

(1989) 12 GUJ CK 0005

In the Gujarat High Court

Case No : Spl. Criminal Application No. 1369 of 1989

Ayubkhan Kalandarkhan Pathan

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 18-12-1989

Acts Referred:

Arms Act, 1959 — Section 25(1)

Constitution of India, 1950 — Article 136, 14, 21, 22, 226

Criminal Procedure Code, 1973 (CrPC) — Section 438, 439, 482

Penal Code, 1860 (IPC) — Section 114, 373, 392, 397, 398

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 11(1), 14, 19, 20, 20(7)

Citation : (1991) CriLJ 1085 : (1990) 1 GLR 473

Hon'ble Judges : S.B. Majumdar, J; B.S. Kapadia, J

Bench : Division Bench

Advocate : G.N. Desai, for the Appellant; J.M. Panchal, Addl Public Prosecutor (for Nos. 1 and 2) and Y.F. Mansuri, (for No. 3), for the Respondent

Judgement

B.S. Kapadia, J.—The petitioner has filed this petition under Article 226 of the Constitution of India and prayed for a writ of mandamus or a writ in the nature of mandamus or any other writ, order or direction directing the 2nd respondent to treat as cancelled the reference to violation of provisions of Sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 hereinafter referred to as "TADA Act" as mentioned in column-5 (really it should be column-6) in the report made by the 2nd respondent i.e. Police Station Officer, Gaekwad Havali Police Station, Jamalpur, Ahmedabad, in respect of complaint in question which is registered at C. R. No. 390/89 of Gaekwad Haveli Police Station, Ahmedabad, and further prayed for a direction requiring the respondents to treat the impugned decision of the 2nd respondent to include violation of Sections 3 and 4 of the TADA Act in the report made by the 2nd respondent, cancelled and for quashing the said part in the impugned complaint. He also prayed for interim relief restraining the respondents Nos. 1 and 2 from arresting him in connection with C. R. No. 390/89 registered with Gaekwad Havali Police Station, Jamalpur,

Ahmedabad, on such terms and conditions as may be deemed fit.

2. According to the petitioner he is staying near Kachni Masjid, Jamalpur, Ahmedabad; he is a Commerce Graduate and had stayed even in U. K. for one year for prosecuting his studies in Engineering; he holds agricultural lands at Rasulpura, Taluka Sanand, District Ahmedabad; he has also an interest in a house situated at Ahmadabad; he is also occupant of the land within City wall of Ahmedabad; he has also an interest in the property of his family at Village Kot Bali, Rajasthan; he personally cultivates about 46 bighas of land at Sanand with a Farm House; he also has an interest in 300 bighas of land at village Sanand and he also has an interest in 21 chawalia situated near Kachni Masjid, Ahmedabad. He has also interest in other properties as mentioned in the petition. He has filed this petition as a citizen of India claiming to be entitled to the fundamental rights guaranteed under the Constitution of India.

3. It is inter alia averred in the petition that one Saiyed Abdulla Patel has filed First Information Report in Gaekwad Haveli Police Station which is registered at C. R. No. 390/89, on 15-10-1987. It is inter alia alleged in the said FIR by said Saiyad Abdulla Patel that he is holding the post of the President of Yuva Congress of Jamalpur ward and he is studying in T. Y. B. Com. in the City College. According to him he is staying with his parents and he had a friend named Salimbhai studying in 12th standard in Ankur High School and his said friend is residing at Kachni Masjid, Jamalpur, Ahmedabad. The petitioner is also staying in the same locality and the petitioner's brother Sardarkhan is also doing work there.

4. It is also alleged in the said FIR that the petitioner and said Saiyad Abdulla Patel both were concludes for the post of President of Yuva Congress, Jamalpur Ward and that as said Saiyad Abdulla Patel was appointed as President of the Yuva Congress, Jamalpur ward the petitioner was keeping enmity with him and that the petitioner was even giving threats to beat said Saiyed Abdulla Patel.

