

PETITIONER:
MAMAD HASSAM BHAGAD AND OTHERS

Vs.

RESPONDENT:
STATE OF GUJARAT AND OTHERS

DATE OF JUDGMENT: 09/05/1996

BENCH:
VENKATASWAMI K. (J)
BENCH:
VENKATASWAMI K. (J)
ANAND, A.S. (J)

CITATION:
1996 AIR 2057 JT 1996 (5) 327
1996 SCALE (4)313

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

K. VENKATASWAMI, J.

This appeal preferred under section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA") challenges the judgment and order of the learned Designated Judge (TADA), Jamnagar dated July 1, 1994.

The learned Designated Judge confirmed an order of attachment of seven vessels/ships under Section 7A of TADA pending further investigation in the matter.

At the outset we would like to make it clear that we do not propose to deal with the matter either in detail or to give a final decision in this matter in view of the fact that when the judgment under appeal was made the matter was under the investigation stage only. In our view any opinion expressed at this stage might cause prejudice to either party and that is the reason for not going into the matter in detail or giving any final decision. Briefly stated the facts are as under :

In the Kalyanpur Police Station Crime Register No.62/93 related to a case booked for the offences punishable under sections 121, 121A, 122, 34 IPC and 25(1)(A)(D), 25(1)(A)(2), 25(1)AA, 25(A)(B), 25 (A)(F) of the Arms Act, Section 20 of Wireless Telegraph Act and Sections 3,4 and 5 of TADA and Section 135(1) of the Bombay Police Act. In the course of investigation one diary of Hamir Sajan was found and it contained certain financial transactions relating to one Haji Ismail for purchasing the ships in question. The District Superintendent of Police attached those ships invoking powers under Section 7A of TADA. A report application No.1993 was filed before the learned Designated Judge seeking confirmation of attachment.

The appellants claiming to be the owners of the ships in question objected to the attachment and sought revocation of such attachment before the learned Designated Judge.

It was argued before the learned Designated Judge that section 7A of TADA came into force on and from 22.5.1993 and the purchases of all the ships having taken place well before that date, the provisions of TADA cannot be invoked. It was also contended that none of the persons objecting (claiming to be the owners) the attachment had ever been arrested provisions of Customs Act or under TADA and hence prima facie Section 7A of TADA has no application. It was further contended that to invoke Section 7A of TADA there should be knowledge or reasons to believe that properties attached are involved in terrorist activities and that requirement was not satisfied on the facts of the case.

Before the learned Designated Judge, the Designated Public Prosecutor after narrating the facts relating to the purchase of the seven ships in question contended that on prima facie case being made out and entertaining reason to believe that the property in question falls within the mischief of Section 7A attachment in question was made and that further inquiry/investigation was still going on regarding all the seven ships to conclusively find as to whether they were involved in smuggling activities or not. It was admitted that since some of the persons were absconding and some of others had left the district therefore, at that stage, attachment could not be revoked and he prayed for confirmation of the order of attachment.

The learned Designated Judge bearing in mind that the investigation was still going on has given only a prima facie finding and on being satisfied with the prima facie case confirmed by the judgment under appeal.

The learned Designated Judge found that the main accused was one Haji Haji Ismail and he was doing the landing activities of gold and silver articles which are smuggled goods and in order to see that Government authorities do not cause any hurdles to him in carrying out such activities he was possessing automatic rifles, foreign made Pistols and other latest and scientific means of communications and they were already attached and Hamir Sajan and other three persons were arrested. Though they were released on bail, in the first instance on the ground that TADA does not apply to them, on appeal to this Court, the order granting bail to them was cancelled and all the accused were taken into custody. The learned Designated Judge also found, prima facie, that there was no mention at all in Section 7A that the property to be investigated must be the property of an offender against whom the offence under Section, 7A is to be registered. According to the learned Judge what was required to be established was that the property in relation to which the investigation was made must be having sources of purchase from the amount or proceeds of terrorism or by way of commission of terrorist activity. Therefore, the learned Judge found that it was not necessary or incumbent upon the Investigating Officer to attach only properties of the persons who were involved in the offence under TADA Act and that on the other hand, any property can be attached if it is reasonably believed that it was derived from the commission of any terrorist activity or was acquired by the proceeds of 'terrorism'. The learned Judge also found that 'the aforesaid party (namely the appellants herein) are related to the main smuggler Haji Haji Ismail' who is absconding and by using the funds provided by him the ships in question were purchased and so it can be said that

"prima facie, doing smuggling
activity of keeping and possessing
latest and modern foreign made arms

and ammunitions in order to cause terrorism among the Customs and Police Officers would mean that by keeping the authority such as Custom Officers or Police Personnel in constant fear due to his terrorist activities, the amount is derived from that activity, it would mean that the fund is created by way of terrorist act, as Haji Haji Ismail has managed for the money to purchase seven ships to the opposite party members who have purchased the ships in their names only as a show and ostentation so that they can be safe from penal action and such other consequences."

