SANJAY DUTT

v.

STATE THROUGH CBI, BOMBAY

AUGUST 18, 1994

[B.P. JEEVAN REDDY AND N.P. SINGH, JJ.]

Terrorists & Disruptive Activities (Prevention) Act, 1987—Arrest and Detention—Reference to the Constitution Bench—Reasons for—Interpretation of Sec. 5—Effect on large number of cases—Setting the issue authoritatively—Obiter Dicta of Supreme Court—Binding upon other courts.

Terrorist and Disruptive Activities (Prevention) Act, 1987—Sec. 5—Arrest and Detention— Unauthorised possession of specified arms and ammunition—Nexus with the object of use—Whether necessary—To be authoritatively settled by the Constitution Bench.

Terrorist and Disruptive Activities (Prevention) Act, 1987—Sec. 24(4)(b) read with Section 167(2) Cr.P.C.—Default in completion of investigation within 180 days—Whether indefeasible right in accused to be released on bail—To be authoritatively and expeditiously settled by the Constitution Bench.

Sanjay Dutt, one of the accused in the *Bombay Blast* Case was arrested and detained pending investigation by CBI u/s 5 of TADA for possession of illegal arms. However, the charge sheet was filed beyond six months of his arrest. The Special Leave Petition was filed for grant of bail on the ground that mere possession of illegal arms was no offence and that Section 5 could be invoked only if there was some material to show that the person who was possessed of the arms intended it to be used for terrorist or disruptionist activity. Further that the filing of charge sheet beyond 180 days gave the accused an indefeasible right of bail on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescibed.

Denying bail, but recommending that the questions raised in the SLP be decided expeditiously and authoritatively by the Constitution Bench, this Court

A **HELD : 1.1. Since even the *obiter dicta* of the Supreme Court is binding upon other Courts in the country and because the interpretation placed upon Sec. 5 amounted to reading words into that section that were not there and as the interpretation of Section 5 one way or the other was likely to affect a large number of cases in the country it was appropriate**
B **for the Constitution Bench to pronounce on the matter and authoritatively settle the issue. [735-C]**

Kartar Singh v. *State of Punjab,* **(1994) JT 2 423, referred to.**

2.1. Investigation should be concluded within 180 days of the arrest
C **but the court, on being satisfied with the progress of the investigation and the reasons for the continued detention of the accused was empowered to extend the said period to one year. There was no provision for issuance of notice to the accused while extending the period of detention. If the reasoning and logic underlying the observation in *Hitendra Vishnu***
D ***Thakur's* case were extended to Section 167(2) of Cr.P.C., it would mean that every time the Magistrate authorised the detenntion of the accused in custody beyond 15 days, he would be obliged to give notice to the accused and hear him. Such a course was neither feasible nor warranted. The view taken by the Division Bench needed re-consideration. [737-F to H, 738-A]**

E

Hitendera Vishnu Thakur & Ors. etc. etc. v. *State of Maharashtra & Ors.*, **JT (1994) 4 SC 255, referred to.**

2.2. Section 167 Cr.P.C. authorised detention of an accused in cus-
F **tody during investigation. After the expiry of the statutory period mentioned therein, if the investigation was not concluded the accused was entitled to be released on bail and that would be deemed to be under the provisions of Chapter XXXIII of the Code. The right to be released on bail under proviso to Section 167(2) accrued to an accused at a particular stage. But could it be held to be an indefeasible right which could be**
G **exercised at any stage including the stage of trial? The meaning and effect of the said provision needed to be authoritatively pronounced upon.**

[738-C, D, F]

Ram Narayan Singh v. *The State of Delhi & Ors.,* **[1953] SCR 652;** *Naranjan Singh Nathawan* v. *State of Punjab & Ors.,* **[1952] SCR 395 and**
H *A.K. Gopalan* v. *Govt. of India*, **[1966] 2 SCR 427, referred to.**

CIVIL APPELLATE JURISDICTION : S.L.P. (Crl.) Nos. 1834-35 of 1994. A

From the Judgment and Order dated 4.7.94 of the Designated Court at Bombay in M.A. No.118/94, B.A. No. 31/94 and B.B.C. No.1 of 1993.

Ram Jethmalani, Shanti Bhushan, Kapil Sibal, Rajinder Singh, S.B. Jaisinghani, Mahesh Jathmalani, C.B. Wadhwa, P.K. Dey, A.K. Sahu, Ms. Rani Jethmalani and Ms. Lata Krishnamurthi for the Petitioner. B

G. Natarajan, V.K. Agarwal and P. Parmeswaran for Respondent.

Caveator in-person A.S. Bhasme for State of Maharashtra. C

The following Order of the Court was delivered :

The purpose of this order is merely to indicate the reasons for referring the matter to the Constitution Bench.