5. Coming to the date of incident i.e. 15-10-79 it is alleged by the complainant that at about 10.00 p.m. (night) he was returning home and at that time the petitioner and his brother-in-law, who is residing in Patwashari and whose name is Ayoobkhan, were following the complainant; that the petitioner told the complainant to go near him (414-419) and so he stood there and at that time the petitioner and his brother-in-law both started abusing him and the petitioner gave him a slap on his face and fist blows in his chest; that petitioner's brother-in-law also gave him fist blows and on account of the slap given by the petitioner there was swelling on the face of the complainant. It is further alleged that thereafter the petitioner took out revolver from his waist -- belt vernacular omitted and threaten-ed him that he would be killed; that his brother-in-law also gave a threat of bringing out his intestines. On account of this there was hubub in the locality and the ladies gathered there; that one Kamrunisha who is residing in the locality and one Rachiben came there and they took the complainant at a distance and thereafter the petitioner and his brother-in-law

went towards their house. Thereafter the complainant went to the Police Station for filing complaint. The Complainant's father had also come to the police station and he also told about this incident to his father. On the aforesaid allegation made by the complainant the FIR is registered at C. R. No. 390/89 wherein the - offences under Sections 373, 506(2), 504, 114 IPC have been mentioned. Office u/s 25(1) of the Arms Act is also mentioned. The second respondent has also mentioned the offences under Sections 3 and 4 of the TADA Act in column No. 5 of the FIR.

6. The petitioner has inter alia averred in the petition that the allegations made in the complaint are totally false and that he has not committed any offence whatsoever and that the entire complaint has been filed male fide by the said complainant. It is also alleged that the said complaint has been filed with a view to bring pressure upon the petitioner and his family members and friends during the election period of Lok Sabha. It is also alleged that the petitioner does not possess any revolver nor the statements made in the complaint that the petitioner pointed revolver towards the complainant and threatened him to kill are true as they are totally false and baseless.

7. What is substantially averred in the petition is that there is no allegation in the complaint that the petitioner has committed any act as contemplated u/s 3 or Section 4 of the TADA Act. However, the second respondent for the reasons best known to him has mentioned in the report prepared by him the offences u/s 3 and Section 4 of the TADA Act. It is also averred in the petition that he has reason to believe that the offences under Sections 3 and 4 of the TADA Act are mentioned in column 5 of the FIR at the instance of the respondent No. 3, who is the President of Yuva Congress, Jamalpur Ward. It is also averred in the petition that the second respondent has mentioned the said offences under the TADA Act only with a view to seeing that the petitioner is deprived of his right of approaching this Court or even the Designated Court u/s 438 of the Cr. P.C. for anticipatory bail. It is also alleged that the action on the part of the second respondent for involving the petitioner for the offence under the TADA Act is completely arbitrary, mala fide and that these are mentioned for collateral purposes.

8. On the aforesaid averments it is submitted that the action of the second respondent is violative of the petitioner's right under Arts. 14 and 21 of the Constitution of India. It is also pointed out in the petition that there are no allegations in the complaint with regard to the required ingredients of the offences under Sections 3 and 4 of the TADA Act. It is also submitted by the petitioner that it is an attempt to deprive him of the right of legitimate procedure under the Criminal Procedure Code, even for filing revision applications and appeals. It is also alleged in the petition that it is done with a view to compel the petitioner to go to the Supreme Court of India at every stage and thereby cause harassment and immense loss of money to the petitioner. It is also averred that it is a pressurising method adopted by the second respondent and that the

petitioner has reason to believe that the said method has been adopted with an ulterior motive and therefore, it is illegal. It is further submitted that in any view of the matter there is a malice in law in mentioning violation of Sections 3 and 4 of the TADA Act in column-5 of the said report by the second respondent. It is also submitted in the petition that the Supreme Court in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, has been pleased to observe that the provisions of TADA Act should not be resorted to very lightly but should be resorted to only sparingly and appropriately and that in spite of the aforesaid observations of the Supreme Court the second respondent has mentioned in column-5 of the report violation of Sections 3 and 4 of the TADA Act though there are no allegations in the complaint against the petitioner with regard to the offences under the TADA Act, and therefore, it is violative of the fundamental rights of the petitioner and hence the present petition.

9. When this matter was first placed before us leave to add the original complainant one Saiyed Abdullahbai as party-respondent No. 3 was granted and notice to the newly added respondent No. 3 was made returnable on 2-12-1989 and Dr. J.M. Panchal, learned Addl. P.P. appeared for the respondents Nos. 1 and 2 and waived service of notice. Mr. Panchal also made a statement that the petitioner will not be arrested to TADA offence and the said statement was extended from time to time.

