Maulavi Hussein Haji Abraham Umari vs State Of Gujarat And Anr on 29 July, 2004

Equivalent citations: AIR 2004 SUPREME COURT 3946, 2004 (6) SCC 672, 2004 AIR SCW 4396, 2004 AIR - JHAR. H. C. R. 2505, (2004) 6 JT 227 (SC), 2004 (4) SLT 886, 2004 (6) SCALE 320, 2004 CRI(AP)PR(SC) 546, 2004 (6) ACE 431, 2004 SCC(CRI) 1815, 2004 (2) UJ (SC) 1484, 2004 (6) JT 227, 2004 CRILR(SC MAH GUJ) 698, 2004 (7) SRJ 139, (2004) 3 EASTCRIC 119, (2004) 2 BLJ 713, (2005) 1 GUJ LR 585, (2004) 29 OCR 55, (2004) 4 PAT LJR 97, (2004) 3 RECCRIR 855, (2004) 3 CURCRIR 57, (2004) 6 SUPREME 61, (2005) 1 ALLCRIR 557, (2004) 6 SCALE 320, (2005) 1 GCD 347 (SC), (2005) 51 ALLCRIC 599, (2004) 4 ALLCRILR 87, (2004) 3 CRIMES 241, (2004) 4 JLJR 1, (2004) 21 INDLD 192, 2004 (2) ANDHLT(CRI) 243 SC, (2004) 2 ANDHLT(CRI) 243, 2004 (2) ALD(CRL) 620

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Bench: S.N. Variava, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  759 of 2003

PETITIONER:
MAULAVI HUSSEIN HAJI ABRAHAM UMARI

RESPONDENT:
STATE OF GUJARAT AND ANR.

DATE OF JUDGMENT: 29/07/2004

BENCH:
S.N. VARIAVA & ARIJIT PASAYAT

JUDGMENT:
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JUDGMENT 2004 Supp(3) SCR 202 The Judgment of the Court was delivered by ARIJIT PASAYAT, J. : The scope and ambit of Section 49(2) of the Prevention of Terrorism Act, 2002 (in short the 'POTA') fall for consideration in this appeal. Since the legal issue involved in this appeal relates to the question as to during what period prayer for police custody can be made, brief reference to the factual aspects is sufficient.

On 27.2.2002 some person died at Godhra in the State of Gujarat and several person were injured when allegedly a train was attacked and set ablaze. The first information report was lodged and

various persons were arrested in connection with the alleged occurrence.

Initially, the case was registered for alleged commission of offences punishable under various provisions of Indian Penal Code, 1860 (in short the 'IPC'), Indian Railways Act, 1989 (in short the 'Railways Act') and the Prevention of Damage to Public Property Act, 1984 (in short the 'Public Property Act') read with Section 135 of the Bombay Police Act, 1951 (in short the 'Bombay Act'). Subsequently, an application was filed in the Court of judicial Magistrate, First Class, Railway seeking addition of offences punishable under Section 3(l)(a), (b) and 3(2) of the POTA. The appellant was arrested on 6.2.2003. He was remanded to police custody till 11.2.2003 and subsequently the police custody was extended till 13.2.2003. As the application for addition of offences covered by POTA was not pressed earlier, a subsequent application was filed and the Additional Sessions Judge accepted the prayer.

As an application for extending the police remand was rejected a Criminal Revision was filed before the Sessions, Judge, Panchamahal, Godhra. The Special Court was constituted under Section 23 of the POTA on 6.3.2003. Sanction order as required under Section 50 of POTA was also passed so far as the appellant is concerned. The revision application which was filed questioning rejection of the prayer for police custody was withdrawn and an application in terms of Section 49(2)(b) of POTA was filed on 24.4.2003. The prayer was accepted by the learned Special Judge, POTA. Questioning legality of the said order, an appeal under Section 34(1) of POTA was filed before the High Court of Gujarat which came to be dismissed by the impugned judgment.

Mr. Colin Gonsalves, learned senior counsel appearing for the appellant submitted that true import of Section 49(2) has not been kept in view by the Special Court and High Court. The same is not intended to give unbridled power to the investigating agency to seek police custody. That would negate the statutory limit provided in Section 167 of the Code of Criminal Procedure, 1973 (in short the 'Code'). For harmonizing construction of the provisions it has to be held that Section 49(2)(b) has application only for the period of 30 days and not beyond it. If the construction put by the High Court is accepted, it would mean that for a period slightly less than 180 days the accused can be in police custody which can never be the legislative intent. Section 49(2)(b) is at the most a procedural provision intended to aid the operation of Section 167(2) of the Code and it cannot be given an extended meaning which would frustrate the legislative intent to restrict the period of police custody.

Great emphasis is laid on the expression "in police custody for a term not exceeding 15 days in the whole" in sub-section (2) of Section 167 and "otherwise than in the custody of the police, beyond the period of 15 days"

> in the first proviso of sub-section (2) of Section 167. It is submitted that in Section 49(2Xa) the period of "15 days" in Section 167(2) of the Code has been substituted to be "30 days". Therefore, according to learned counsel for the appellant, Section 49(2Xb) can be resorted to only during the period of 30 days.

In response, learned counsel for the respondents submitted that if the interpretation suggested by learned counsel for the appellant is accepted it would make the second proviso to Section 49(2)(b) redundant in the sense that even if beyond the period of 30 days the custody of the accused is judicial custody yet the investigating officer will have no scope to seek for police custody beyond the 30 days period; The same can never be the legislative intent.

In order to appreciate the rival submissions, the provisions of Section 167(2) of the Code of Section 49(2)(b) of POTA need to be extracted. Section 167(2) along with its proviso reads as follows :

"Section 167(2): The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

(a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of 15 days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-

section shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) No magistrate shall authorize detention in any custody under this section unless the accused is produced before him;

(c) No magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police.

