

(1991) 02 GUJ CK 0004
In the Gujarat High Court

Babu Satyam Bhaiyya and Another

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 26-02-1991

Acts Referred:

Arms Act, 1959 — Section 25(i)(b)(a)

Penal Code, 1860 (IPC) — Section 120B, 302

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3 , 5, 5

Citation : (1991) 2 GLR 1217

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Judgement

N.J. Pandya, J.—The learned Special Designated Judge is dealing with what has been registered in the City Sessions Court at Ahmedabad as Terrorist Sessions Case No. 3 of 1990 against the present petitioner. The incident relating to the said case occurred on 14-5-1989 and at Amraiwadi Police Station, an offence came to be registered at No. 242 of 1989 disclosing offences under Sections 302, 120-B of Indian Penal Code, under Sections 25(i)(b)(a) of the Indian Arms Act and under Sections 3 and 5 of the Terrorist & Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "the Terrorist Act"). The latter Act is the focus of attention in this petition. Before the learned Designated Judge could frame the charge for offence u/s 5 of the Terrorist Act, by application at Exh. 5 the learned Designated Judge was moved to discharge the accused from offence u/s 5 of the said Terrorist Act.

2. The argument advanced seems to be that by commission of the alleged offence by the petitioners, the people were not terroised in any manner whatsoever and hence, the provisions of the Terrorist Act could not have been invoked. The learned Designated Judge dealt with application Exh. 5 on behalf of petitioner No. 1 and application Exh. 7 on behalf of petitioner No. 2 by a common order and rejected both on 23-8-1990.

3. In view of the aforesaid averment made in the applications Exhs. 5 & 7 that

people in fact were not terrorised, it seems that the attention had shifted to in the course of argument, whether Section 5 itself makes it to be an independent offence under the Terrorist Act. The learned Designated Judge has clearly expressed himself to the effect in para 3 that Section 5 of the Terrorist Act makes possession of a fire-arm in a notified area an offence punishable thereunder.

4. In the petition filed before this Court this very concept of the learned Judge is challenged and all throughout attention is focussed on the aforesaid conclusion of the learned Judge as to whether Section 5 creates any new offence under the Terrorist Act.

5. With this submission in mind learned Advocate Shri Mehta for the petitioners had taken the Court through the history of the said Terrorist Act, circumstances under which it was required to be framed and enforced and after referring to its preamble as well as objects and reasons for framing the same, he had gone through the definition clauses and thereafter, had dealt with Sections 3 and 4 of the said Act. Based on this, according to learned Advocate Shri A.H. Mehta, Section 5 of the Terrorist Act cannot be said to be creating new offence of possessing a fire-arm unauthorisedly whether it is in notified area or not.

6. It is an admitted position that possession of an unauthorised firearm is an offence and it is so under the relevant provisions of the Indian Arms Act. Therefore, according to learned Advocate Shri A.H. Mehta what has been done by Section 5 of the Terrorist Act is to make that very offence under the Arms Act punishable with a higher punishment and according to him, therefore, because some stringent punishment is imposed by one Act for the activity of an accused, which is made to be an offence under another enactment, straightway a conclusion cannot be drawn that because of the higher punishment prescribed under the latter enactment that act itself becomes an offence under the new enactment. In other words, what is an offence under the Indian Arms Act has been made to attract higher punishment or more stringent punishment under the Terrorist Act, but for that reason, only it cannot be said that it becomes an offence under the Terrorist Act also.

7. On behalf of the State learned A.P.P. Shri Mehta (Dave) had raised some preliminary objections. His objection was that if the petitioner were aggrieved by the order passed by the learned Designated Judge, they were required to follow the remedy prescribed in Section 19 of the said Terrorist Act namely to approach the Supreme Court and instead of doing that they directly approached this Court. This amounts to more or less invoking revisional power of this Court and this is where the preliminary objection of learned A.P.P. Shri Mehta (Dave) comes in and it is that under the guise of the petition under Articles 226 & 227 of the Constitution actually the petitioners are seeking the exercise of this Court's power u/s 397 read with Section 407 of Criminal Procedure Code and at the same time, they are successfully trying to by-pass the said statutory mandate of Section 19 of the Terrorist Act which would have compelled them to approach the Supreme Court.

