

(1995) 04 SHI CK 0011

High Court of Himachal Pradesh

Case No: Criminal W.P. No. 1 of 1995

Partap Malik

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision: April 5, 1995

Acts Referred:

- Arms Act, 1959 - Section 25, 27
- Constitution of India, 1950 - Article 226, 227
- Penal Code, 1860 (IPC) - Section 120B, 216A, 307, 34
- Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 19, 2(1), 3, 4, 5

Citation: (1995) 1 ILR HP 703

Hon'ble Judges: L.S. Panta, J; Kamlesh Sharma, J

Bench: Division Bench

Advocate: Chhabil Dass and Anand Sharma, for the Appellant; Om Parkash Sharma, A.A.G., for the Respondent

Final Decision: Dismissed

Judgement

Kamlesh Sharma, J.

In this writ petition, Petitioner Partap Malik has prayed for quashing the charge against him under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter called the TADA) in F.I.R. No. 81 of 1993 dated 29.6.1993 or in any other F.I.R. which might have been recorded against him, and grant of anticipatory bail in respect thereof.

2. Brief facts arising out of the pleadings of the parties are that the Petitioner was working as teacher at Dalhousie from July, 1990 to July, 1992. After leaving Dalhousie the Petitioner had joined as Editor-cum-Executive Director of the monthly magazine "Chankaya Bureau" at Ghaziabad (U.P), which is owned and run by one Shri D.P. Yadav, Ex-Minister and M.L.A. of Uttar Pradesh. During his stay at Dalhousie, the Petitioner married one Smt. Neel Kamal, sister of Shri Sanjeev Raj against the wishes of her parents. As such, his relations with Sanjeev Raj were hostile. On a raid conducted in the

house of Sanjeev Raj a foreign-made pistol was recovered and F.I.R. No. 189 of 1994 u/s 25 of the Arms Act and Section 120-B I.P.C. was registered against him in the Police Station Dalhousie. During the course of investigation Sanjeev Raj revealed that the foreign-made pistol recovered from him was given to him by the Petitioner, as such, he was also made co-accused in the said case. Apprehending his arrest, the Petitioner moved this Court for anticipatory bail, which was granted in his favour on 28.11.1994 in Cr.M.P.(M) No. 869 of 1994. According to the Petitioner, he has been falsely implicated because he had written an article "HASIN VADION MEIN KALA DHANDA", a copy whereof is Annexure PA to the petition, against the District Police Chamba.

3. It is also on record that in an another case F.I.R. No. 81 of 1993 u/s 307 read with Section 34 I.P.C. and Sections 25, 27, 57 and 59 of the Arms Act was registered in Police Station, Khair on 29.6.1993 and Sections 3, 4 and 5 of the TADA were also added to it on 30.6.1993 and Section 216-A I.P.C. on a later date. The allegations made in this F.I.R. are that a secret information was received at Police Post Sanghani on 29.6.1993 at about 3.50 P.M. that six strangers carrying large bags and binoculars were passing through Chambi Adhwar (J and K border) in suspicious circumstances. Three of them, who disclosed their names Abdul Latif, Mohammad Han if and Mohammed Yakub Khan did come to Police Post, Sanghani to get their names entered as per the instructions issued to keep a watch on the activities of the militants who might come to that area from Jammu and Kashmir. Lateron, on receipt of the information that some other persons were staying in village Jalari, the Incharge, Police Post, Sanghani alongwith another constable left for that village to ascertain their particulars. On the way they met Abdul Latif, Mohammad Hanif and Mohammad Yakub Khan, from whom they made enquiries about the strangers staying at Jalari but they were not able to give satisfactory reply and tried to run away when the police officials tried to catch hold of them. They could only over-power one of them, namely, Abdul Latif and other two ran away. In the meantime, those strangers staying in the house of Gul Mohammad Magre opened fire on the police officials and one local citizen Abdul Rashid got bullet injuries. The strangers were asking the police officials to let off their accomplice Abdul Latif. At that time police officials were without any arms and ammunition. In the meantime, constables Jaiwant Raj and Man Singh reached the spot with arms and ammunition and on the counter-firing of the police officials, those strangers fled away towards Jammu and Kashmir border. During the investigation two accused Gul Mohammad and Shafi Mohammad were arrested on 5.7.1993 and later on two more accused Abdul Latif and Mohammad Yakub Khan were handed over by the Jammu and Kashmir Police to Himachal Pradesh Police on 10.8.1994. In their interrogation it was revealed that a gun deal had taken place in the year 1992 through one Iqbal Mohammad resident of Madpaniar, District Chamba from the militants of Jammu and Kashmir, who had failed to make full payment of the deal, therefore, the militants had come to the said village to kidnap Iqbal Mohammad and they had resorted to firing on 26.9.1993 under the circumstances stated hereinabove.