10. Affidavit-in-reply is filed by one Shri C. F. Jadeja, Police Sub Inspector, Gaikwad Haveli Police Station, Jamalpur, Ahmedabad, practically denying all the averments and allegations made in the petition against the respondent No. 2. However, referring to the judgment of the Supreme Court in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, it is submitted that the High Court has no jurisdiction to entertain an application for bail under Sections 439 or 482 of the Code of Criminal Procedure and it was further submitted that what cannot be achieved directly should not be permitted to be achieved indirectly. It is further submitted on the basis of the observation of the Supreme Court that a citizen can move the High Court under Articles 226 and 227 of the Constitution or the Supreme Court under Article 32 of the Constitution only for challenging the constitutional validity of TADA Act or its provisions on the ground that they offend Articles 14, 21 and 22 or on the ground that a notification issued by the Central Government or the State Government u/s 9(2) of the TADA Act constituting a Designated Court for any area or areas or for such case or class or group of cases as specified in the notification was a fraud on powers and thus, constitutionally invalid. It is further submitted in the affidavit-in-reply that the Supreme Court has laid down guidelines for Designated Courts to find out whether provisions of the TADA Act are applicable or not while deciding the question whether bail should be granted u/s 20(a) of the TADA Act or not and therefore, as per the decision of the Supreme Court while deciding the question as to whether provisions of the TADA Act are applicable or not, the Designated Court has to take into consideration the police report along with the statement in the case diary and other available materials. It was therefore,

submitted that for the purpose of deciding the question as to whether offences under Sections 3 and 4 of the TADA Act are made out or not, the Court should take into account not only the complaint but other investigation papers viz. statements of witnesses also. It is further submitted in the reply-affidavit that taking into consideration the statements of the witnesses together with the complaint commission of offence by the petitioner and another under the TADA Act is prima facie disclosed. It is also contended that whether the provisions of the TADA Act have been rightly pressed into service should be left to be decided by the Designated Court as held by the Supreme Court. It is also contended that merely because an application u/s 438 of the Cr. P.C. is not maintainable would not mean that fundamental rights of the petitioner are violated and that discharging duties enjoined by law by the police authorities upon receipt of complaint for an offence could never be assailed as an action violating fundamental rights.

11. Statements of persons recorded on 16-10-1989 include the one that of the complainant. The complainant has stated therein that after taking out the revolver and giving a threat of killing him by the petitioner there was fear in the people residing in the neighbourhood and on account of the action of both of them (both the accused) the businessmen of the area also frightened and they closed their shops and went away; that people ran belter skelter in the said locality and that the people did not come out from their houses on account of fear. The statement of the second witness is also to the effect that the petitioner took out from his waist-belt something like a pistol and gave a threat of killing the complainant and that a man accompanying the petitioner also gave a threat of bringing out intestines of the complainant and that in the meantime father of the complainant Saiyed had also come there and he gave rebuke and they were separated, but the petitioner and the person accompanying him again got excited and they were abusing like anything and they were telling the people that they all will be killed "sabko udavi dunga"; that on saying so there was fear in the people and they started running away; that there was an atmosphere of fear and the larri-gallawallas who were keeping their larries near Kachni Masjid also closed down their business and ran away and that even the traffic on the road also became standstill. The third witness only says to the effect that she had seen the incident and that the shops and the houses in the locality were closed at the time of incident and that the people were frightened.

12. In view of the aforesaid rival contention Rule was issued in this matter and by the consent of both the sides and their learned counsel the matter is heard fully on various dates.

13. The main contention raised on behalf of the petitioner is with regard to the maintainability of the petition under Article 226 of the Constitution of India in view of the provisions of the TADA Act. It may be mentioned that so far as the provisions of the TADA Act are concerned, there is no specific provision which takes away the constitutional rights of the parties concerned and there is also no

provision under the TADA Act taking away the power of the High Court to decide the matter under Article 226 of the Constitution of India. Section 19 of the TADA Act speaks about the right to prefer appeal 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. Said Section also provides that no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Designated Court. It is therefore, clear that so far as the right of appeal or revision under the Cr. P.C. is concerned, it is taken away. Section 25 of the TADA Act speaks about the over-riding effect of the provisions of the TADA Act and it provides that notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in this Act or in any instrument having effect by virtue of any enactment other than this Act the provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect. However the said Section does not refer to taking away the powers of the High Court under Article 226 or 227 of the Constitution of India. It is pertinent to note that in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, the Supreme Court has observed in para 12 as under;

"12. At the very outset, Shri Poti, learned counsel appearing for the State Government with his usual fairness, unequivocally accepted that the provisions of the Act do not take away the constitutional remedies available to a citizen to approach the High Court under Article 226 or Article 227 or move this Court by a petition under Article 31 for the grant of an appropriate writ, direction or order. It must necessarily follow that a citizen can always move the High Court under Article 226 or Article 227, or this Court under Article 32 challenging the constitutional validity of the Act or its provisions on the ground that they offend Arts. 14, 21 and 22 or on the ground that a notification issued by the Central Government or the State Government u/s 9(1) of the Act constituting a Designated Court for any area or areas or for such case or class or group of cases as specified in the notification was a fraud on powers and thus constitutionally invalid."