8. To this, learned Advocate Shri A.H. Mehta has an answer and it is to the effect that if at all the unauthorised fire-arm is not an offence under the Terrorist Act, the very forum would change and instead of a Designated Court, a Sessions Court exercising its power under the Code of Criminal Procedure would have dealt with the case against the petitioners and the entire exercise of framing of charge and proceeding with the recording of evidence etc., would have been continued thereunder. No doubt, we are all aware of the fact that even for the detailed working out of the trial under the Terrorist Act, the Criminal Procedure Code does play considerable part, but to the extent to which there are provisions in the, the provisions of the Criminal Procedure Code are excluded. This will certainly not be the position, if the Terrorist Act itself does not apply and the Court functions as a Sessions Court only under the Criminal Procedure Code.

9. There would be other implications also namely if it is a matter conducted by a Court of Sessions can approach this Court either by way of Revision or Appeal as a matter of course and as a matter of right under the Code; while that may not be the position if that matter is dealt with by the Designated Court.

10. Apart from this practical implications, the aforesaid question raised in the Petition namely that the Designated Court could not have exercised its power in the instant case because the Terrorist Act itself is not attracted would in my opinion, certainly be a subject-matter of enquiry under Articles 226 and 227 of the Constitution. For this, we have got several judicial pronouncement which are cited by both the sides in support of their rival contentions.

11. On behalf of the petitioner a Division Bench judgment is cited and it is Ayubkhan Kalandarkhan Pathan Vs. State of Gujarat and Others, where the Division Bench speaking through Justice B.S. Kapadia has expressed an opinion that the power of the High Court under Article 226 is not taken away by the provisions of the Terrorist Act and that it can certainly inquire into the matter brought to its notice whether the provisions of the Terrorist Act apply or not?

12. On behalf of the State an unreported decision has been upon which is rendered in Special Criminal Application No. 1065 of 1990 again by a Division Bench consisting of Justice M. B. Shah and Justice B.C. Patel. There, a possibility was raised whether there is likely to be conflict between the said Ayubkhan Kalandarkhan Pathan Vs. State of Gujarat and Others, and Suresh Ramtirath Yadav Vs. State of Gujarat, .

13. For the time being we will go to the said decision reported at page 104 where the D.B. consisting of Chief Justice P.R. Gokulakrishnan and Justice R.A. Mehta has expressed a clear opinion that the High Court has no jurisdiction to entertain an application under Sections 439 & 482 in respect of a detenu under the Terrorist Act, 1985.

14. The said Terrorist Act has got its own provisions and they are held to be a complete Code and so far as bail matters are concerned, in view of several pronouncements of the Supreme Court, it is now clear that the Designated Court

is required to consider on the basis of the material placed before it as to whether the provisions of the Act applies or not? Thereafter, it has to deal with the prayer for bail. If the bail is either rejected or granted as the case may be, the remedy is to approach the Supreme Court only in such matters the High Court would not come in the picture.

15. However, with regard to this submission as to likely conflict, in the unreported judgment referred to above the D.B. has clarified the situation and has expressed to the effect that there is no conflict in the aforesaid two decisions. They have also stated that had they found in conflict, the matter would have been certainly referred by them to a larger Bench. Thereafter, they have proceeded to ascertain the factual position available in Ayubkhan Kalandarkhan Pathan's case. Then they have extracted out a portion from the said Ayubkhan Kalandarkhan's case which reads as under (at page No. 482 para 16 of GLR)

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 question as to whether the provisions of TADA Act apply or not.

Relying on this very abstracted portion, learned A.P.P. Shri Mehta (Dave) had strongly urged that the matter before us is not confined to the stage where it was in the said Ayubkhan's case and the matter is already dealt with by a Designated Court in the aforesaid manner. However, as per the said passage in the Ayubkhan's case, the High Court was moved by filing a petition under Article 226 to look into the question as to whether the provisions of the Terrorist Act applies or not? The fact and situation in all case may certainly vary from case to case. But so far as the question posed before the Court is concerned, in my opinion, there is no difference at and the question before is whether the provisions of the said Act apply or not, of course in relation to Section 5 thereof. Learned A.P.P. Shri Mehta (Dave) had drawn my attention to Jagir Singh Vs. Ranbir Singh and Another, where it has been laid down that what may not be done directly cannot be allowed to be done indirectly as that would be an evasion of the Statute. In the case before the Supreme Court what was sought to be done was that after failing in a Revision before the Sessions Judge filed against an order of the Magistrate, claiming it to be a Revision against the Order of the Sessions Case in Revision Application, the High Court was moved and this attempt on the part of the petitioner in that case was struck down the aforesaid observation. Further on, we find a strident note to the effect that the provisions of the Act of Parliament shall not be evaded by shift or contrivance.