D

Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) provides :

> **"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 and 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 pubishable 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." E F

According to this section, unauthorised possession of any of the specified arms and ammunition (specified in Columns 2 and 3 of Category-I or Category III(a) of Schedule-I of the Arms Rules, 1962) or bombs, dynamite or other explosive substances in a notified area is sufficient by itself to attarct the provision. Mensrea is not an ingredient of the offence. The *non obstante* clause "notwithstanding anything contained in any other law for the time being in force" - gives the provision an over-riding effect. The punishment for such unauthorised possession is imprisonment for a term which shall not be less than five years but which may extend to G H

A imprisonment for life besides fine.

The petitioner is one of the accused in Bombay Blast which took place on 12.3.1993 registered as Case No.1 of 1993 on the file of the Designated Court for Greater Bombay. The case of the prosecution against the petitioner, set out in the chargesheet, is that on 16th January, 1993 he B "knowingly and intentionally procurred from accused Anees Ibrahim Kaskar through Sameer Ahmad Hingora, Hanif Kadawala, Baba @ Ibrahim Musa Chouhan, Abu Salem Abdul Qayoom Ansari and Manzoor Ahmed Sayed Ahmed 3 AK-56 rifles, 25 hand grenades and one 9 mm. Pistol and cartridges for the purpose of comitting terrorist acts. By keeping the AK-56 C rifles, hand grenades, pistol and cartridges in the possession willingly, accused Sanjay Dutt facillitated the objectives. Some parts of the rifle, the 9 mm. pistol and 53 rounds of live cartridges were recovered during the course of the investigation. Accused Yusuf Mohsin Nullwala, Kersi Bapuji Adenia, Rusi Framrose Mulla, Ajay Yashprakash Marwah, who caused D wilful destruction of evidence namely 1 AK-56 rifle, one 9 mm. pistol, and cartriges by deliberately removing them from the house of accused Sanjay Dutt, at his instance, with the intention to protect the offender i.e., Sanjay Dutt from legal consequences and therefore, they are also guilty of the offence u/s 201 IPC".

E The prosecution is relying upon the statements of the servant of the petitioner and of the police guard posted at his house and certain other circumstances. The Petitioner himself made a confession to the police, which has remained unretracted till today, wherein he admitted receiving three AK-56 rifles on 16.1.1993 alongwith ammunition from the aforesaid F persons but stated that two days after he returned two of them and retained only one for the purpose of self-defence. He stated that during those days the communal situation in Bombay was tense and there were constant threats to the lives and property of the petitioner and members of his family. Only with a view to defend himself in an extreme eventuality, the petitioner stated, he acquired the AK-56 rifle and that as soon as he came G to know that the persons who sold the said rifle to him were implicated in the case, he instructed his people to destroy the said weapon. He stated that he did so out of fear.

Sri Ram Jethmalani, learned counsel for the petitioner contends that H possession of any of the arms and ammunitions or other material specified

in Section 5 *per se* does not attract Section 5. More particularly, he submitted, possession of a weapon exclusively for self-defence can certainly not attract the said provision. Learned counsel pointed out that according to Section 5 read with the relevant entries in Schedule I to the Arms Rules, 1962, even the mere unauthorised possession of a pistol or a revolver in the notified area would by itself attract Section 5, if read literally. He submits that when the legislative competence of the Parliament to enact TADA was questioned in *Kartar Singh* v. *State of Punjab,* 1994 J.T. (2) 423, this Court affirmed the Parliament's competence with reference to *inter alia* Entry (I) of List-I of the Seventh Schedule to the Constitution. For this reason, he says, the requirement of the said Entry must necessarily be read into Section 5. In other words, according to the learned counsel, the prosecution must allege and establish that the weapon unauthorisedly in possession of the accused was intended to be used for any of the objects mentioned in Sub-Section (1) of Section 3 of the Act. He points out that Section 2(h) of the Act defines 'Terrorist act' and 'Terrorist' as under :-

> Sec. 2(h). "terrorist act" has the meaning assigned to it in sub-section (1) of Section 3, and the expression "terrorist" shall be construed accordingly;