The aforesaid observations of the Supreme Court clearly flow from the concession given by Mr. Poti who appeared for the State Government in the said case and those observations can only be interpreted as illustrative. It is clear from the 42nd Amendment to the Constitution of India which introduces Part-XIVA relating to Tribunals. In Article 323A of the Constitution it is inter alia provided that law can be made under Clause (1) excluding jurisdiction of all courts except that of the Supreme Court under Article 136 with respect to the dispute or complaints referred to in Clause (1). In absence of any such provision in the Constitution of India taking away the power of the High Court under Article 226 of the Constitution for entertaining any such petition when there is real fear of infringement of fundamental rights it cannot be taken away by the Act of Parliament and in fact no such provision is made in the Act also.

Mr. G. N. Desai, learned counsel appearing for the petitioner on the point of maintainability of the petition has relied on the judgment of the Supreme Court in the case of S.M.D. Kiran Pasha v. Govt. of Andhra Pradesh, reported in JT (1989) 4 (AP) 366. In the said case decided on 9-11-1989 the Supreme Court has held that Article 226 of the Constitution of India notwithstanding anything in Article 32, empowers the High Court throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them for the enforcement of any of the rights conferred by Part-III and for any other purpose; and also envisages making of interim order, whether by way of injunction or stay or in any other manner in such a proceeding. In the said case the Supreme Court has also held as under:--

".....The question is at what stage the right can be enforced? Does a citizen have to wait till the right is infringed? Is there no way of enforcement of the right before it is actually infringed? Can the obligation or compulsion on the part of the State to observe the right be made effective only after the right is violated or in other words can there be enforcement of a right to life and personal liberty before it is actually infringed? What remedy will be left to a person when his right to life is violated? When a right is yet to be violated, but is threatened with violation can the citizen move the court for protection of the right. The protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty is guaranteed and the rest of the society, including the State, is compelled or obligated not to violate that right, and if someone has threatened to violate it or its violation is imminent, and the person whose right is so threatened or its violation so imminent resorts to Article 226 of the Constitution, could not the court protect observance of his right by restraining those who threatened to violate it until the court examines the legality of the action. Post-violation resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled..... Law surely can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with that violation and he approaches the court under Article 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus?..... If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been

violated, what is left is the remedy against such violation and for restoration of the right....."

14. The aforesaid observations of the Supreme Court clearly apply in the present case. It may be mentioned that the aforesaid observations were made by the Supreme Court in the case when the writ petition was pending in the court and the appellant's right to personal liberty happened to be violated by taking him in custody in preventive detention though he was released after four days. The question in the said case was whether he could be taken into custody again and is it be proper for the Court to reject the earlier writ petition and tell that his petition has become infructuous and that he had no alternative, but to surrender and then petition for habeas corpus should be filed. In the said case judgment of the Full Bench of this Court in the case of Vedprakash Devkinandan Chiripal and etc. Vs. State of Gujarat and Another, was also considered and approved by the Supreme Court. In the said case the Full Bench answered the question in the affirmative relying on the earlier decisions of the Supreme Court and took the view "that before detention, if writ of mandamus is moved for challenging unauthorised detention order which is already passed on the ground that the order is a nullity because it is passed (a) by an incompetent person or (b) it is a mala fide order or (c) it is contrary to the legal procedure prescribed for passing such order, or (d) it is otherwise a nullity for any other reason, for example, passed against a wrong person, it cannot be said that such challenge would be per se not maintainable." The Supreme Court has observed in the said case that it is inclined to agree in as much as it would be a challenge to an existing order of detention which is posing an imminent threat to a fundamental right of the named person guaranteed under Article 21, and there could, therefore, be no reason why in such an exceptional and rare case, detention order already made, and either served or yet to be served, and the person is still free could not be legally brought under challenge.

