representation of the petitioners.”

3. The revision Petitioner had filed the discharge petition on the following grounds:

(a)The accused are neither members of the conspiracy nor have they committed the offence.

(b)The Terrorist and Disruptive Activities Prevention Act (herein after referred to as Act) had expired on 22.05.1995 and therefore the prosecution of the petitioners under a repealed act is not maintainable.

(c)The harbouring was done after the commissioning of the offence and this will not attract the Act.

(d)No offence under Section 3(3) of the Act has been made out.

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4. The respondent has countered these allegations by contending that in view of the saving Clause in Section 1(4)(d) of

the Act the prosecution under the Act was maintainable and harbouring a convict after the commission of the offence would also attract the provisions of the Act. The respondent relied upon the evidence of witnesses who have stated that the accused Sundaramoorthy was introduced to them as a Cloth merchant, Gurusamy and they were asked to give shelter to him and this subterfuge clearly proved that fully knowing the identity of the accused and the commission of the crime by him, the revision petitioners had gone out of their way to harbour them.

5. The learned Presiding Judge of the Designated Court-II, Chennai on a detailed consideration of the materials placed before him came to the conclusion that as he found a prima facie case against the revision petitioners which required further scrutiny and as the harbouring of the accused had taken place prior to the expiry of the Act, the discharge petition deserves to be dismissed.

6. Submissions:

Assailing this, the revision petitioners are before this Court. The revision Petitioners were represented by Mr.Sankara Subbu Advocate and the respondents response was articulated by the learned Advocate General, Vijayanarayanan.

6.1. Mr.Sankara Subbu, learned counsel for the petitioners would put forward the following pleas as a challenge to the order under revision. His first argument was that the invocation of the Act after it has ceased to exist was wrong and the revision petitioners should be discharged. He would contend that a fresh investigation in the garb of a further investigation is not saved under Section 1(4) of the Act. He would further contend that the revision petitioners are not aware of the conspiracy and commission of the offence by Sundaramoorthy and therefore they cannot be prosecuted under the Act. He has relied on the Judgment of the Hon'ble Supreme Court reported in **AIR 2008 Supreme Court 961 – Vijaykumar Baldev Mishra @ Sharma**

Vs. State of Maharashtra. The issue before the Hon'ble Supreme Court was the refusal of the Designated Court to grant permission to the Public Prosecutor to withdraw the case filed under the Act. The application for withdrawal was made as the case did not attract the stringent provisions of the Act and further the Act had expired. While setting aside the order of the Designated Court, the Bench observed that the anomaly in Section 3 of the Act warranted it to be struck down as unconstitutional but since there was no prayer to that effect no orders were passed. The next Judgment cited was the one reported in **1995 SCC (Cri) 902 - Anirudhsinhji Karansinhji Jadeja and another Vs. State of Gujarat** to state that it is the Deputy Superintendent of Police who is vested with the right under the Act to grant approval for recording any information about the commission of an offence under the Act. This is cited in support of his argument that in the instant case there is a total non application of mind by the Deputy Superintendent of Police before granting approval under Section 20 A (1) of the Act.

6.2. The next point that was canvassed was that the revision petitioners are neither members of the conspiracy nor have they committed an offence and therefore the prosecution against them has to be stopped and they should be discharged from the offence. He would further argue that after the dismissal of the petition under Section 227 of the Act, the revision petitioners filed a petition under Section 309 of the Criminal Procedure Code for adjournment but however charges were framed. He would state that even when charges were framed the Court can set right the injustice vide **1990 SCC (Cri) 110 – S.M.D.Kiran Pasha Vs. Government of Andhra Pradesh and others.**

7. Per contra, the learned Advocate General would advance the following counter arguments:

(a) That the proceedings before this Court is infructuous as the charges have been framed on 15.10.2010 and the impugned order had not been challenged and orders of stay not obtained.

