RANGKU DUTTA @ RANJAN KUMAR DUTTA A

v.

STATE OF ASSAM

(Criminal Appeal No. 2307 of 2009)

MAY 20, 2011 B

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Terrorist and Disruptive Activities (Prevention) Act, 1987 – s.20-A(1) – Conviction of appellant-accused by Designated TADA Court – Challenged on ground of violation of the C *provisions contained under s.20(A)(1) – Held: The Parliament through s.20-A has clearly manifested its intention to treat the offences under TADA seriously inasmuch as under s.20-A(1), notwithstanding anything contained in the CrPC, no information about the commission of an offence under TADA* D *shall even be recorded without the prior approval of the District Superintendent of Police – It is not the requirement under s.20-A(1) to have the prior approval only in writing – Prior approval may be either in writing or oral also – S.20(A)(1) is a mandatory requirement of law – First, it starts with an* E *overriding clause and, thereafter, to emphasise its mandatory nature, it uses the expression "No" after the overriding clause – Whenever the intent of a statute is mandatory, it is clothed with a negative command – Also, the requirement of s.20(A)(1) was introduced by way of an amendment with a view* F *to prevent abuse of the provisions of TADA – Thus, the Court while examining the question of complying with the said provision must examine it strictly – The requirement of prior approval must be satisfied at the time of recording the information – If there is absence of approval at the stage of* G *recording the information, the same cannot be cured by subsequent carrying on of the investigation by the DSP – In the instant case, even verbal approval of the concerned authority was not obtained before recording the information –*

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A *Therefore, the entire proceeding right from the registering of the FIR, filing of the charge-sheet and the subsequent trial was vitiated by a legal infirmity and there was a total miscarriage of justice in holding the trial, ignoring the vital requirement of law – Judgment of the Designated TADA Court therefore set*
B *aside.*

Appellant was allegedly an ULFA extremist. Placing reliance upon the FIR lodged by PW15-Office-in-charge of police station, against the appellant and other accused, the Designated TADA Court convicted the appellant
C **under Section 120B/302 IPC read with Section 3(2)(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and sentenced him to undergo imprisonment for life.**

In the instant appeal, the appellant challenged the
D **judgment of the Designated TADA Court on the ground that the FIR had been recorded in clear violation of the provisions contained under Section 20(A)(1) of the TADA Act, as a result whereof, the entire proceeding subsequent thereto was vitiated and this also vitiated the**
E **judgment and order of the designated TADA court. The appellant urged that in accordance with the provisions contained under Section 20(A)(1) of the TADA Act, no information about the commission of any offence under the said Act should be recorded by the Police without**
F **prior approval of the District Superintendent of Police and that in the present case, it was clear from the evidence of PW 15 that he did not take the approval of the Superintendent of Police before recording the FIR.**

The question which therefore arose for consideration
G **was whether in this case the mandatory requirement of Section 20(A)(1) of the TADA was complied with.**

Allowing the appeal, the Court

HELD:1. The requirement of Section 20(A)(1) of the
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TADA was introduced by way of an amendment with a view to prevent abuse of the provisions of TADA. The Parliament, through Section 20-A of TADA has clearly manifested its intention to treat the offences under TADA seriously inasmuch as under Section 20-A(1), notwithstanding anything contained in the Code of Criminal Procedure, no information about the commission of an offence under TADA shall even be recorded without the prior approval of the District Superintendent of Police and under Section 20-A(2), no court shall take congizance of any offence under TADA without the previous sanction of the authorities prescribed therein. It is not the requirement under Section 20-A(1) of the TADA Act to have the prior approval only in writing. Prior approval is a condition precedent for registering a case, but it may be either in writing or oral also. It is clear that approval has to be taken, even if it is an oral approval. [Paras 14, 15, 16] [647-F-G; 648-B-C-F-H]

State of A.P. v. A. Satyanarayana and Others **2001(10) SCC 597;** *Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others* **1994 (4) SCC 602: 1994 (1) Suppl. SCR 360 – relied on.**