4. On his interrogation, Iqbal Mohammad had further revealed that two persons, namely, Parvez Malik and Mohammad Salim, whose names were later on found to be Partap Malik, the Petitioner, and Sanjeev Raj were introduced to them by one Vijay Kumar for purchase of a gun for which they were ready to pay huge amount. As per Iqbal Mohammad, he received an amount of Rs. 25,000/- from the Petitioner for the deal and at the first instance he bought one pistol for Rs. 19,500/- from one Arif at Bhadarwah with the help of one Muneer, who was working in brick kiln at Jawas in Chamba District but the said pistol was returned by the Petitioner to Iqbal Mohammad after a few days on the pretext that the same was out of order and asked him to arrange for AK-47 rifle. On the asking of Iqbal Mohammad, Arif had arranged for AK-47 rifle for a sum of Rs. 30,000/- which Iqbal Mohammad and Muneer brought from Bhadarwa to Chamba and thereafter to Dalhousie and handed over to the Petitioner, who further transported it to the residence of one D.P. Yadav at Ghaziabad in a Contessa Car and Nand Kishore Yadav and Sanjeev Raj were also with him. According to the police, the Petitioner was mainly instrumental in the said gun deal from the militants through Iqbal Mohammad and smuggling the same to Dalhousie and thereafter to Ghaziabad. Therefore, his complicity in the crime punishable under Sections 3, 4 and 5 of the TADA cannot be ruled out. According to the Police, the Petitioner had direct hand in purchase of AK-47 rifle from militants, which is a banned weapon and is used by the militants for anti-national activities, as such he has facilitated the commission of crime under the TADA. Since the investigation is going on, evidence against the Petitioner for the offence under the TADA that the said AK-47 rifle was used for disruptive activities is yet to be collected.

5. Apprehending his arrest in FIR No. 189 of 1994, the Petitioner moved an application for anticipatory bail (Cr.M.P.(M) No. 930 of 1994) in this Court in which interim directions were issued on 3.12.1994 not to arrest the Petitioner and he was granted opportunity to have the assistance of his counsel during the course of investigation. Later on, by order dated 19.12.1994 the Petitioner was ordered to be released on bail on his furnishing bail bonds in the sum of Rs. 5,000/- to the satisfaction of arresting authority/Judicial Magistrate Dalhousie on the further conditions stated in the said order. However, the State of Himachal Pradesh moved Cr.M.P.(M) No. 869 of 1994 for recalling the order dated 19.12.1994 and directing the Petitioner to approach the designated Court for the purpose of bail in view of the fact that the case against the Petitioner was also registered u/s 3, 4 and 5 of TADA, for which this Court had no jurisdiction to grant bail. Admittedly, this fact was not brought to the notice of the learned Single Judge who passed order dated 19.12.1994. After hearing the parties, Cr.M.P.(M) No. 869 of 1994 was allowed and order dated 9.12.1994 was recalled and Cr.M.P.(M) No. 930 of 1994 was dismissed. However, seven days time was granted to the Petitioner to move the appropriate forum, during which period he was not to be arrested. Thereafter, the Petitioner has filed the present writ petition.