He relied on the dictum laid down by the Hon'ble Supreme Court in the case reported in **1979 SCC (Cri) 405 – Rathilal Bhanji Mithani Vs. State of Maharashtra and others** that after the framing of charges the question of discharge would not be available to the revision petitioners.

(b)The next contention put forward was that in view of Section 19 of the Act the revision under Article 227 was not maintainable. The decision cited by the petitioners' counsel viz; **1994 (2) LW (Cri) 422 - Kartar Singh Vs. State of Punjab** was distinguished.

(c)Extensive arguments were put forward with reference to the plea that on 22.05.2005 the Act expired and thereafter the provisions of the Act cannot be invoked.

(d)He had also succinctly put across the arguments that the powers of the Courts under Article 32 and 226 of Constitution of India is circumscribed by the provisions of the special enactment.

The learned Advocate General had cited the following Judgments in support of the above contentions.

(a) Powers of the Court under Article 32 and 226 of the constitution of India-

(i) *Union of India and other Vs. Major General Shri Kant Sharma and another* (Supreme Court).

(ii) *P.Sundararajan Vs. The Deputy Registrar, National Green Tribunal Southern Zone* (Madras High Court)

(b) Discharge Petition becomes infructuous-

(i) 1996 (4) SCC 659 – *State of Maharashtra and others Vs. Som Nath Thapa and others*

ii) 2010 (9) SCC 479 – *Uma Shankar Singh Vs. State of Bihar and others*

(iii) 2014 (13) SCC 137 – *Dinesh Tiwari Vs. State of Uttar Pradesh.*

(c) Saving provisions of Section 1(4) of the Act

(i) 1996 (1) SCC 722 – *Mohamed Iqbal Madar Sheikh and others Vs. State of Maharashtra*

(ii) *Manu/Tn/0144/2004 - Venkatesan Vs. State of Tamil Nadu and another*

(iii) 1996 (1) LW (Cri) 138 – *S.Viola Selvin Vs. State of Tamil Nadu*

(d) Powers of the High Court under Section 482 of Criminal Procedure Code and Article 227 of the Constitution of India.

(i) 2003(6) SCC 641 – *State, through Special Cell, New Delhi Vs. Navjot Sandhu and others*

(ii) 1993 CriLJ 3318 – *Shaheen Zainab Vs. Government of Andra Pradesh and other.*

8. Discussion:

8.1. The pivotal point on which the arguments on either side hinges, is the effect of the prosecution on the revision petitioners when the Act had expired with effect from 22.05.1995. While the revision petitioners would contend that the prosecution was under a dead Act, the respondents would contend that the action of the respondent is saved under Section 1(4) of the Act.

8.2. To appreciate the argument it is necessary to extract the provisions of Section 1(4) of the Act.

"It shall remain in force for a period of eight years from the 24th day of May, 1987, but its expiry under the operation of this Sub-Section shall not affect-

(a)the previous operation of, or anything duly done or suffered under this Act or any rule made thereunder or any order made under any such rule, or

(b)any right, privilege, obligation or liability or liability acquired, accrued or incurred under this Act or any rule made thereunder or any order made under any such rule, or

(c)any penalty, forfeiture or punishment incurred in respect of any offence under this Act or any contravention of any rule made under this Act or of any order made under any such rule, or

(d)any investigation, legal proceeding or remedy

in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired."

A reading of this Section would indicate that any investigation, legal proceeding or remedy may be instituted, continued and enforced and any such penalty, forfeiture or punishment may be imposed as if the act had not expired. This provision would therefore clarify that the institution of a proceeding could also be commenced after the expiry of the Act as if the Act had not expired.