Learned counsel urges that before a person is charged for having committed a terrorist act, it must be alleged that he committed any of the acts specified in sub-section (1) of Section 3. Similarly, any person, who is being charged for conspiracy, his actions must have nexus with the objects mentioned in sub-section (1) of Section 3. Section 5 does not say that the accused concerned found in possession of any arms and ammunitions specified, must be in possession of the same for any of the objects mentioned in sub-section (1) of Section 3. But unless the possession of the arms and ammunitions specified in Section 5 are related or connected with any of the objects mentioned in sub- section (1) of Section 3, the accused shall not be deemed to be a 'terrorist' within the meaning of the Act and the possession of any arms and ammunitions specified therein, shall not be deemed to be a 'terrorist act', says Sri Jethmalani. He relies upon the observations in the concurring opinion of R.M. Sahai, J. in Kartar Singh. In paragraphs 478 and 479 the learned Judge opined that to attract Section 5 there must be some inter- relation between Section 5 and Sections 3 and 4 of the Act, howsoever remote it may be. The following observations are particularly relied upon :

"In Sections 3 and 4 the offence arises on the act having been done whereas in Section 5 it is founded only on possession. Even under sub-section (3) of Section 3 person is liable to be prosecuted for abetting the offence if he assists or communicates with a terrorist. Sub-sections 5 and 6 inserted by Act 43 of 1993 to Section 3 also require that a person can be prosecuted only if he is found to be a member of a terrorist gang or terrorist organisation etc. The Act, therefore, visualises prosecution of the terrorist or disruptionist for offences under Sections 3 and 4 and in others only if they are associated or related with it. That is in keeping with the objective of the Act. The legislation has been upheld as the legislature is competent to enact in respect of a cirme which is not otherwise covered by any Entry in List II of the Seventh Schedule. The definition of the cirme, as has been discussed earlier, is contained in Sections 3 and 4 of the Act and it is true that while defining the crime it is open to the legislature to make provision open to the legislature to make provision which may serve the objective of the legislation and from a wider point of view one may say that possession of such arms, the use of which may lead to torrorist activity, should be taken as one of the offences as a preventive or deterrent provision. Yet there must be some inter-relation between the two howsoever, remote it may be. The harshness of the provisions is apparent as all those provisions of the Act for prosecuting a person including forfeiture of property, denial of bail etc., are applicable to a person accused of possessing any arms and ammunition as one who is charged for an offence under Sections 3 and 4 of the Act. It is no doubt true that no one has justification to have such arms and ammunitions as are mentioned in Section 5, but unjustifiable possession does not make a person a terrorist or disruptionist. Even under Ireland Emergency Provisions Act, 1978 on which great reliance was placed by learned Additional Solicitor General there is no such harsh provision like Section 5. Since both the substantive and procedural law apply to a terrorist and disruptionist or a terrorist act or a disruptive act, it is necessary, in my opinion that, this Section if it has to be immune from attack of arbitrariness may be invoked only if there is some material to show that the person who was possessed of the arms intended it to be used for terrorist or disruptionist activity or

it was an arm and ammunition which in fact was used." A

It may be noticed that the said observations were made on a submission "raised in the written submissions only". In other words, it does not appear that the said issue was raised or argud before the Constitution Bench. On this basis, it is contended by the other side that the said observations are in the nature of *obiter dicta* and cannot be treated as a decision. B

Since even the *obiter dicta* of this Court is said to be binding upon other Courts in the country and also because the interpretation placed upon Section 5 by the learned Judge amounts to reading words into Section 5 which are not there and further because interpretation of Section 5 one may or the other is likely to affect a large number of cases in the country, we think it appropriate that the matter is pronounced upon by the Constitution Bench so as to authoritatively settle the issue. C D

There is yet another issue which is raised by the petitioner in the additional grounds based upon Section 20(4)(bb) of TADA. It is submitted that the charge-sheet in this case was filed beyond six months of his arrest but no order extending the petitioner's detention was made by the Designated Court *with notice to the petitioner,* before the expiry of 180 days. In this context, the orders of the Bombay High Court granting him bail, or continuing it, are said to be of no significance, as held by the Designated Court itself in the order in question. (The Designated Court held that notwithstanding the said orders, the petitioner must be deemed in law to be in custody.) If so at the end of 180 days from the date of his arrest, says the counsel, an indefeasible right accrued to the petitioner to be enlarged on bail soon upon the expiry of 180 days. In support of this contention, strong reliance is placed upon the Judgment of this Court in Cirminal Appeal Nos. 732-735 of 1993 decided on July 12, 1994 (*Hitendra Vishnu Thakur & Ors. etc. etc.* v. *State of Maharashtra & Ors.,* J.T. (1994) 4 SC 255. Among other questions the said decision deals with the meaning, effect and retrospectivity of clause (bb) in sub-section (4) of Section 20 of TADA. We may read sub-section 4 in full at this stage : E F G

> "(4) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modification that– H

A (a) the reference in sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to "Judicial Megistrate or Executive Magistrate or Special Executive Magistrate";

B (b) the references in sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", and "one hundred and eighty days" respectively; and

C (bb) Provided further that, if it is not possible tc complete the investigation within the said peiod of one hundred and eightly days, the Designated Court shall extend the said period up to one year, 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 one hundred and eightly days; and

D (c) sub-section (2-A) thereof shall be deemed to have been omitted."