2. The submission made by the State that the investigation was conducted by the DSP, therefore, the requirement of section 20(A)(1) was complied with, cannot be accepted. Section 20(A)(1) is a mandatory requirement of law. First, it starts with an overriding clause and, thereafter, to emphasise its mandatory nature, it uses the expression "No" after the overriding clause. Whenever the intent of a statute is mandatory, it is clothed with a negative command. Apart from that, since the said section has been amended in order to prevent the abuse of the provisions of TADA, this Court while examining the question of complying with the said provision must examine it strictly. No information about

A the commission of an offence under the TADA Act can be recorded by the Police without the prior approval of the District Superintendent of Police. Therefore, the requirement of prior approval must be satisfied at the time of recording the information. If a subsequent B investigation is carried on without a proper recording of the information by the DSP in terms of Section 20(A)(1), that does not cure the inherent defect of recording the information without the prior approval of the District Superintendent of Police. The requirement of approval C must be made at the initial stage of recording the information. If there is absence of approval at the stage of recording the information, the same cannot be cured by subsequent carrying on of the investigation by the DSP. [Paras 19, 20, 22 and 23] [649-D-F; 650-E-H; 651-A-D B]

Benjamin Leonard MacFoy v. United Africa Co. Ltd. [1961(3) Weekly Law Reports 1405] – referred to.

G.P. Singh's Principles of Statutory Interpretation, E 12th Edition, p.404 – referred to.

3. The Designated TADA Court came to a finding that there was verbal approval from the Superintendent of Police even after noting that the I.O. concerned (PW 15) admitted that he did not obtain approval. It is nobody's F case that PW 15 was confronted with the FIR while he was giving his evidence. Therefore, the prosecution in this case has failed to bring on record that verbal approval was obtained. PW 15 has not been declared hostile. Therefore, having regard to the clear evidence of G PW 15, this Court is constrained to hold that even verbal approval of the concerned authority was not obtained in the case before recording the information. Therefore, the entire proceeding right from the registering of the FIR, filing of the charge-sheet and the subsequent trial is H vitiated by a legal infirmity and there is a total miscarriage

of justice in holding the trial, ignoring the vital requirement of law. Therefore, the impugned judgment of the Designated TADA Court is set aside. [Para 26, 27 and 28] [651-F-H; 652-A-B]

Case Law Reference:

2001(10) SCC 597	**relied on**	**Para 14**
1994 (1) Suppl. SCR 360	**relied on**	**Para 16**
[1961(3) Weekly Law Reports 1405]	**referred to**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2307 of 2009.

From the Judgment & Order dated 10.09.2009 of the Designated Court, Assam, Gauhati in TADA Sessions Case No. 116 of 2000.

Manish Goswami, Map & Co., for the Appellant.

Vartika Sahay (Corporate Law Group) for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Heard learned counsel for the parties.

2. This is a statutory appeal under Section 19 of Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "the said Act") impugning an order dated 10.9.2009 passed by the Designated Court TADA. The learned counsel appearing for the sole appellant has impugned the judgment of the designated court (TADA) on various grounds but at the time of arguments, he made emphasis on a particular ground, namely, that in the instant case, the FIR has been recorded in clear violation of the provisions contained under Section 20(A)(1) of the said Act, as a result whereof, the entire proceeding subsequent thereto has been vitiated and this has also vitiated the judgment and order of the designated court.

A 3. The material facts of the facts are these.

4. That FIR was lodged on 6.11.1993 by one Ajit Kumar Sarma, Office-in-Charge of Bihpuria Police Station against several persons including the appellant. Of the four accused B persons, no charges were framed against Moni Pathak. In so far as Bhaben Gogoi @ Bikram was concerned, he was acquitted by the designated court and Indreswar Hazarika @ Babul Handique died during the pendency of the proceedings before the designated court. Only Rangku Dutta @ Ranjan C Kumar Dutta was convicted and is the appellant before us.

5. The FIR which has been lodged on 6.11.1993 runs as follows:

"I beg to report that on 5.11.93 at 2150 hrs. while SI D AQM Zahingir I/C Dholpur O.P. along with the PSO Hav. Loknath Konwar and other police personnel were informed law and order duty in connection with Debraj Theatre show at Dhalpur circle in open place by the side of Hill, some ULFA extremist fired at SI AQM Zahingir and PSO Hav. E Loknath under simultaneously from a close range behind them and as a result both of them succumbed to injuries.