6. Mr. Chhabil Dass, learned Counsel appearing for the Petitioner, has urged that assuming the accusations against the Petitioner, as stated in the reply-affidavit, are

correct, no case is made out against the Petitioner u/s 5 of the TADA. According to Mr. Chhabi1 Dass, when the Petitioner had allegedly purchased an AK-47 rifle through Iqbal Mohammad in June, 1993 and carried it to Ghaziabad to the residence of D.P. Yadav, Police Stations Khair, Tisa and Dalhousie of District Chamba, where the alleged offence was committed, was not a notified area as defined in Section 2(1)(f) of the TADA. Admittedly, the notification u/s 2(1)(f) of the TADA was issued later on 1.11.1993. Therefore, as per submission of Mr. Chhabi1 Dass, possession of AK-47 rifle by the Petitioner was not an offence u/s 5 of the TADA. So far the allegations made in FIR No. 81 of 1993 in respect of the incident dated 29.6.1993 are concerned, according to Mr. Chhabi1 Dass, there is no involvement of the Petitioner and his alleged complicity in the crime punishable under Sections 3 and 4 of the TADA is too far fetched.

7. On the other hand Mr. Om Parkash Sharma, learned Additional Advocate General, has pointed out that the case is yet to be investigated to find out whether the said AK-47 rifle was used by the Petitioner for disruptive activities. According to Mr. Sharma, in view of the incident of 29.6.1993 which had happened as a consequence of purchase of AK-47 rifle, a strong suspicion arises against the Petitioner in respect of the complicity of the Petitioner in the commission of crime under Sections 3 and 4 of the TADA. Mr. Sharma has also pointed out that by now it is well settled that this Court in exercise of powers under Article 226 of the Constitution should only interfere in the rarest of the rare cases and the present case is not of such nature in view of direct accusations in conjunction with attendant circumstances arising from the evidence so far collected by the police.

8. In order to appreciate the respective contentions of the learned Counsel for the parties, we would advert to the law laid down by the Supreme Court in their recent judgments. One of these judgments is State of Maharashtra v. Abdul Hamid Haji Mohammad (1994) 2 Supreme Court Cases 664, wherein the learned Judges were directly dealing with the question of jurisdiction of High Court under Article 226 of the Constitution to quash the prosecution "under the TADA. The answer to the question is given in Para 7 of the judgment, which is as under:

The first question is: Whether the High Court was empowered in the present case to invoke its jurisdiction under Article 226 of the Constitution to examine the correctness of the view taken by the Designated Court and to quash the prosecution of the Respondent under the TADA Act? Shri Jethmalani contended, placing reliance on the decisions in R.P. Kapur v. State of Punjab and State of Haryana v. Bhajan Lal that in the facts of this case, the High Court had such a jurisdiction since there is no accusation against the Respondent in the charge-sheet filed in the Designated Court, which, if believed, must result in his conviction for an offence punishable under TADA Act. We are not impressed by this argument of Shri Jethmalani. It is no doubt true that in an extreme case if the only accusation against the Respondent prosecuted in the Designated Court in accordance with the provisions of TADA Act is such that ex facie it cannot constitute an offence punishable under TADA Act, then the High Court may be justified in Invoking the power under Article 226 of the Constitution on the ground that the detention of the accused is