The Division Bench, construing the said provision in the light of Section 167 of the Criminal Procedure Code held thus:. "(The proviso to E Section 167(2) of the Code read with Section 20(4)(b) of TADA, therefore, creates an indefeasible right in an accused person, on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail..... As a consequence of the amend- F ment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged, where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (b) of sub-section (4) of Section 20 read with the proviso to sub-section (2) of Section 167 of Cr.P.C., an indefeasible right to be enlarged on bail accrues G in favour of the accused, if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 Cr.P.C. An obligation, in such a case, is cast upon the Court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases H governed by clause (bb) of Section 20(4). There is yet another obligation

also which is cast on the Court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf..... Thus, we find that once the period for filing the charge (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court *shall* release him on bail, if the accused seeks to be so released and furnishes the requisite bail. ..... It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's 'default'. Similarly, when a *report* is submitted by the public prosecutor to the Designated Court for grant of extension under clause (bb), its notice should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. It is true that neither clause (b) nor (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon."

We are of the respectful opinion that the said proviso may have been conceived to prod the prosecution to proceed with the complete the investigation with all promptitude. The idea is that the investigation should be concluded within 180 days of the arrest but in case it could not be concluded and the public prosecutor reports the progress of investigation and the specific reasons for the detention of the accused beyong the period of 180 days, the court - evidently on being satisfied with the progress of the investigation and the reasons for the continued detention of the accused - is empowered to extend the said period to one year. The absence of words providing for issuance of notice to the accused while extending the period of detention tends to support this view. If the reasoning and logic underlying the aforesaid observations in *Hitendra Vishnu Thakur* are extended to Section 167(2) of Cr.P.C., as it may well be contended, it would mean that every time the Magistrate authorises the detention of the accused in custody beyond 15 days, he would be obliged to give notice to the accused

A and hear him. Such a course may neither be feasible nor warranted. In our opinion, the view taken by the Division Bench in *Hitendra Vishnu Thakur* probably calls for a re-consideration.

It has been said in the said judgment that after the expiry of the statutory period mentioned in proviso to sub-section (2) of Section 167 and B sub-section (4) of Section 20 of the TADA and 'indefeasible right' is created in a accused person on account of the default by the investigating agency in the completion of the investigation. But can such a right be exercised by an accused who in the meantime has been remanded to custody under other provisions of the Code like Section 309(2) and Section C 209(b) of the Code. It need not be pointed out that Section 167 is a provision regarding authorising detention of an accused in custody during investigation. After the expiry of the statutory period mentioned therein, if the investigation is not concluded the accused becomes entitled to be released on bail. When such accused is released, then it shall be deemed D that he has been released under the provisions of Chapter XXXIII of the Code. According to us, the right to be released on bail under proviso to sub-section (2) of Section 167, accrues to an accused at a particular stage. But can it be held to be an 'indefeasible right' which can be exercised at any stage including the stage of trial? Even a Habeas Corpus application E on the ground that there is no valid order of remand or detention of the accused to custody, has to be dismissed, if it is found that on the date of the return of the Rule, the accused is in custody on the basis of a valid order of remand or detention. (*Ram Narayan Singh* v. *The State of Delhi and others,* [1953] SCR 652; *Naranjan Singh Nathawan* v. *State of Punjab & Others,* [1952] SCR 395 and *A.K. Gopalan* v. *Government of India,* [1966] F 2 SCR 427). In short, the meaning and effect of the said provision has to be authoritatively pronounced upon.

Yet another contention raised by Sri Jethmalani relates to interpretation of sub-section (8) of Section 20 in the facts and circumstances of the G case. We need not however, refer to it - nor to his other arguments - since we are referring the very Special Leave Petition to the Constitution Bench where, of course, it would be open to both the parties to raise all such contentions as are open to them in law.

H When we indicated our inclination to refer the matter to the Con-

stitution Bench, Sri Jethmalani made a fervent plea for releasing the petitioner on interim bail. We are, however, not inclined to accede to the said request. It is sufficient to observe that it shall be open to the petitioner to make this request, if he is so advised, before the Constitution Bench. A

Since the present Special Leave Petition is one directed against an order refusing bail and also because it is in the interests of justice that the questions indicated hereinabove are decided authoritatively at an early date, this is a case, in our opinion, which merits an expeditous hearing. It is open to the learned counsel for the parties to make a mention in this behalf before the Hon'ble Chief Justice of India. B

A.G.