
(1990) 07 GUJ CK 0014
In the Gujarat High Court

Mohammed Rafik Husseinmiya Thakore and Others	APPELLANT
Vs	
State of Gujarat and Others	RESPONDENT

Date of Decision : 24-07-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226, 226
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 16, 19, 3

Citation : (1991) 1 GLR 159

Hon'ble Judges : M.B. Shah, J;B.C. Patel, J

Bench : Division Bench

Judgement

M.B. Shah, J.

The petitioners have prayed as under:

- (a) That this Hon"ble Court be pleased to declare that the provisions of the [Terrorist and Disruptive Activities (Prevention)] Act are illegal, ultra vires, void and inoperative;
- (b) That this Hon"ble Court may be pleased to issue a Writ of Prohibition or a Writ in the nature of prohibition under Article 226 of the Constitution of India, directing the respondents to forbear and desist from applying Section 3 or any other provisions of the Act in the case and to reconsider the bail application by deleting Section 3 of the "TADA" Act;
- (c) That such other and further reliefs as may be deemed fit in the circumstances of the case may kindly be granted.

At the outset, Mr. Pathan, learned Advocate appearing on behalf of the petitioners, stated that the petitioners are not pressing their first prayer that the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA" Act) are illegal and ultra vires. He submitted that prayer (b) be granted. He submitted that the order passed by the Designated Court is violative of petitioners' fundamental rights under Article 21 of the Constitution of India because the provisions of TADA Act are applicable to

the facts alleged in the F.I.R. and in the statements of the witnesses recorded by the Investigating Officer. For substantiating his contention he has relied upon the decision of this Court in the case of Ayubkhan Kalandarkhan Pathan Vs. State of Gujarat and Others, .

2. As against this, Mr. Panchal, learned Public Prosecutor, vehemently submitted that as the Designated Court has exercised its jurisdiction and has arrived at the conclusion that prima facie the provisions of TADA Act are applicable to the facts of the present case, this Court should not exercise its jurisdiction under Article 226 of the Constitution of India as:

(1) There is alternative efficacious remedy available to the petitioners of approaching the Designated Court or the appellate forum as provided in the TADA Act;

(2) The procedure prescribed under the TADA Act is exhaustive and it is self-contained code. He relied upon the decision of the Division of this Court in the case of Suresh Ramtirth v. State 1900(1) 31 GLR 104.

3. For appreciating the aforesaid contentions it would be necessary to state some facts of the present case. On 27th March, 1990 three first information reports were lodged against some of the petitioners and other persons at Umreth Police Station. The petitioners were arrested in connection with Umreth Police Station C.R. No. 1-53 of 1990 for the offences punishable under Sections 147, 149, 307, 302, 504, 506(2), 295, 153, 365 of the Indian Penal Code and under Sections 3 and 4 of the TADA Act. They preferred Criminal Miscellaneous Application No. 549 of 1990 before the Designated Judge for Kheda District at Nadiad for releasing them on bail. The Court after considering the material produced by the Investigating Officer arrived at the conclusion that criminal acts have been committed in a large group with an intention to create a terror amongst the Hindu inhabitants of village Bhalej. The repercussion of this incident had caused disturbance of peace in other cities and villages of the District and had also given cause to similar such incidents. The Designated Court, therefore, arrived at the conclusion that the act of murdering Girishbhai Chandubhai was nothing but a terrorist act as defined in Section 3 of the TADA Act. In this judgment it is not necessary to reproduce the details of the incident given in the First Information Report. Previously the petitioners had preferred Criminal Miscellaneous Applications Nos. 410 of 1990 and 411 of 1990 before the Designated Court. Those applications were rejected by a common order dated 11-5-1990. Thereafter the petitioners preferred Criminal Miscellaneous Application No. 549 of 1990 before the Designated Court for releasing them on bail. After discussing the judgments which were cited before him and perusing the investigation papers produced by the Investigation Officer the Designated Judge by his judgment and order dated 3rd July, 1990 rejected the said application. The petitioners have challenged the aforesaid order by filing this petition under Article 226 of the Constitution of India.

4. In our view, petition under Article 226 of the Constitution of India against the judgment and order passed by the Designated Court under the TADA Act rejecting the bail application filed by the petitioners is not required to be entertained by this Court for the following reasons:

(1) Section 16 of the TADA Act provides that no appeal or revision shall lie to any Court from any judgment, sentence or order of a Designated Court except as provided in Section 19 of the Act.