8.3. In the decision reported in **1996 (1) LW (Cri) 138**, in which the counsel for the petitioner herein was also the counsel for the petitioner; a Division Bench of this Court after considering

a catena of Judgments has held that the Saving clause included the procedural aspect as well in the following words:

"53. After carefully considering the rival submissions in the light of the decisions referred to above we are of the opinion that by virtue of Section 1(4) of the Act, all the proceedings including the procedural aspect are saved. The decisions cited by the learned Senior Counsel for the Petitioner referred supra were not dealing with the saving clause like Section 1(4) except in one decision of a single Judge of this Court. It will be too much to hold that the legislature while introducing Section 1(4) of the TADA Act has not intended to include the procedural aspect at all or else the very purpose of introducing Section 1(4) of the TADA Act becomes redundant. Further we have to give much importance to the words "may be imposed as if this Act had not expired". The provision found in Section 1(4) of the TADA Act is much wider than Section 6 of the General Clauses Act to include even procedural aspect."

8.4. The Honourable Supreme Court in its decision reported in **1996 (1) SCC 722** supra, after extracting the provisions of

Section 1(4) observed as follows:

"7. In view of the aforesaid Sub-Section (4) of Section 1, it has to be held that framers of the Act had enacted a saving provision like Section 6 of the General Clauses Act, in Sub-section (4) of Section 1 of TADA and desired that even after expiry of such temporary Act, the proceedings initiated under the said Act, should not come to an end without the final conclusion and determination. They are to be continued in spite of the expiry of the Act. The deeming clause in subsection (4) of Section 1, saying as if this Act had not expired shall keep the pending investigations and legal proceedings alive. In spite of the Act having expired, it has to be treated that it has not expired so far such pending investigations and legal proceedings are concerned. The effect of a legal fiction by a deeming clause is well known. Legislature can introduce a statutory fiction and Courts have to

proceed on the assumption that such state of affairs exists on the relevant date, because when one is bidden to treat an imaginary state of affairs as real he has to also imagine as real the consequences which shall flow from it unless prohibited by some other statutory provision."

8.5. The Honourable Supreme Court in ***State of Maharashtra and others Vs. Som Nath Thapa and others [1996 (4) SCC 659]*** dealt with the effect of the repeal of TADA. They had quoted the decision in *Mohamed Iqbal Vs. State of Maharashtra* (Paragraph No.8.4. Supra) with approval.

8.6. Another Judgment of this Court in the matter of ***Venkatesan Vs. The State of Tamil Nadu represented by its Secretary, Department of Home and another***, in which once again the counsel for the petitioner herein appeared for the petitioner therein, this Court held that

"A reading of Section 1(4) of the Act makes it clear that the frames of the Act had desired that even after the expiry, the

proceedings initiated under the Act should not come to an end without the final conclusion and determination which have, therefore, to be continued in spite of the expiry of the Act and therefore, there is indeed no scope for a controversy as to whether any investigation, inquiry, trial in respect of any offence alleged under the Act shall come to an end as Sub-Section (4) to Section 1 of the Act protects and keeps alive such an investigation and trial”.

8.7. Thus on a conspectus of the above Judgments it is clear that the institution of the prosecution against the revision petitioners was only a continuation of the proceedings already initiated. The revision petitioners are guilty of harbouring A3 – Sundaramoorthy immediately after the commission of the offence and their knowledge is *prima facie* indicated by the Section 161 (3) Criminal Procedure Code statement of Zaggirussain @ Subi who has deposed that A3 – Sundaramoorthy was introduced to him as Gurusamy, a Cloth merchant. Such a subterfuge has been adopted by the revision petitioners only on account of the

fact that the revision petitioners were aware of the offence and they did not want the identity of A3 known. Therefore the submission of the learned counsel for the revision petitioners that the revision petitioners were not guilty of having committed the offence nor being part of the conspiracy fails. Therefore there is a prima facie case of harbouring against the revision petitioners which has to be gone into in trial and therefore at this stage they cannot be discharged. The decision reported in **1999 SCC (Cri) 691 – State of Tamil Nadu through Superintendent of Police, CBI/SIT Vs. Nalini and others** would therefore not come to the rescue of the revision petitioners.

