Supreme Court of India
Mohamed Iqbal Madar Sheiri And Ors vs The State Of Maharashtra on 8 January, 1996
Bench: A.M. Ahmad Cji, B.P Jeevan Reddy, N.P. Singh

CASE NO.:
Appeal (crl.) 21-25 of 1996

PETITIONER:
MOHAMED IQBAL MADAR SHEIRI AND ORS.

RESPONDENT:
THE STATE OF MAHARASHTRA

DATE OF JUDGMENT: 08/01/1996

BENCH:
A.M. AHMAD CJI & B.P JEEVAN REDDY & N.P. SINGH

JUDGMENT:

JUDGMENT 1996 (1) SCR 183 The Judgment of the Court was delivered by N.P. SINGH, J. Leave granted.

These appeals have been Filed against the orders passed by the Designated Court, Bombay, rejecting the prayer for bail made on behalf of the appellants, who are accused under different Sections of the Penal Code including Section 302 read with 149 and under sub-section (1) and sub- section (2}(i) of Section 3 of the Terrorist and Disruptive Activities (prevention) act, 1987 (hereinafter referred to as TADA'}.

After the incident relating to the Babri Masjid at Ayodhya on 6.12.1992, communal riots flared up in the city of Bombay and its suburbs. On the night of 7.1.1993, around 11.30 P.M., according to the complainant, some unknown miscreants knocked the door of her house. The husband of the complainant sent her and the two children aged about 11 years and 9 years to a nearby house for shelter. In that very house other families had also taken shelter. It is said that around 12.30 in the night, the appellants along with others assembled in front of the said house and poured kerosene oil and set the house on fire. They also threatened and prevented persons from coming to the rescue of the victims by threatening them at the point of deadly weapons. Some inmates managed to come out of the house by opening the tiles of the roof, but many children, ladies and males were burnt to death. It is also the case of the prosecution that door of the house had been bolted from outside so that they may not escape. After investigation, charge-sheet was submitted and the appellants were put on trail for different offences including under Section 3(1) and 3(2)(i) of the TADA. The Designated Court constituted under the provisions of the TADA. has rejected the prayer for bail, after discussing the allegations made against different appellants and materials collected during investigation against them including ocular testimony, that appellant put the house in question on fire by locking the doors from outside which resulted in death of several children, ladies and males. In one house itself six people were charred to death. The Designated Court has directed release on bail some of the accused persons, but in respect of the appellants, it has come to the conclusion that prima-facie .there were materials on the record to show that these appellants purported to strike

terror and to create hatred among the two communities by using inflammable substance, that is petrol and kerosene, resulting in death of many of the victims and as such a case under the provisions of Sections 3(1) and 3(2) (i) of the TADA was .made out.

The learned counsel, perhaps in view of serious allegations made against the appellants, did not press the appeal on merit by contending that if the allegations are considered in a prima-facie manner, no offence under Section 3(1) or Section 3(2)(i) of the TADA was disclosed. He however, took a stand that as the TADA was a temporary Act which has admittedly lapsed, there is no question of the appellants being-tried for offences under any of the Sections of the TADA and the conditions prescribed by sub-section (8) of Section 20 of TADA in respect of grant of bail now have to be ignored. In other words, the Designated Court might be justified, according to the learned counsel, when it rejected the prayer for bail of the appellants, on 7th and 8th March 1994, but in view of the lapse of the TADA, now this court can direct release of the appellants ignoring the provision of sub-section (8) of Section 20, because it will be deemed that after the lapse of TADA, now no prosecution for any offence under Sections 3(1) and 3(2)(i) is pending before the Designated Court.

There is no dispute that the TADA being a temporary enactment, its duration was specified in the Act itself, and it has expired on the expiry of the specified time. In such a situation, Section 6 of the General Clauses Act, 1897 shall be of no help because Section 6 of the aforesaid Act i s applicable only when any Central Act is repealed and it shall not be attracted when a temporary Act expires on the expiry of the specified time. The relevant part of Section 6 of the General clause Act says :

"Section 6. Effect of repeal - Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) (b) (c) (d).