16. To the extent that the Supreme Court has not been approached against the said order below Exhs. 5 & 7 of the Designated Court, no doubt, the argument

based on the said 1979 Supreme Court decision (Jagir Singh's case) is available to the State and it has been advanced as such by learned A.P.P. Shri Mehta (Dave). However, on examination, I do not find any shift or contrivance having resorted to. I, therefore, hold that this decision does not apply.

17. So far as the application of Terrorist Act is concerned, even in cases where the main offences created by the Statute are concerned, namely as given in Sections 3 and 4 of the Act, we find the Supreme Court sounding caution in one case after the other, first being Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, followed by several other decisions but the latest being Niranjn Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others, .

18. The overall picture that we gather from the aforesaid various Supreme Court pronouncements is whether the alleged offence can be tackled by ordinary law or there are circumstances indicating that the special statute is to be resorted to. In the latest Supreme Court decision 1990 Niranjn Singh's case, it was a gang-war. One leader of a gang wanted to establish his supremacy for the area and therefore, had come in conflict with make it effective, in the war that ensued, the leader of supremacy and make it effective, in the war that ensued, the leader of the other gang was shot dead. The authorities had applied the provisions of the Terrorist Act and the Supreme Court was pleased to strike it down.

19. In the case before us they initially indicated that Section 3 of the Terrorist Act was invoked, but later on there seems to be only reference to Section 5 of the Terrorist Act, which relates to the unauthorised possession of the fire-arm. Per se therefore, it is not possible even remotely to suggest that the situation available in our case was such as would required invocation of a special enactment as the act complained of was not amenable to the regular penal laws and that the authorities were not able to tackle the situation under their ordinary powers.

20. Extraordinary powers having been given under the Terrorist Act, the Supreme Court and if we turn in that background to the aforesaid applicability of Sections 5 in the case before us, we will find that for a moment, it cannot stand scrutiny. Before that, however, let us go through the provisions of the Terrorist Act.

21. The preamble clearly indicates that the Act is to make special provisions for the prevention of and for coping with Terrorist and Disruptive Activities and for matters connected therewith or incidental thereto.

22. This would clearly indicate that Terrorist and Disruptive Activities indulged into by such persons may give rise to a situation where other prevailing laws, but all told together, the entire situation is required to be tackled by this special enactment provided their main activity is either to strike terror or to bring about disruption as envisaged by the Act.

23. Then the circumstances and the background in which the enactment was

require to be drafted out has been traced in the statement of object and reasons and its first paragraph in my opinion, would be enough for our purpose.

The Terrorist and Disruptive Activities (Prevention) Act, 1985 was enacted in May, 1985, in the background of escalation of terrorist activities in many parts of the country at that time. It was expected then that it would be possible to control the menace within a period of two years and therefore, the life of the said Act was restricted to a period of two years from the date of commencement. However, it was subsequently realised that on account of various factors, what were stray incidents in the beginning have now become a continuing menace specially in States like Punjab. On the basis of experience, it was felt that in order to combat and cope with terrorist and disruptive activities effectively it is not only necessary to continue the said law but also to strengthen it further. The aforesaid Act of 1985 was due to expire on the 23rd May 1987. Since both Houses of Parliament were not in Session and it was necessary to take immediate action, the President promulgated the 23rd May, 1987, which came into force with effect from the 24th May, 1987.

We are not entering into the question whether the situations available in the States like Punjab as indicated in the statement of objects and reasons are available in Gujarat or not, as we are confining ourselves to the applicability of Section 5 of the Terrorist Act which is the only one pressed into service in the case before us. Clearly, therefore, we are out of the said frightening situation created by either Terrorist or Disruptive elements in the one illustrative case of States like Punjab and we are confining ourselves to the case of an accused who is found possessing with unlicensed fire-arm. Incidentally, it may be mentioned here that the case against the petitioner also relates to a gang-war as there was enmity between the victim and the petitioners as per the police papers and they were all engaged in nefarious activities.

24. In this connection, if we turn to the definition clause, first we have to consider the definition contained in Clause (d) of Section (1) which refers to the disruptive activities and then Clause (6) which pertains to Terrorist Act. Instead of defining, however, in both the clauses, we find reference to Sections 3 and 4. Then we should also refer to the phrase "Designated Court" as contained in Clause (c) of Sub-section (i) of Section 2 which in turn refers to Section 9. For our purpose, notified area is also important and it is as contained in Clause (f) of Sub-section (1) of Section 2. The latter definition is quite clear and it means only the area as the State Government may be Notification in the Official Gazette specify. It is not in dispute that the entire State of Gujarat is a notified area as contemplated by this definition of the Terrorist Act.