8.8. The respondent have raised the issue of maintainability of this revision in the light of Section 19 of the Act. Section 19 reads as follows:

"19.Appeals.-(1)Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.

(2)Except as aforesaid, no appeal or revision

shall lie to any Court from any judgment, sentence or order including an interlocutory order of a Designated Court.

(3) Every appeal under this Section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days."

The Honourable Supreme Court while upholding the constitutional validity of TADA Act in ***Kartar Singh Vs. State of Punjab reported in 1994 (3) SCC 569 = 1994 (2) LW (Cri) 422*** held as follows:

"359. Though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles. The legislative history and the object of TADA Act indicate that the Special Act has been enacted to meet challenges arising out

of terrorism and disruption. Special Provisions are enacted in the Act with regard to the grant of bail and appeals arising from any Judgment, sentence or order (not being an interlocutory order) of a Designated Court etc. The overriding effect of the provisions of the Act (i.e. Section 25 of TADA Act) and the Rules made thereunder and the non-obstante clause in Section 20(7) reading, "Notwithstanding anything contained in the code..... clearly postulate that in granting of bail, the special provisions alone should be made applicable. If any party is aggrieved by the order, the only remedy under the Act is to approach the Supreme Court by way of an appeal. If the High Courts entertain bail applications invoking their extraordinary jurisdiction under Article 226 and pass orders, then the very scheme and object of the Act and the intendment of the Parliament would be completely defeated and frustrated. But at the same time it cannot be said that the High Courts have no jurisdiction. Therefore, we totally agree with the view taken by this Court in Abdul Hamid Haji Mohammed'17 that if the High Court is inclined

to entertain any application under Article 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. What those rare cases and what would be the circumstances that would justify the entertaining of applications under Article 226 cannot be put in strait-jacket. However, we would like to emphasise and re-emphasise that the judicial discipline and comity of courts require that the High Courts should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused indicted under the special Act since this Court has jurisdiction to interfere and correct the orders of the High Courts under Article 136 of the Constitution."

Therefore it is clear that though the High Court can exercise powers under Article 226 or 227 of the Constitution of India the power should be used sparingly and only in cases where there is an abuse of process of Court.

In the instant case the revision petitioners have not been able to demonstrate any abuse of process of Court. On the

contrary, the respondent have able to prove a prima facie case of harbouring against the revision petitioners which has to be established in trial. The Designated Court II, Chennai has rightly rejected the Discharge Petition and therefore invoking the powers of this Court under Article 227 of the Constitution of India was contrary to the provisions of Section 19 of the Act.

8.9. The respondents have also challenged the revision on the ground that the same is infructuous as the charges were framed prior to the filing of the revision petition. To buttress this argument the learned Advocate General has relied upon the Judgment of the Honourable Supreme Court reported in **2010 (9) SCC 479 – Uma Shankar Singh Vs. State of Bihar and others**. The Honourable Supreme Court held that once charges have been framed against the petitioner, special leave petition before it was rendered infructuous and the remedy of the petitioner if any, was no longer available to them.

9. The learned Single Judge of this Court in the Judgment reported in **2010 CriLJ 3240 – K.Selvam Vs. State**

represented by Inspector of Police Special Police Establishment, Central Bureau of Investigation has also reiterated the fact that after farming of charges, question of discharging an accused did not arise.

In view of the detailed discussion supra, the order dated 07.10.2010 of the presiding Judge, Designated Court II under TADA (P) Act, Chennai in CrI.M.P.No.24 of 2010 in C.C.No.6 of 1993 does not suffer from any infirmity. The Civil Revision Petition is therefore dismissed. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is also closed.

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23.01.2019

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Index : Yes/No
Speaking order/non-speaking order
To,
1.The Presiding Judge Designated Court-II,
Chennai.

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P.T.ASHA, J.,

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Pre-Delivery order in
C.R.P(PD).No.4306 of 2010 &
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