Finally the learned Judge observed that :

"Therefore, at this juncture, it is established prima facie that ships mentioned in report Application No.1/1993 are liable to be attached and they are attached rightly as stated by the authorities and they deserve to be confirmed."

Mr. Mehta, learned Senior Counsel reiterated the same arguments which were addressed before the learned Designated Judge. As we have observed at the outset it would not be advisable to give any definite opinion with regard to the 'involvement' of the attached ships at this stage except observing that from the materials on record we are satisfied that the Investigating Officer prima facie had reason to believe that there is basis for invoking Section 7A of TADA. We may also add in fairness to Senior Counsel that he cited certain judgments to support his arguments, but for the very same reasons as given above we do not think it is necessary to quote and elaborate those citations."

After carefully going through all the relevant papers and the prima facie views expressed by the learned Designated Judge, we are of the opinion that at this stage we need not interfere with those conclusions reached by the learned Designated Judge. However, on the facts of this case, the ship bearing the name "Nabi Mahar", Registration No.B.D.I.430 purchased on 10.12.1965, as per the case of the prosecution itself, cannot be kept under attachment, the reason being that this ship was purchased long before the passing of TADA. Therefore, the said ship has to be released from attachment. We make an order accordingly. Except for this modification, for obvious reason. we do not find any ground to interfere with the judgment and order of the learned Designated Judge in any other respect. Subject to the modification as above, the appeal stands disposed of.

C.A.NOS.	S.L.P.NOS.	CC NOS.
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8652/96	11870/96	19260/93
8919-20/96	4250-51/93	
8729/96	7406/93	
8725/96	11911/96	20225/93
2570/93	8090/93	20528/93
8703/96	16410/93	
8364-66/96	2533-35/94	20030/93
8905/96	2993/94	
2359-60/94		

5305/93
8699/96
8702/96
8697/96
8863/96
8726/96
8655/96
8698/95
11178/94
15438/54
17640/94
13168/94
14415/95
17196/95
18159/95

Union of India & Anr, etc. etc.

V.

M. Bhaskar & Qrs. etc. etc.

[With CC 19260/93 in C.A. Nos.....of 1996 (arising out SLP (C) Nos. 4250-51/93, 7406/93, CC 20225/93 in C.A. No. 2570/93, C.A. No.....of 1996 (arising out of SLP(C) No.16410/93), CC 20030/93, (arising out of SLP(C) Nos.2533-35/94, 2993/94), C.A. Nos.2359-60/94, 5305/93, C.A. Nos....of 1996 (arising out of SLP (C) Nos. 11178/94, 15438/94, 17640/94, 13168/94, 14415/95, 17196/95, 18159/95)]

Union of India & Anr. etc.etc.

V.

M. Bhaskar & Ors. etc.etc.

J U D G M E N T

HANSARIA.J.

This batch of appeals requires us to decide two questions both of whom are relatable to the Railway Board's memorandum dated 15.5.1987 on the subject of recruitment of Traffic/Commercial Apprentices. The two questions are: (1) the purport of the memorandum; and (2) the validity of the same.

2. There has been a cleavage of opinion among the various Central Administrative Tribunals (CATs) of the country. Most of the Tribunals have rejected the understanding of the Union of India - the main appellant-relating to the meaning and scope of the memorandum. The Ernakulam Bench of the Tribunal has even regarded the memorandum as invalid.

3. The broad contents of the memorandum may be noted. It brought about some changes in the recruitment of Traffic/Commercial Apprentices - one of the changes being that on and from 15.5.1987 the recruitment of these Apprentices would be made in the pay scale of Rs.1600-2660 (this scale earlier was Rs.1400-2300) and, instead of all the posts being filled up by promotions, ratio of promotees was made 75%, and of the remaining 25%, 10% were required to come through Railway Recruitment Boards and 15% on the basis of Limited Department competitive Examination. The pre-1987 Apprentices laid their claim for the higher scale of pay on the basis of 1987 memorandum; and it is this claim which has come to be allowed by the majority of the CATs.