15. From the aforesaid latest judgment of the Supreme Court it is clear that once when there is imminent threat of violation of fundamental right coupled with overt act such an action of the Government can be challenged for protecting the fundamental rights guaranteed under Article 21 of the Constitution of India. In view of the aforesaid discussion we hold that the provisions of the TADA Act do not take away the fundamental right of the petitioner guaranteed under Article 21 and therefore, High Court has also power under Article 226 to entertain such petition for protecting fundamental rights before it is violated.

16. It is submitted on behalf of the respondent State that the Designated Court is the only Court to act having exclusive jurisdiction to try the cases under the TADA Act and therefore, this Court should not do any exercise to find out as to whether the provisions of the TADA Act are applicable or not in this case. u/s 11(1) of the TADA Act every offence punishable under any provision of this Act or any rule made thereunder shall be triable only by the Designated Court within whose local jurisdiction it was committed or, as the case may be, by the

Designated Court constituted for trying such offence under Sub-sec. (1) of Section 9. Under the provisions of Section 14 of TADA Act a designated court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. Section 20(7) of the TADA Act clearly provides that nothing in Section 438 of the Criminal Procedure Code shall apply in relation to any case involving arrest of any person on an accusation of having committed an offence punishable under this Act or any rule made thereunder. Therefore, for the first time the Designated Court will have "an opportunity to consider as to whether the provisions of TADA Act apply or not only when the accused is brought before the Court after he is arrested by the Police and at that time the Designated Court will consider the question as to whether the provisions of TADA Act apply or not taking into consideration the observations made by the Supreme Court of India in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, . However, the question is before the accused is arrested and on account of overt act of the police if the petitioner feels that his fundamental rights of personal liberty is imminently in danger and is likely to be violated by arresting him wrongly involving him for the offences under TADA Act and when he moves the High Court by filing petition under Article 226 of the Constitution, whether the High Court can look into the question as to whether the provisions of TADA Act apply or not. In such circumstances the High Court has to consider the question of protection of fundamental right guaranteed under Article 21 of the Constitution and for that purpose it is necessary to consider as to whether the person concerned has been involved in the case as such or not, by making proper allegations against him, for the offences Under Sections 3 and 4 of the TADA Act. It cannot be gainsaid that for the purpose of effectively exercising the power under Article 226 of the Constitution the High Court has power to consider the question as to whether the provisions of the TADA Act apply or not. It may be mentioned that the aforesaid observations are made by the Supreme Court in the case of Usmanbhai (supra) in the light of facts of that case namely, application u/s 439 of Cr. P.C. for bail was made in the High Court which was rejected by the High Court on the ground that it has no power u/s 439 of Cr. P.C. and with a view to examine the validity of the judgment delivered by this Court the Supreme Court has examined the entire scheme of the TADA Act and observed that the High Court has no power u/s 439 of the Cr. P.C. when the accused is involved in the commission of an offence under the TADA Act. Naturally therefore, the provisions of Section 438 of Cr. P.C. also would not apply and with a view to apply the provisions of the TADA Act effectively the Supreme Court also held in the said case that the High Court cannot exercise powers u/s 482 of Cr. P.C. when it has no right of hearing appeal or revision. It may be mentioned that the observations of the Supreme Court in the case of Usmanbhai (supra) with regard to the duty of the Designated Court of properly examining the papers at the time of hearing even bail application, are made because TADA Act is limited in its scope and effect and that the Act is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary

penal law. The intendment is to provide special machinery to combat the growing menace of terrorism in different parts of the country. Since, however, the Act is a drastic measure, it should not ordinarily be resorted to unless the Government's law enforcing machinery fails. The aforesaid observations of the Supreme Court are required to be kept in mind by the Enforcing Machinery of the Government namely, the Police Department for investigating the cases under the TADA Act. The aforesaid observations are made with a view to see that there is no misuse of the powers under the TADA Act by the Police. Under the circumstances we are of the opinion that this Court has power to examine the question as to whether the provisions of the TADA Act apply or not when writ petition under Article 226 of the Constitution is maintainable, to protect the fundamental rights guaranteed under Arts. 14 and 21 of the Constitution of India.

17. It is submitted on facts on behalf of the State that there is sufficient material on record to attract the provisions of Section 3 of the TADA Act. However, it may be mentioned that no arguments have been advanced on the point of applicability of Section 4 of the TADA Act, to the facts of the present case. Looking to the definition of the term "disruptive activities" as contemplated in Section 4 of the TADA Act there is no allegation worth the name attracting the provisions of Section 4 of the TADA Act.