Explanation I - For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not

furnish bail.

Explanation II - If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorizing detention."

Section 49(2) of POTA reads as follows :

> "Section 49(2) : Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2), -
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> (a) the references to "f fteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days", respectively, and
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> (b) after the proviso, the following provisos shall be inserted, namely :-
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> "Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period up to one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days:
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> Provided also that if the police office making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person from judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody." If the arguments of learned counsel for the appellant is accepted it would mean that what is specifically prov'ded in Section 49(2)(b) would be controlled by Section 167(2) of the Code.
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> The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey, [1880] 5 QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha, AIR (1961) SC 1596 and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta, AIR (1965) SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not

> interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co., [1897] AC 647 HL. Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors.

v. Raje Ram Sheoram and Ors., AIR (1991) SC 1406, Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors., AIR (1991) SC 1538 and Kerala State Housing Boar d and Ors. v. Ramapriya Hotels (P) Ltd. and Ors., [1994] 5 SCC 672).

> "This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant"

(Coke upon Littleton 18th Edition 146).

> "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails.....But if the later clause does not destroy but only qualifies the carter, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (per Lord Wrenbury in Forbes v. G/X [1922] l A.C. 256.
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> A statutory proviso "is something engrafted on a preceding enactment" (R. v. Taunton, St James, 9 B. & C. 836).
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> "The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances" (per Lord Esher in Re Barker, 25 Q.B.D. 285).
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> A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (See Jennings v. Kelly, [1940] A.C. 206).
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> The above position was noted in Ali M.K. & Ors. v. State of Kerala and Ors., (2003) 4 SCALE 197.
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> It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent.

Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the Legislature enacting it. (See Institute of Chartered Accountants of India v. M/s. Price Waterhouse and Anr. AIR (1998) SC 74. The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner, [1846] 6 Moore PC l, Courts, cannot aid the Legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See The State of Gujarat and Ors. v. Dilipbhai Nathjibhai Patel and Anr., JT (1998) 2 SC

253). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See Stock v. Frank Jones (Tiptan) Ltd., [1978] l AII ER 948 HL. Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn L.C. in Vickers Sons and Maxim Ltd. v. Evans, [1910] AC 445 HL, quoted in Jamma Masjid, Mercara v.

Kodimaniandra Deviah and Ors., AIR (1962) SC 847).

The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See Lenigh Valley Coal Co. v. Yensavage, 218 FR 547). The view was re-iterated in Union of India and Ors. v. Filip Tiago De Gama of Vedem Vasco De Gama, AIR (1990) SC 981.

In Dr. R. Venkatchalam and Ors. Etc. v. Dy. Transport Commissioner and Ors. Etc., AIR (1977) SC 842, it was observed mat Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Commissioner of Sales Tax, M. P. v. Popular Trading Company, Ujjain, [2000] 5 SCC 515). The legislative casus omissus cannot be supplied by judicial interpretative process.

Two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole - appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four

corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danackwerts, L.J. in Artemiou v. Procopiou, [1966] l QB 878, "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislature and produce awholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. (Per Lord Reid in Luke v. IRC, [1966] AC 557 where at p. 577 he also observed: "this is not a new problem, though our standard of drafting is such that it rarely emerges".

It is then true that, "when the words of a law extend not to an inconvenience rarely happening, but due to those which often happen, it is good reason not to strain the words further than they reach, by saying it is casus omissus, and that the law intended quae frequentius accidunt."

> "But", on the other hand, "it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom" (See Fenton v. Hampton, 11 Moore, P.C. 345). A casus omissus ought not to be created by interpretation, save in some case of strong necessity. Where, however, a casus omissus does really occur, either through the inadvertence of the legislature, or on the principle quod semel aut bis existit proetereunt legislators, the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as it existed before such statute - Casus omissus et oblivioni datus dispositioni communis juris relinquitur; "a casus omissus", observed Buller, J. in Jones v. Smart, I.T.R. 52, "can in no case be supplied by a court of law, for that would be to make laws."

The golden rule for construing wills, statutes, and, in fact, all written instruments has been thus stated: "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no further' (See Grey v. Pearson, 6 H.L. Ca'. 61). The latter part of this "golden rule" must, however, be applied with much caution. "If', remarked Jervis, C.J., "the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning" (See Abley v. Dale, 11 C.B. 378).

At this juncture, it would be necessary to take note of a maxim "Ad ea quae frequentius accidunt jura adaptantur" (The laws are adapted to those cases which more frequently occur).

One thing which is specifically to be noted here is that the proviso inserted by Section 49(2)(b) of POTA is in relation to the proviso to Section 167(2) of the Code and not in respect of Section 167(2). Therefore, what is introduced by way of an exception by Section 49(2)(b) of POTA is in relation to the proviso to Section 167(2)(b). That being the position, the interpretation suggested by learned counsel for the appellant cannot be accepted. It is to be noted that the acceptance of application for police custody when an accused is in judicial custody is not a matter of course. Section 49(2)(b) provides inbuilt safeguards against its misuse by mandating filing of an affidavit by the investigating officer to justify the prayer and in an appropriate case the reason for delayed motion. Special Judge before whom such an application is made has to consider the prayer in its proper perspective and in accordance with law keeping in view the purpose for which the POTA was enacted, the reasons and/or explanation offered and pass necessary order. Therefore, the apprehension of learned counsel for appellant that there is likelihood of misuse of the provision is without substance. In any event, that cannot be a ground to give an extended meaning to the provision in the manner suggested by the learned counsel for the appellant.

The appeal is sans merit and deserves dismissal, which we direct.