4. The appellant has challenged the legality of this view. It has also been contended that the memorandum is not invalid for the reason given by the Ernakulam Bench or, for that matter, any other reason. The learned counsel appearing for the respondents have supported the view taken by the majority of the CATs insofar as the benefit of higher pay scale is concerned. According to them the memorandum is also invalid because of its discriminatory nature and introduction of arbitrary cut-off date.

5. To decide the controversy, it would be apposite to apprise ourselves as to what was the procedure of recruitment before the memorandum in question; and what was really meant by the word 'Apprentices'. We have put this aspect at the forefront because the Tribunals, who have granted the benefit of higher pay scale, have done so, with respect, without applying their mind to the relevant provisions of the Indian Railway Establishment Manual,

hereinafter the Manual, dealing with the recruitment of (1) Traffic Apprentices; and (2) Commercial Apprentices. Rule 123 of 1968 Edition of the Manual deals with recruitment of Traffic Apprentices and Rule 127 with Commercial Apprentices. It is apparent from this Manual that the posts to be held by Traffic Apprentices before the 1987 were of: (1) Assistant Station Masters; (2) Assistant Yard Masters; (3) Traffic Inspectors; and (4) Section Controller (in the scale of Rs.1400-2600). Insofar as Commercial Apprentices are concerned these posts were of: (1) Assistant Claims inspectors/Supervisors; (2) Assistant Commercial Inspectors; (3) Assistant Rates Inspectors (Goods and Coaching); and (4) Other Inspectors for outdoor duties. This apart, the pre - 1987 position was that in the Traffic and Commercial Departments, posts in the pay scale of Rs.1400-2300 were being filled up to the extent of 25% by direct recruits, of which 15% were from open market and 10% from Limited Departmental Competitive Examination; and the balance 75% by promotion from lower grade. Further, the term 'Apprentices' was being actually used to cover 'direct recruits', as distinct from 'promotees'. Another thing to be noted, which again missed the Tribunals in question, is that when the pay scale of Rs.1400-2300 was being paid to Traffic/Commercial Apprentices, the higher pay scale of Rs.1600-2660 was being paid to those who were in a higher grade.

6. Though the above is disputed by Mrs. Sharda Devi, appearing for some of the respondents, we entertain no doubt on this score, because from what has been stated in para 6 of the Affidavit filed by T.P.V.S. Sekar Rao, Deputy Chief Personnel Officer, South Central Railway Headquarters Office, Secunderabad, it appears that the Pay scale of Rs.1400-2300 was being made available to Traffic Inspector Grade III, whereas scale of Rs.1600-2660 was meant for Traffic Inspectors Grade II. Similarly, Commercial Inspector, Grade III, was getting the scale of Rs.1400-2300 and Commercial Inspector, Grade II, the scale of Rs.1600-2660. Mrs. Sharda Devi has referred to us in this connection to the Table of "Avenue of Promotion for SS/TIs.." finding place at page 82 of this counter, to being home her point. This chart itself shows that there are promotional posts and the old state of Rs.455-700 (which on revision became Rs.1400-2300) was meant for some Traffic Apprentices and not all. We may refer in this context to what finds place in Section B of Chapter II of the Manual. This Section deals with Rules governing the promotion of Group 'C' and shows that some promotional posts have been categorised as selection posts and some non-selection. The aforesaid chart relating to the 'avenue of promotion' has itself mentioned which are the non-selection posts and which are selection posts.