(2) Against the judgment and order passed by the Designated Court no appeal or revision or application (miscellaneous) for granting bail to the person arrested under TADA Act is maintainable before this Court. Undertrial prisoner charged with the commission of an offence under TADA Act has no right to insist that the question of his involvement, innocence or guilt should be determined by the High Court on the alleged ground of violation of fundamental rights during the pendency of the trial by a Senior Judicial Officer.

(3) When TADA Act provides that no revision or appeal shall lie against the order passed by the Designated Court except as provided u/s 19, the said provision cannot be allowed to be evaded indirectly. The exercise of extraordinary powers under Article 226 would require very exceptional circumstances to warrant interference because this power is not meant to circumvent the statutory law.

(4) It cannot be disputed that this Court has jurisdiction under Article 226 to protect the fundamental rights or legal rights, but when there is an alternative and efficacious remedy available to that person, there is a self-imposed restriction to the effect that this Court may not interfere and direct a party to resort to alternative remedy. The TADA Act provides for a complete machinery to challenge an order passed by the Designated Court and the remedy provided by that Act must be followed. This Court should permit the other judicial functionary to examine and decide the matter on merits as per the law.

(5) It is a misconception to say that judicial order pronounced by the Designated Court affects the fundamental rights of citizens under Article 21 of the Constitution.

(6) In the present case the Designated Court has passed the order rejecting the bail application after appreciating the evidence which was produced before it. The Designated Court is required to examine the circumstances of each case closely and decide whether the F.I.R. or other material gathered by the Investigating Officer discloses an offence punishable under TADA Act. After appreciating the evidence if the Designated Court arrives at the conclusion that the provisions of the TADA Act are applicable, this Court has no jurisdiction under Articles 226 or 227 to reappreciate the evidence. The extraordinary jurisdiction of this Court under Articles 226 or 227 is not appellate jurisdiction.

5. In our view, the question involved in this petition is covered by the decision of this Court in the case of Suresh Ramtirth Yadav Vs. State of Gujarat, . In that

case the petitioner challenged his detention as an under-trial prisoner from 12-8-1986 i.e., from the date of his arrest as being against the basic principle of the criminal jurisprudence and violative of Article 21 of the Constitution of India and, therefore, he prayed for issuance of writ of habeas corpus and for necessary orders releasing the petitioner on bail. The Division Bench of this Court consisting of Mr. P.R. Gokulakrishnan, C.J. and Mr. R.A. Mehta, J. dealt with the contention whether in that type of situation under Article 226 of the Constitution of India the High Court can interfere and release the petitioner who, according to the learned Advocate for the petitioner, was under illegal custody. The Court negated the said contention and held that when an under trial prisoner is charged with the commission of an offence, he cannot insist that the question of his innocence or guilt be tried by the High Court or Supreme Court alleging violation of fundamental rights during the pendency of the trial where fairly triable question of fact and/ or law are pending and can be gone into by the trial Court which is constituted under the provisions of the TADA Act nor can he be released by the High Court in a habeas corpus petition when he has been refused bail by a judicial order and is kept in judicial custody. The relevant discussion in paragraphs 22 and 23 is as under (at page No. 112 of GLR):

22. We are not able to appreciate how this decision can be of any assistance to the petitioner in the facts and circumstances of the present case. It was a case pertaining to preventive detention and not a case of undertrial prisoner who has been refused bail by Judicial Court. When an undertrial prisoner is charged with the commission of an offence, he cannot insist that the question of his innocence or guilt be tried or determined by the High Court or Supreme Court alleging violation of fundamental rights during the pendency of the trial where fairly triable question of fact and/or law are pending and can be gone into by the trial Court which is constituted under the provisions of Terrorists and Destructive Activities (Prevention) Act, 1985 nor can he be released by the High Court in a habeas corpus petition when he has been refused bail by a judicial order and is kept in judicial custody.

23. The decision in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, clearly affirms the decision of the Gujarat High Court to the effect that the High Court has no jurisdiction to entertain any proceeding either u/s 439 or u/s 482 of the Code of Criminal Procedure arising out of an order passed by the Designated Court under the Terrorist and Destructive Activities (Prevention) Act, 1985. In that case, the Supreme Court also did say that the powers of the High Court under Articles 226 and 227 of the Constitution of India are unaffected and a citizen can always move the High Court challenging the Constitutional validity of the Act or its provisions of the Constitutional validity of the notification u/s 9(1) of the Act constituting the Designated Court on the allegation that there was fraud on powers and there is constitutional invalidity. In the present case, there is no such challenge to constitutional validity. The prayers of the petitioner are pure and simple to release him from the judicial custody which can be only by way of bail for which the appropriate forum is the Designated Court. It has

already refused bail, against which the only forum is the Supreme Court and as held by the Supreme Court in Usmanbhai's case (supra), the High Court has no jurisdiction in matters of bail under the Terrorist and Disruptive Activities (Prevention) Act, 1985.