18. Now so far as the question of attracting the provisions of Section 3 of the TADA Act is concerned, the necessary provision which would be applicable to the present case may be extracted as under:

"3(1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using..... fire arms..... in such a manner as to cause, or as is likely to cause death of, or injuries to, any person or persons or loss of, or damages to, or destruction of property..... or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act....."

19. With regard to the point of intention if we look to the complaint which is annexed to the petition as Annexure-A, it is clear that not even a single averment is made in the FIR with regard to intention, as mentioned in Section 3 of the TADA Act. However, it is submitted by Mr. Panchal, learned Addl. P.P. that the Supreme Court has observed that while considering application for bail Designated Court should take into consideration not only the FIR, but all accompanying papers with the report, meaning thereby the charge-sheet. It may be mentioned that no charge-sheet is so far filed in this case. Still however, taking into consideration the statements of three persons, copies of which are filed as Annexure-I to the affidavit-in-reply, it may be mentioned that assuming the said statements to be correct at this stage for the purpose of finding out as to whether the ingredients of Section 3 of the TADA Act are complied with or not,

looking to the time at which the alleged incident had taken, place i.e. at about 10-00 p.m. on 15-10-1989 no such intention either to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people, is even disclosed. Therefore, there are no allegations so far with regard to the intention on the part of the petitioner. Assuming that such an intention was there even though what is required is "use" of fire arm in such manner to cause or likely to cause death or injury to any person or persons. In the present case excepting taking out the revolver and giving a threat by the petitioner there was no use alleged whatsoever. Looking to the language of Section 3 of the TADA Act it requires use of the fire arm and not merely taking it out and giving a threat and therefore, assuming those allegations to be correct, looking to the observations made by the Supreme Court in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, with regard to the applicability of the TADA Act that the Act is limited in its scope and effect and that the Act is an extreme measure to be resorted to when the police cannot tackle the situation under ordinary penal law., and that such a drastic measure should not be resorted to unless the Government law enforcing agency fails, there is no allegation disclosing the alleged commission of offence u/s 3 of the TADA Act.

20. It may be mentioned that on the point of interpretation of the word "use" Mr. Panchal, learned Addl. P.P. has relied on the judgment of the Supreme Court in the case of Shri Phool Kumar Vs. Delhi Administration, . That was a case Under Sections 392, 397 and 398 of IPC wherein the expression "use" is occurring. Looking to the context in which the word "use" is mentioned in Section 3 of the TADA Act the meaning attached to the word "use" in the said case cannot be attached here. Therefore, the said judgment is not applicable to the facts of the present case and therefore, it is useful to the respondents.

21. However, we would hasten to make a clarification that at present the investigation is pending and the respondent No. 2 will be at liberty to further investigate the case and ultimately if he finds further material which complies with the requirement of Section 3 of the TADA Act, in the light of the observations made by the Supreme Court in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, , he would be at liberty to make appropriate reports even for the alleged commission of the offence u/s 3 or 4 or any other section of the TADA Act or the Rules made thereunder. However, at this juncture looking to the FIR along with the statements of three persons assuming them to be correct, we are of the view that they do not disclose commission of the offence u/s 3 of the TADA Act. In that view of the matter we are of the view that mentioning of violating of Sections 3 and 4 of the TADA Act in column-5 (really it should be column-6) of the FIR (Annexure-A to the petition) by the 2nd respondent is unwarranted and hence wrong and that amounts to a threat of invasion on the fundamental rights of the petitioner under Article 21 of the Constitution of India.

22. The result of the above finding would be that the petitioner cannot be arrested by the respondents for the alleged commission of offences Under Sections 3 and 4 of the TADA Act as the investigation stands today and therefore, we direct the second respondent to treat mentioning of violation of Sections 3 and 4 of the TADA Act in column-6 of the FIR as unwarranted and wrong and not to proceed with the arrest of the petitioner on the basis of said mentioning column-6 of the FIR. However, it is clarified that the second respondent would be at liberty to further investigate the matter and on getting further material if he is satisfied that it is necessary to proceed against the petitioner under the provisions of the TADA Act taking into consideration the observations made by the Supreme Court in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, , he would be at liberty to do so and thereafter he should proceed in accordance with law in making report to the Designated Court, if necessary. Accordingly, to the aforesaid extent we allow this petition. Rule is made absolute to the aforesaid extent.