7. From the aforesaid, it is clear that the memorandum of 1987 was really not one of revision of pay of the Traffic/Commercial Apprentices, as has been understood by those Tribunals who have conceded the higher pay scale. The higher pay scale was really meant for the Traffic/Commercial Inspectors of higher grade. Mrs. Sharda Devi's effort to satisfy us that the higher pay scale was really a revision on the basis of what finds place in para 2(ii) of the 1987 memorandum is founded on misapprehension inasmuch the mention in that sub-para that "Traffic Apprentices absorbed in the cadre of Section Controllers in scale of Rs.470-750/1400-2600 (RP) will be fixed at starting pay of Rs.1600 on absorption", does not mean that these Section Controllers were given the pay scale of Rs.1600-2660, as urged by the learned counsel. All that was conveyed by this statement was

that the Section Controllers, even though getting the revised scale of Rs.1400-2600, their starting pay would be Rs.1600. This was so required according to Shri Malhotra appearing for the appellant. because the Trained Apprentices could become eligible for the post of Section Controller only after having two years Yard's experience in the grade of Rs.455-700. It is this pay scale which had become on revision Rs.1400-2300: the unrevised pay scale of Section Controller was Rs.470-750, which on revision become Rs.1400-2600. So, what has been stated in para 2(ii) does not support the case of the respondents that the memorandum of 1987 really dealt with the revision of pay of all the Traffic/Commercial Apprentices.

8. We, therefore, hold that the Tribunals which allowed the benefit of pay scale of Rs.1600-2660 to all the Traffic/Commercial Apprentices irrespective of the grade of the posts held by them, not only misunderstood the memorandum of 1987, but misconceived the provisions relating to the recruitment and promotion of these Apprentices as finding place in the Establishment Manual. Indeed, somehow or other they were oblivious of what has found place in the Manual in this regard.

9. This leaves for consideration the question of validity of the memorandum. The Ernakulam Bench, which held the memorandum invalid, did so for the reason that the Railway Board, which had issued the memorandum, could not have changed the provisions finding place in the establishment Manual. which are statutory in nature, whereas the memorandum was categorized as administrative instruction. Now, there is no dispute in law that statutory provision cannot be changed by administrative instruction. Now then, the Tribunal, despite having noted Rule 1-A of the Indian Railway Establishment Code (Volume-I) as published on 21st March, 1951 reading:

"Normally recruitment will be to the lowest grade of the lowest class but direct recruitment on limited scale to intermediate grades will be made in accordance with instructions laid down by the Railway Board from time to time"

ultimately failed to bear in mind the aforesaid provision. Rule 1-A which had come to be made pursuant to the power conferred by the proviso to Article 309 and having stated that the recruitment in the lowest grade will be made in accordance with the instructions laid down by the Railway Board from time to time, the rule itself permitted the Railway Board to issue necessary instructions, and the memorandum of 1987 having been issued by the Railway Board in exercise of this power, we hold that Board had valid authority to issue the memorandum.

10. Another submission made by Mrs. Sharda Devi in assailing the validity of memorandum was that though pre - 15.5.1987 Apprentices would get the scale of Rs.1400-2300, the post 15.5.1987 Apprentices were made available the scale of Rs.1600-2660, for no good reason, and so, the memorandum was arbitrary. This is more so, as earlier the apprentices were to undergo training for 3 years, which was reduced to 2 years by the memorandum. Shri Malhotra's contention in this connection was that there was a change of policy in the sense that Apprentices recruited after 15.5.1987 were to man the posts, not of Assistant Station Masters, Assistant Yard Masters etc. as before, but of Station Masters and Yard Masters. It is because of this that higher pay scale was made available to them. It was also brought to our notice

that the memorandum provided that the standard of examination for the Apprentices to be recruited after 15.5.1987 was required to be higher than that which was prevailing, and if because of this, the period of training was made 2 years in place of 3, the same cannot make the policy unreasonable, as a 2 year period for training is of sufficiently long duration to equip persons selected after a more rigorous test, with the knowledge required to man the posts in question. We agree and state that if direct recruits passing examination of higher standard to man higher posts were required to be given higher pay scales, the same cannot be regarded in any way as discriminatory or even arbitrary. Such a policy decision is not unreasonable also.

11. The final submission in this regard was that the cut-off date "15.5.1987 is arbitrary. This also is not correct because the memorandum had come to be issued following many deliberations and discussions with different unions of which mention has been in detail in one of the documents on record. So, it cannot be said that the date (15.5.1987) is one 'picked out from a hat', in which case a cut-off date would be arbitrary, as stated by this Court recently in para 4 of Union of India v. Sudhir Kumar Jaiswal (1994) 4 SCC 212. We are rather satisfied that the date has relevance and the memorandum has come to be issued following the aforesaid discussion. So, we uphold the validity of the memorandum. Appeals @ SLP (C) Nos.2533-35 of 1994