(Emphasis added)

Thereafter the Division Bench further considered the provisions of TADA Act and the decision of the Supreme Court in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, , and held that the provisions of the TADA Act are self-contained and in view of the decision of the Supreme Court in Usmanbhai's case revision or appeal before the High Court u/s 439 or 482 of the Criminal Procedure Code is not maintainable. Therefore, the Court's jurisdiction under Article 226 of the Constitution of India by alleging as if there is violation of Article 21 cannot be exercised to circumvent the aforesaid prohibition. The Court referred to Section 16 of the TADA Act which specifically provides that no appeal or revision shall lie to any Court from any judgment, sentence or order of a Designated Court except to the Supreme Court as provided in Section 19 of the Act. In view of the aforesaid clear pronouncement by the Division Bench of this Court, this petition is not maintainable before this Court against the order passed by the Designated Court.

6. However, learned Advocate Mr. Pathan submitted that in the case of Ayubkhan Kalandarkhan Pathan Vs. State of Gujarat and Others, s held 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 Articles 14 and 21 of the Constitution of India.

7. In our view there is no conflict between the law laid down in the aforesaid two decisions. If there is any conflict between the two decisions, we would have referred the matter to a larger Bench. We say so because the decision in the case of Ayubkhan Pathan is solely based upon the facts of the case. The Court has in terms posed a question for its decision as under (at page No. 482 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 right 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.

The Court held that the Court has jurisdiction under Article 226 of the Constitution to protect the petitioner against violation of his fundamental rights under Articles 14 and 21 of the Constitution of India because of the mala fide action of the Investigating Officer. In that case also the Court has followed the decision of the Supreme Court in the case of Usmanbhai (supra). The Court also

relied upon the decision of the Supreme Court in the case of S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others, . For the aforesaid law there cannot be any dispute. On the contrary in that very judgment the Court has specifically held that respondents of that case shall not harass the petitioner for the alleged commission of the offences under Sections 3 and 4 of the TADA Act as the investigation stood on that day. It further 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 (supra), he would be at liberty to do so. From the discussion of the aforesaid judgment it is apparent that the Court decided the said case on peculiar facts as the petitioner of that case apprehended that he would be arrested mala fide under the TADA Act. It was a case of mala fide exercise of the power under the TADA Act by the Executive (by the Investigating Officer). That type of situation would not arise in cases where Judicial Officer i.e. Senior Sessions Judge exercises his judicial power. Further, as the order is passed by a Judicial Court, there is no question of violation of Article 21. Hence it cannot be said that there is a conflict between the law laid down in the case of Suresh Ramtirth and the law laid down in the case of Ayukhan Pathan. It is based upon the peculiar facts of that case.

8. It is established law that in extraordinary circumstances this Court has jurisdiction under Article 226 to protect the fundamental rights or legal rights of the petitioners or any person even though there is alternative efficacious remedy available to those persons, but at the same time there is self-imposed restriction by the Courts that normally powers under Article 226 are not to be exercised when there is alternative efficacious remedy available to those persons. May be that in exceptional circumstances if the ground is made out showing that order is 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 e.g. passed against wrong person, this Court may interfere, but the grounds would be similar to lack of jurisdiction and not of appreciating the evidence. This is well-settled principle. However, it would be worthwhile to refer to some of the decided cases.

9. In the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , the Supreme Court has held that it is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This will be clear from the following discussion in paragraph 11:

Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under Sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal

under Sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court u/s 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Water Works Co. v. Hawkesford* (1859) 6 CBNS 336 in the following passage:

"There are three classes of cases in which a liability may be established founded upon statute

But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives special and particular remedy for enforcing it

The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.* 1919 AC 368 and has been reaffirmed by the Privy Council in AIR 1940 105 (Privy Council) . It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.

When Section 19(2) of the TADA Act specifically provides that except as provided in Section 19(1) of the TADA Act no appeal or revision shall lie to any Court from any judgment, sentence or order including an interlocutory order of a Designated Court, the said provision cannot be circumvented by resorting to the powers of the High Court under Articles 226 or 227 of the Constitution of India.