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

As such what will be the effect of expiry of a Temporary Act, has to be examined on the provisions of that Act itself, without any aid from Section 6 of the General clauses act. That is why after expiry of a temporary Act, often a question arises in connection with the legal proceedings whether they can be continued? In many temporary Acts a saving provision in the nature of section 6 of the General Clauses Act is enacted. If there is no provision in the temporary Act similar to Section 6 of the General Clauses Act, the normal rule is that the proceedings initiated under that Act shall ipso facto come to an end with the expiry of the Act. If there is no saving provision, after the expiry of the Act a person who was being prosecuted under the said Act, cannot be prosecuted.

So far TADA is concerned, the framers of the Act have specially enacted a provision similar to Section 6 of the General Clauses Act in sub-section (4) of Section 1 which says :

"Section 1 (1)....,.,.,....,..... .....

(2)....,.....,..... .....

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(3)....,.....,..... .....

(4) It shall remain in force for a period of eight years from the 24th day of May, 1987, but its expiry under the operation of this sub-section shall not effect -

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

(b) any right privlege obhgation or liability acquired, accrued or incurred under this Act or any rule made thereunder or any order made under any such rules. or

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

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired."

In view of the aforesaid sub-section (4) of Section I, it has to be held that framers of the Act had enacted a saving provision like Section 6 of the General Clauses Act, in sub-section (4) of Section 1 of 'TADA and desired that even after expiry of such temporary Act, the proceedings initialed under the said Act, should not come to an end without the final conclusion and determination. They are to be continued in spite of the expiry of the Act, The deeming clause in sub-section (4) of Section 1, saying "as if this Act had not expired shall keep the pending .investigations and legal proceedings alive. In spite of the Act having expired, in has to be treated that it has not expired so far such pending investigations and legal proceedings are concerned. The effect of a legal fiction by a deeming clause is well known. Legislature can introduce a statutory fiction and courts have to proceed on the assumption that such state of affairs exists on the relevant date, because when one is bidden to trial an imaginary state of affairs as real he has to also imagine as real the consequences which shall flow from it unless prohibited by some other statutory provision.

In the case of State of Orissa v. Bhupendra Kumar Rosa, AIR 1962 SC 945 = (1962) supp. 2 S.C.R.380 a Constitution Bench of this Court said about the effect of the expiry of a temporary Act:

"It is true that the provisions of section 6 of the General Clauses Act in relation to the effect of repeal do not apply to a temporary Act. As observed by Patanjali Sastri, J, as he then was. in 5. Krishnan v, State of Madras, 1951 SCR 621 : AIR 1951 SC 301, the general rule in regard to a temporary statute is that in the absence of special provision to the contrary, proceedings which are being taken against a person under it will ipso facto terminate as soon as the statute expires. That is why the Legislature can. and often does, avoid such an anomalous consequence by enacting in the temporary statute a saving provision, the effect of which is in some respects similar to that of S.6 of the General Clauses Act."

As a specific provision has been enacted in subsection (4) of Section 1 of TADA in respect of continuance of investigation, legal proceeding, penalty, punishment which is virtually identical to 'Section 6 of the General Clauses Act, there is no scope for a controversy as to whether any investigation, inquiry, trial in respect of any offence alleged to have been committed under TADA when the said Act was in force shall come to an end. Sub-section (4) of Section 1 gives protection and keeps such investigations and trials alive, as is done by Section 6 of the General clauses Act, when a later Act repeals the earlier Act. In such a situation, it is not possible to hold that because of the expiry of the TADA which was a temporary Act, situation has changed so far the offences which arc alleged to have been committed when that Act was in force.