25. Now, when we refer to Sections 3 and 4, we do find the description of a situation which will be for the purposes of the said Act be taken as meaning either a Terrorist Act or Disruptive Activities. We are not entering into the detailed discussion on these two provisions because these two Sessions are not directly involved here. However, for our immediate purpose, it must be

mentioned that the entire enactment and its purpose has been directed towards tackling a situation where the Terrorist and Disruptive elements are required to be dealt with. Therefore, the emphasis always has been on terrorism and disruption brought about by this activity. The effect on various facets of day to day life is also dealt with in the aforesaid two Sections. To tackle with this for the first time what we refer to as terrorist activity or disruptive activity in loose terms have now been given legal significance by these definitions and have been specified to be crimes. In other words, new offences are created by the said Act.

26. In this background when we turn to Section 5 we find reference to the Arms Rules, 1962-Category I or Category III of Schedule I of said Rules and then refers to Bombs, Dynamites and other explosive substances found in possession of a person unauthorisedly in the notified area and this situation has demanded imposition of higher sentence as per Section 5. Learned A.P.P. Shri Mehta (Dave) had attacked the argument of learned Advocate Shri A.H. Mehta by saying that Section 5 creates a new offence.

Section 5: Possession of certain unauthorised arms etc., in specified areas:

Where any person is in possession of any arms and ammunition specified in columns 2 & 3 of Category I or Category III (a) of Schedule I to the Arms Rules, 1962 or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

In this Section we find reference to the said Schedule and the aforesaid explosive Articles, but nowhere do we find any reference to this unauthorised possession being an offence under the Terrorist Act. On the contrary, we find clear reference to the fact that this fact/situation in the notified area would attract higher punishment as per Section 5 and what is important than this shall be the position "notwithstanding anything contained in any other law for the time being in force" (emphasis supplied). This reference to any other law for the time being in force would be to no other enactment or law except the said Arms Act where punishment is certainly much less and there was no minimum prescribed initially in the said provision. This can be found from Section 25 of the Arms Act, 1959. Now, if the situation like the one envisaged by the Terrorist Act is to be dealt with, the said punishment under the Arms Act may not be adequate and therefore this provision for minimum punishment and even a higher punishment which may extend to imprisonment for life and shall also be liable to fine as per Section 5 of the Terrorist Act.

27. Learned Advocate Shri Mehta has rightly submitted that while dealing with the matter under the Indian Penal Code and as well as the Arms Act and if the Court dealing with the matter holds against the accused of that case, while awarding the sentence it can certainly look to this provision of enhanced

punishment as that would be the law applicable in the area because the State happens to be a notified area under the Terrorist Act. However, by that fact alone it will not be necessary that the matter is required to be dealt with by the Designated Court under the Terrorist Act.

28. To my mind, even resort to Section 5 may no longer be necessary because so far as the enhanced punishment is concerned, by amending the provisions of the Arms Act, minimum sentence of six months, further enhanced to one year has been provided though the discretion is left with the Court to impose a lesser sentence for which special reasons are required to be recorded in the judgment. The result of the said discussion therefore, is that the conclusion of the learned Designated Judge in his order that possession of fire-arm in a notified area is an offence punishable under the Terrorist Act is not correct. It is punishable being an offence under the Arms Act and not as per the provisions of the Terrorist Act. By this I mean that it is an offence under the former Act and not under the latter Act. So far as the quantum of punishment is concerned, it being a notified area as long as there is a difference between the quantum of punishment under the Arms Act on the one hand and under the Terrorist Act on the other, no doubt, Section 5 of the Terrorist Act is not only required to be invoked but, there being non obstante clause, it is Section 5 of the Terrorist Act that will prevail. There is, therefore, no warrant to suggest that the possession of fire-arm unauthorisedly in a notified area is an offence punishable under the Terrorist Act.

To put it differently, I hold that the Terrorist Act would apply provided the offence is created thereunder and then only the matter will be required to be dealt with by the Designated Court. Possession of firearm therefore, is an offence under the Arms Act and not under the Terrorist Act and the offence having taken place in the notified area, for that reason alone, punishment is to be awarded as per Section 5 of the Terrorist Act. The matter is, therefore, not required to be tried by a Designated Court and it is to be dealt with like any other criminal case under the general

29. The petition is, therefore, required to be allowed and it is allowed. The order passed below Exhs. 5 & 7 of the Terrorist Criminal Case No. 3 of 1990 is hereby quashed and set aside. The accused stands discharged from the offence of Section 5 under the Terrorist Act. However, while framing the Arms Act and shall also refer to the relevant provisions thereof as applicable to the facts of the case and thereafter, shall refer to Section 5 of the Terrorist Act for punishment purpose. Rules is made absolute.