Earlier of this incident on 5.10.93 an encounter took place between the ULFA with Dhalpur O.P. Place and under the leadership of SI AQM Zahangir I/C Dhalpur O.P. F where Lakhimpur Dist. ULFA commander Jogen Gogoi killed and since them the banned ULFA activists associates of Jogen Gogoi were planning with criminals conspiracy to liquidate SI AQM Zahingir.

G On 5.11.93 evening the said ULFA activists with the help of Sri ranku Dutta got identified SI AQM Zahingir and then ULFA extremist namely (1) Sri Indreswar Hazarika @ Babul Handique (2) Sri Nobel Gogoi @ Bikram under the leadership of Sri Moni Pathak @ Debo Pathak taking H advantage of darkness attacks simultaneously with fire

arms and killed SI AQM Zahingir and PSO Hav. Loknath Knowar.

So I request to register a case under Section 120(B)/302 IPC R/W 3/4/5 TADA(P) Act, 1987 against the (illegible) ULFA activist and four others associates, I have already taken up the investigation of the case."

6. On the basis of the FIR, a case being Bihpuria Police Station Case No. 497 of 1993, was initiated under Section 120B/302 IPC read with Section 3 / 4 and 5 TADA (P) Act and the designated court vide order dated 31st October, 2002 framed charges against the appellant, inter alia, under Section 120(B)/302 of the Indian Penal Code and Section 3(2)(1) of the said Act. Thereafter, the designated court by impugned judgment dated 10th September, 2009 passed in TADA Sessions Case No. 116 of 2000 found the appellant guilty of offences punishable under Section 120B/302 IPC read with Section 3(2)(1) of the said Act and sentenced him to undergo imprisonment for life and to pay a fine of Rs. 2000/-, in default further imprisonment for two months.

7. Learned counsel appearing for the appellant urged that in accordance with the provisions contained under Section 20(A)(1) of the said Act, no information about the commission of any offence under the said Act shall be recorded by the Police without prior approval of the District Superintendent of Police.

8. Learned Counsel submitted that the said provision under Section 20(A)(1) was incorporated by way of an amendment vide Section 9 of Act 43 of 1993. The said amendment came into effect on 23.5.1993 and the FIR was recorded on 6.11.1993.

Therefore, at the time when the FIR was recorded, the provision of Section 20(A)(1) was clearly attracted.

9. It will be in the fitness of things that to appreciate the

A points urged by the appellant, Section 20(A) is set out below:

> 20-A Cognizance of offence – (1) Notwithstanding anything contained in the Code, no information about the commission of an offence under this Act shall be recorded by the police without the prior approval of the District Superintendent of Police.
>
> (2)No court shall take cognizance of any offence under this Act without the previous sanction of the Inspector-General of Police, or as the case may be, Commissioner of Police.

10. Relying on the said section, the learned Counsel for the appellant submitted that from the evidence of PW 15 Ajit Kumar Sarma who recorded the FIR, it is clear that he did not take the approval of the Superintendent of Police before recording the FIR. In his cross-examination, PW 15 clearly stated "I did not obtain the approval from the concerned SP for registering the case." From the evidence of PW 11, who is one Sanjit Sekhar Roy, learned counsel stated that the said PW 11 was working on 22.6.2000 as DSP Headquarter at North Lakhimpur. In his cross- examination, he stated that the occurrence took place on 6.11.1993 and prior to the filing of the Ejahar which is the FIR, the written approval of the SP concerned was not obtained and in the Ejahar itself, There is no approval of SP, North Lakhimpur.

11. We have looked into the original FIR Exhibit P-12. In the original FIR, the following endorsement which has been made by Ajit Kumar Sarma is quoted below:

> "Received and registered Bihpuria PS Case no. 0497/93 u/s 120(B)/302 I.P.C. R/W 3/4/5 TADA (P) Act, 1987 with the approval of SP(I) NL."