It was then submitted that in the present case the appellants have been denied the benefit of proviso (a) to Section 167 (2) of the Code of Criminal Procedure (hereinafter referred to as the 'Code') of their being released on ground of default in submission of the charge-sheet within the statutory period specified. Sub-section (4) of Section 20 of TADA makes the provision of Section 167 of the Code applicable in respect of offences under TADA except that the periods prescribed for the authorised detention in respect of such offences during which the investigation should be completed are different. After the expiry of periods which have been specified in Section 20(4)(b) and Section 2f)(4)(bb), the accused for an offence under TADA acquires the. right to be released on bail, in terms of Proviso (a) to Section 167(2) of the Code. It need not be pointed out or impressed that in view of series of judgments of this Court, this right cannot be defeated by any Court, if the accused concerned is prepared and does furnish bail bonds to the satisfaction of the Court concerned. Any accused released on bail under proviso (a) to Section 167(2) of the Code read with Section 20{4)(b) or Section 20(4)(bb), because of the default on the part of the investigating agency to conclude the investigation, within the period prescribed, in view of proviso (a) to Section 167(2) itself, shall be deemed to have been so released under the provisions of Chapter XXXIII of the Code, It cannot be held that an accused charged of any offence, including offences under TADA, if released on bail because of the default in completion of the investigation, then no sooner the charge-sheet is filed, the order granting bail to such accused is to be cancelled. The bail of such accused who has been released, because of the default on the part of the investigating officer to complete the .investigation, can be cancelled, but not only .on the ground that after the release, charge-sheet has been submitted against such accused for an offence under TADA, For cancelling the bail, the well settled principles in respect of cancellation of bail have to be. made out. In this connection, reference may be made to the case of Aslam Babalal Desai v. State of Maharashtra. [1992] 4 SCC 272. The majority judgment has held that in view of deeming provision under proviso (a) to section 167(2). the order granting bail shall be deemed to be one under Section 437 (1) or sub-section (2) or Section 439(1) and that

order can be cancelled, when a case for cancellation is made out under Sections 43 /(5) and 439(2) of the Code. But for that, the sole ground should not be that alter the release of " such accused, the charge-sheet has been submitted. The same view was expressed by this Court in the case of Raghubir singh v. State of Bihar. AIR (1987) SC 149 = 1986 (3) SCR 802.

So far the facts of the present case are concerned, the appellant Nos. 1 to 6 were taken into custody on 16.1.1993. The charge sheet was submitted on 30.8.1993; obviously beyond the statutory period under Section 20(4)(b). There is nothing on record lo show that provisions of Section 20(4)(bb) were applied in respect of appellants. They had become entitled to he released on bail under proviso (a) to Section 167(2) of the Code read with Section 20(4)(b) of the TADA. But it is an admitted position that no application for bail on the said ground was made on behalf of the appellants. Unless applications had been made on behalf of the appellants, there was no question of their being released on ground of default in completion of the investigation within the statutory period, It is now settled that this right cannot be exercised after the charge-sheet has been submitted and eognizance has been taken, because in that event the remand of the accused concerned including one who is alleged to have committed an offence under TADA, is not under Section 167(2) but under other provisions of the Code. This has been specifically considered by a Constitution Bench of this Court in the case of Sanjay Dutt v. Stale through C.B.I. Bombay (II), [1994] 5 SCC 410. It was said :

"The "indefeasible right" of the accused lo be released on bail in accordance with Section 20(4)(bb)of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after tiling of the challan, notwithstanding the default in filing it within the lime allowed, is governed from the lime of filing of the challan only by the provisions relating to the grant of bail applicable at that stage".

As such now it is not open to the appellants to claim bail under proviso

(a) to Section 167(2) of the Code, Admittedly charge-sheet has been submitted against the appellants, and they are in custody on the basis of orders of remand passed under other provisions of the Code and at this stage proviso (a) to Section 167(2) shall not be applicable.

During hearing of the appeal, it was pointed out by the counsel appearing on behalf of the appellants that some courts in order to defeat the right of the accused to be released on bail under proviso (a) to Section 167(2) after expiry of the statutory period for completion of the investigation, keep the applications for bail pending for some days so that in the meantime, charge-sheets are submitted. Any such act on the part of any court cannot be approved. If an accused charged with any kind of offence, becomes entitled to be released on bail under proviso (a) lo Section 167(2) that statutory right should not be defeated by keeping the applications pending till she charge-sheets are

submitted, so that the right which had accrued is extinguished and defeated. So far the present case is concerned, we are informed by the counsel for the appellants that a petition for grant of bail on merit had been filed which was rejected on 22.3.1993, But admittedly no petition for grant of bail after the expiry of the, statutory period for the submission of the charge-sheet had been filed. There is no statement that any application for grant of bail had been filed on behalf of the appellants under proviso (a) to Section 167(2) after the expiry of the statutory period which application was kept pending till 30th August 1993. Now the appellants have forfeited their right to be released on bail under proviso (a) to section 167(2) as they are in custody on basis of orders for remand passed under other provisions of the Code. In such a situation, we are left with no option, but to dismiss these appeals. However, we directed that the trial of the appellants be expedited.