12. In these appeals, it was contended by Shri Das on behalf of respondent Nos.2 to 4 that the cases of these respondents stand on different footing from other respondents. because, though they had come to be recruited pursuant to an advertisement of January 1987, they were called for training programme commencing from August 1989 and so, they should be taken as post - 1987 Apprentices, for which reason they would be entitled to the benefit of the memorandum. This contention has been advanced because of the language of sub-para (xii) of para 2 of the memorandum, according to which the revised pay scale of Rs.1400-2300 was meant for "apprentices already under training". It was urged that the aforesaid respondents were not "under training" on 15.5.1987 as they had been called for training which was to commence from August 1989, Our attention was also drawn by Shri Das to a document at page 130 of the paper book, which is a communication of the Principal, Sonal Training School, addressed to the Chief Optg. Supdt. by which the representation of 30 Traffic Apprentices for the absorption/posting in the pay scale of Rs.1600-2660 was forwarded for consideration.

13. As to the last document, we would say that the same is inconsequential inasmuch as the Principal had only forwarded the representation. Though it is correct that the respondents were called for training from 1989, that is not enough to distinguish their case from other respondents inasmuch as they had come to be recruited pursuant to an advertisement of January 1985; and so, they have to be treated as pre-1987 Apprentices. What has been stated in sub-para (xii) cannot be taken in isolation; that has to be understood along with other provisions contained in the memorandum. If this were to be so done, we do not think if we would be justified in treating these respondents differently from other pre-1987 Apprentices because they were called for training in 1989. We have taken this view because it is known that at times there are no vacancies in training schools and so training programme has to be spread out. We, therefore, reject the contenting advanced on behalf

of these respondents by Shri Das.

Appeal @ SLP (C) No. 15438 of 1994

14. In this appeal, a separate argument was advanced on behalf of respondent No.1, Prakash Chandra Ojha, who had approached the Patna Bench of the CAT with the grievance that he was unjustly and illegally denied promotion to Grade- I Commercial Inspector in 1990, despite his having been promoted as Commercial Inspector Grade-II by an order dated 21.9.1989, which was made effective from 11.10.1988, because of which he had become eligible for promotion to Grade-I on 11.10.1990, as the eligibility condition was completion of 2 years of experience in Grade-II. The Patna Bench held that the exclusion of this respondent from the list of eligible candidates for the selection meant for 1990 was wrong.

15. The aforesaid decision has been challenged in this appeal by the Union of India by contending that 2 years' period of experience has to be reckoned, not from 11.10.1988, but from 21.9.1989. There is no dispute that the eligibility condition is 2 years experience in Grade-II. Now, this respondent having really started working in Grade-II pursuant to the order of 21.9.1989, he could not have gained experience prior to the date he had joined pursuant to this order. The mere fact that his promotion in Grade-II was notionally made effective from 11.10.1988 cannot be taken to mean that he started gaining experience from that day, because to gain experience one has to work. Notional promotions are given to take care of some injustice, inter alia, because some junior has come to be promoted earlier. But we entertain no doubt that the person promoted to higher grade cannot gain experience from the date of the notional promotion; it has to be from the date of the actual promotion.

16. We, therefore, hold that the view taken by the Patna Bench qua this respondent is not sustainable.

Conclusion

17. All the appeals, therefore, stand disposed of by setting aside the judgments of those Tribunals which have held that the pre-1987 Traffic/Commercial Apprentices had become entitled to the higher pay scale of Rs.1600-2660 by the force of memorandum of 15.5.1987. Contrary view taken is affirmed. We also set aside the judgment of the Ernakulam Bench which declared the memorandum as invalid; so too of the Patna Bench in appeal @ SLP(C) No.15438 of 1994 qua respondent No.1. We also state that cases of respondents 2 to 4 in appeals @ SLP(C) Nos.2533-34 of 1994 do not stand on different footing.

18. Despite the aforesaid conclusion of ours, we are of the view that the recovery of the amount already paid because of the aforesaid judgments of the Tribunals would cause hardship to the concerned respondents/appellants and, therefore, direct the Union of India and its officers not to recover the amount already paid. This part of our order shall apply (1) to the respondents/appellants who are before this Court: and (2) to that pre-1987 Apprentice in whose favour judgment had been delivered by any CAT and which had become final either because no appeal was carried to this Court or, if carried, the same was dismissed. This benefit would be available to no other.