10. While dealing with the provisions of Section 397 of the Criminal Procedure Code the Supreme Court in the case of *Jagir Singh Vs. Ranbir Singh and Another*, w that the provisions of an Act of Parliament shall not be evaded by shift or contrivance. The relevant discussion in paragraphs 5 and 6 is as under:

5. In order to cross the hurdle imposed by Section 397(3) it was suggested that the revision application before the High Court could be treated as an application directed against the order of the Sessions Judge instead of as one directed against the order of the Magistrate. We do not think that it is permissible to do so. What may not be done directly cannot be allowed to be done indirectly, that would be an evasion of the statute. It is a "well-known principle of law that the provisions of an Act of Parliament shall not be evaded by shift or contrivance" (per Abbot C.J. in *Fox v. Bishop of Chester* (1824) 2 B & C 635). "To

carry out effectually the object of a Statute it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined" (Maxwell, 11th Edition, page 109). When the Sessions Judge refused to interfere with the order of the Magistrate, the High Court's jurisdiction was invoked to avoid the order of the Magistrate and not that of the Sessions Judge. The bar of Section 397(3) was, therefore, effectively attracted and the bar could not be circumvented by the subterfuge of treating the revision application as directed against the Sessions Judge's order.

6. If the revision application to the High Court could not be maintained under the provisions of the Criminal Procedure Code, could the order of the High Court be sustained under Article 227 of the Constitution, as now suggested by the respondent? In the first place the High Court did not purport to exercise its power of superintendence under Article 227. The power under Article 227 is a discretionary power and it is difficult to attribute to the order of the High Court such a source of power when the High Court itself did not in terms purport to exercise any such discretionary power in the second place the power of judicial superintendence under Article 227 could only be exercised sparingly to keep subordinate Courts and Tribunals within the bounds of their authority and not to correct mere errors. Where the statute banned the exercise of revisional powers by the High Court it would indeed require very exceptional circumstances to warrant interference under Article 227 of the Constitution, since the power of superintendence was not meant to circumvent statutory law.

11. Apart from the fact that there is alternative efficacious remedy available and the fact that there is a specific ban u/s 19 of the Act for exercising revisional jurisdiction, it cannot be said that the order passed by the Designated Court violates the fundamental rights under Article 14 or 21 of the Constitution of India as it is a judicial order. In the case of *Sahibzada Saiyed Muhammed Amirabbas Abbasi and Others Vs. The State of Madhya Bharat and Others*, , the Supreme Court held that the denial of equality before the law or the equal protection of the laws can be claimed against executive action or legislative process but not against the decision of a competent tribunal. The remedy of a person aggrieved by the decision of a competent judicial tribunal is to approach for redress a superior tribunal if there be one. The Court further held as under:

Relief under Article 32 for enforcement of a right conferred by Ch. III can be granted only on proof of that right and infringement thereof, and if, by the adjudication by a Court of competent jurisdiction the right claimed has been negatived, a petition to this Court under Article 32 of the Constitution for enforcement of that right, notwithstanding the adjudication of the Civil Court, cannot be entertained.

In this view of the matter, if the Designated Court has arrived at the conclusion that the provisions of the TADA Act are applicable and the facts of the case do not warrant granting of bail, it cannot said that the petitioners' fundamental right under Article 21 is violated.

12. Similarly in the case of Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another, , the Supreme Court has inter alia dealt with the orders passed by the Civil Court and has held that the argument that the impugned order affects the fundamental rights of the petitioners under Article 19(1), is based on a complete misconception about the true nature and character of judicial process and of judicial decisions. An incidental consequence which may flow from the order will not introduce any constitutional infirmity in it. The material discussion in paragraph (38) is as under:

(38) The argument that the impugned order affects the fundamental rights of the petitioners under Article 19(1), is based on a complete misconception about the true nature and character of judicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the Appellate Court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Article 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the Court and nothing more. If this basic essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by Court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental rights of citizen under Article 19(1).

13. The aforesaid judgment is followed by the Supreme Court in the case of Triveniben Vs. State of Gujarat, . The Court has held that the judicial verdict pronounced by Court in relation to a matter cannot be challenged on the ground that it violates one"s fundamental right. The judgment of a Court cannot be said to affect the fundamental rights of citizens.

14. In view of the aforesaid settled law, it cannot be said that the order passed by the Designated Court violates the fundamental right of the petitioners under Articles 14 or 21 of the Constitution of India.

15. In the result, the Special Criminal Application is rejected.