not under the provisions of TADA Act. We may to add that this can happen only in extreme cases which would be rare and that power of the High Court is not exercisable in cases like the present where it may be debatable whether the direct accusation made in conjunction with the attendant circumstances, if proved to be true is likely to result in conviction for an offence under TADA Act. The moment there is a debatable area in the case, it is not amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution and the gamut of the procedure prescribed under TADA Act must be followed, namely, raising the objection before the Designated Court, and, if necessary, challenging the order of the Designated Court by appeal in the Supreme Court as provided in Section 19 of TADA Act. In view of the express provision of appeal to the Supreme Court against any judgment, sentence or order, not being an interlocutory order of a Designated Court, there is no occasion for the High Court to examine merits of the order made by the Designated Court that the Act applies. We have no doubt that in the present case wherein the High Court had to perform the laboured exercise of scrutinising the material containing the accusation made against the Respondent and the merits of the findings recorded by the Designated Court holding that the provisions of TADA Act were attracted, there was sufficient indication that the writ jurisdiction of the High Court under Article 226 of the Constitution was not available. The ratio of the decisions of this Court in R.P. Kapur and Bhajan Lal on which reliance is placed by Shri Jethmalani, has no application to the facts of the present case. There was thus no justification for the High Court in the present case to exercise its jurisdiction under Article 226 of the Constitution for examining the merits of the controversy much less for quashing the prosecution of Respondent Abdul Hamid in the Designated Court for offences punishable under TADA Act.

(emphasis supplied)

9. This legal position has further been reiterated by the Supreme Court in State of W.B. and Anr. v. Mohd. Khalid and Ors. (1995) 1 Supreme Court Cases 684 to hold that, "If there is a debatable area in the case, it is not amenable to the writ jurisdiction under Article 226 of the Constitution of India and the gamut of the procedure prescribed under TADA (sic TADA) must be followed including challenging the order of the Designated Court u/s 19 of the TADA. It is also clear that the High Court cannot perform a laboured exercise of scrutinising the material.

(Emphasis supplied)

10. In this judgment, the learned Judges have referred to earlier judgments in State of Haryana v. Bhajan Lal 1992 Supp.(I) SCC 335; State of Bihar v. P.P. Sharma 1992 Supp(I) SCC 222 ; Maninder Kaur v. Rajinder Singh, 1992 Supp (2) SCC 25 ; Radhey Shyam Khemka v. State of Bihar (1993) 3 SCC 54; [State of Bihar Vs. Murad Ali Khan and Others](#) ; [Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others](#), and [Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others](#), wherein the Supreme Court has consistently held that the High Court should exercise its power of

quashing a criminal proceedings sparingly and with circumspection and in the rarest of rare cases. The High Court is not justified in going into the disputed question of fact by appreciating the documents and evidence produced before it by treating them as evidence to hold the accused person as innocent because it will amount to pre-trial of a criminal trial under Article 226 or 227 of the Constitution or inherent powers of the Court. In other words, the High Court should not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. The High Court may only examine whether the first information report or the complaint or the material collected by the prosecution taken on their face value and accepted in entirety, prima facie constitutes an offence or make out a case against the accused person.

11. Further, this Court finds that in none of these cases referred to by the Supreme Court the prayer was to quash the first information report or complaint at the very outset before giving an opportunity to the police to investigate the matter. In fact, in all these cases the quashing of criminal proceedings pending in the Court was the question involved, whereas, in the present case the Petitioner is seeking quashing of the first information report at the very outset, as a result of which the investigation will be throttled, which in our opinion, cannot be permitted in the facts and circumstances on record. Instead of rushing to this Court to file this petition, the proper course for the Petitioner was to approach the Designated Court under the TADA and seek appropriate orders from it, which could further be appealed against u/s 19 of the said Act.

12. So far this Court is concerned, we do not find this case of the category of the rarest of rare cases to quash the first information report. The notification u/s 2(1)(f) of the TADA might have come in operation later but the incident of 29.6.1993, which was as a consequence of the purchase of AK-47 rifle by the Petitioner, does raise a serious suspicion about the activities of the Petitioner for which fair chance is required to be given to the Investigating Agency. In the circumstances, we do not find any merit in this writ petition and it is dismissed. However, we direct that the Petitioner will not be arrested for a period of ten days, during which period he may approach the Designated Court for seeking appropriate orders, if he so desires.

13. Petition dismissed.