12. It is an admitted position in this case that even though the aforesaid endorsement has been made in the FIR, the SP(I), North Lakhimpur, whose approval is alleged to have been taken by PW 15 Ajit Kumar Sarma has not been examined by

the prosecution. Apart from that, in the substantive evidence before the Court, PW 15, Ajit Kumar Sarma has categorically stated that he has not obtained approval of SP before registering the case. He rather said that he registered the case and himself took up the investigation of the case, prepared the seizure list and recorded the statement of witnesses and at that point of time, the rank of Ajit Kumar Sarma was that of SI of police.

13. We have already referred to the evidence of PW 11 who has also deposed that written approval of SP was not obtained.

14. In the background of these facts, the question is whether in this case the mandatory requirement of Section 20(A)(1) was complied with. Attention of this Court has been drawn to certain decisions of the Court where from it appears that there was a controversy and divergence of judicial view as to whether written approval or oral approval is required. The said divergence of judicial view has been set at rest by the judgment of a three-Judge Bench of this Court in *State of A.P. Vs. A. Satyanarayana and Others* 2001(10) SCC 597.

15. A Three-Judge Bench of this Court setting out the controversy in this matter ultimately came to hold as follows in paragraph 8:

> "Having applied our mind to the aforesaid two judgments of this Court, we are in approval of the latter judgment and we hold that it is not the requirement under Section 20-A(1) to have the prior approval only in writing. Prior approval is a condition precedent for registering a case, but it may be either in writing or oral also, as has been observed by this Court in *Kalpanath Rai* case 1997(8) SCC 732 and, therefore, in the case in hand, the learned Designated Judge was wholly in error in refusing to register the case under Sections 4 and 5 of TADA. We, therefore, set aside the impugned order of the learned

A Designated Judge and direct that the matter should be proceeded with in accordance with law."

16. It is, therefore, clear that approval has to be taken, even if it is an oral approval. Attention of this Court has also been B drawn to a decision rendered in *Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others* 1994(4)SCC 602 as to the requirement of the provision of Section 20(A)(1). The learned Judges of this Court after considering various provisions of the said Act held that the requirement of Section 20(A)(1) of TADA was introduced by way of an amendment with C a view to prevent abuse of the provisions of TADA. We, therefore, reiterate the principles laid down by this Court in paragraph 12 by Justice Dr. A.S. Anand(as His Lordship then was), which is set out below:

D "Of late, we have come across some cases where the Designated Courts have charge-sheeted and/or convicted an accused person under TADA even though there is not even an iota of evidence from which it could be inferred, even prima facie, let alone conclusively, that E the crime was committed with the intention as contemplated by the provisions of TADA, merely on the statement of the investigating agency to the effect that the consequence of the criminal act resulted in causing panic or terror in the society or in a section thereof. Such orders F result in the misuse of TADA Parliament, through Section 20-A of TADA has clearly manifested its intention to treat the offences under TADA seriously inasmuch as under Section 20-A(1), notwithstanding anything contained in the Code of Criminal Procedure, no information about the G commission of an offence under TADA shall even be recorded without the prior approval of the District Superintendent of Police and under Section 20-A(2), no court shall take congisance of any offence under TADA without the previous sanction of the authorities prescribed therein. Section 20-A was thus introduced in the Act with

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a view to prevent the abuse of the provisions of TADA." A

17. Learned counsel appearing on behalf of the State wanted to urge that in the instant case, the requirement of Section 20(A)(1) has been complied with and in support of her submissions, the learned counsel has drawn the attention of B this Court to the evidence of PW 4 and PW 6. In his evidence, PW 4 Nitul Gogoi has said that on 21.10.94 he was working as D.S.P. H.Q. at Lakhimpur. On that day, the S.P. Lakhimpur handed over the CD of this case to him to hold "remaining part of investigation of the case."

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18. PW 6 Nirmal Dr. Das also deposed that on 25.9.99, he was working as Head Quarter DSP at North Lakhimpur. On that day, S.P. Lakhimpur entrusted the investigation of the case in his name and accordingly, he got the CD from R.S.I.

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19. Relying on the aforesaid deposition of PW 4 and PW 6, the learned counsel urged that in the instant case, the investigation was conducted by the DSP, therefore, the requirement of section 20(A)(1) has been complied with. We are unable to appreciate the aforesaid submission. E

20. It is obvious that Section 20(A)(1) is a mandatory requirement of law. First, it starts with an overriding clause and, thereafter, to emphasise its mandatory nature, it uses the expression "No" after the overriding clause. Whenever the intent of a statute is mandatory, it is clothed with a negative F command. Reference in this connection can be made to G.P. Singh's Principles of Statutory Interpretation, 12th Edition. At page 404, the learned author has stated:

> "As stated by CRAWFORD: "Prohibitive or negative G words can rarely, if ever, be directory. And this is so even though the statute provides no penalty for disobedience. As observed by SUBBARAO, J.: "Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative". Section 80 and H

A Section 87-B of the Code of Civil Procedure, 1908, section 77 of the Railways Act, 1890; section 15 of the Bombay Rent Act, 1947; section 213 of the Succession Act, 1925; section 5-A of the Prevention of Corruption Act, 1947; section 7 of the Stamp Act, 1899; section 108 of
B the Companies Act, 1956; section 20(1) of the Prevention of Food Adulteration Act, 1954; section 55 of the Wild Life Protection Act, 1972, the proviso to section 33(2)(b) of the Industrial Disputes Act, 1947 (as amended in 1956); section 10A of Medical Council Act, 1956 (as amended
C in 1993), and similar other provisions have therefore, been construed as mandatory. A provision requiring 'not les than three months' notice is also for the same reason mandatory."

21. We are in respectful agreement with the aforesaid
D statement of law by the learned author.

22. So there can be no doubt about the mandatory nature of the requirement of this Section. Apart from that, since the said section has been amended in order to prevent the abuse
E of the provisions of TADA, this Court while examining the question of complying with the said provision must examine it strictly.

23. Going by the aforesaid principles, this Court finds that
F no information about the commission of an offence under the said Act can be recorded by the Police without the prior approval of the District Superintendent of Police. Therefore, the requirement of prior approval must be satisfied at the time of recording the information. If a subsequent investigation is carried on without a proper recording of the information by the
G DSP in terms of Section 20(A)(1), that does not cure the inherent defect of recording the information without the prior approval of the District Superintendent of Police. Whether the Deputy Superintendent of Police is a District Superintendent of Police or not is a different question which we need not
H decide in this case. But one thing is clear that the requirement

of approval must be made at the initial stage of recording the information. If there is absence of approval at the stage of recording the information, the same cannot be cured by subsequent carrying on of the investigation by the DSP. Reference in this connection is made to the principles laid down by Lord Denning speaking for the Judicial Committee of Privy Council in *Benjamin Leonard MacFoy Versus United Africa Co. Ltd.* [1961(3) Weekly Law Reports 1405]. Lord Denning, speaking for the unanimous Bench, pointed out the effect of an act which is void so succintly that I better quote him:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

24. We are in respectful agreement with the aforesaid view.

25. Therefore, the evidence of PW 4 and PW 6 do not come to any aid of the State Counsel in the facts of the present case.

26. We are, however, surprised to find that the Designated Court in the impugned judgment has come to a finding that there has been verbal approval from the Superintendent of Police even after noting that the I.O. In this case (PW 15) admitted that he did not obtain approval. It is nobody's case that PW 15 was confronted with the FIR while he was giving his evidence. Therefore, the prosecution in this case has failed to bring on record that verbal approval was obtained. It may be noted that PW 15 has not been declared hostile.

27. Therefore, having regard to the clear evidence of PW 15, this Court is constrained to hold that even verbal approval

A of the concerned authority was not obtained in the case before recording the information.

28. Therefore, the entire proceeding right from the reigstering of the FIR, filing of the charge-sheet and the B subsequent trial is vitiated by a legal infirmity and there is a total miscarriage of justice in holding the trial, ignoring the vital requirement of law. We have, therefore, no hesitation in setting aside the impugned judgment of the Designated Court.

29. The appeal is, therefore, allowed. The appellant who C is in jail must be set at liberty forthwith, if not required in connection with any other case.

B.B.B. Appeal allowed.