2024:MHC:3507

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.09.2024

PRONOUNCED ON : 01.10.2024

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

AND

THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR

CRL.A.Nos.411 & 282 of 2024
and
CRL.M.P.No.4266 of 2024

1.Subair ... Appellant in Crl.A.No.411/2024

2.Nabeesa Sulaiman ... Appellant in Crl.A.No.282/2024

Vs.

The National Investigation Agency,
Represented by Inspector of Police,
NIA, Chennai. ... Respondent in both Crl.As

Common Prayer: Criminal Appeals filed under Section 21 of National Investigation Agency Act, 2008, to call for the records relating to the order dated 06.02.2024 made in Crl.M.P.No.2476 of 2023 in Spl.S.C.No.17 of 2022 on the file of Special Court under the National Investigation Agency

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Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast and POTA Cases), Chennai at Poonamallee, Chennai – 600 056 and set aside the order of attachment and allow above appeals.

For Appellants : Mr.R.Vivekananthan
(in both Crl.As)

For Respondent : Mr.AR.L.Sundaresan
Additional Solicitor General of India
Assisted by Mr.R.Karthikeyan
Special Public Prosecutor
[For NIA]
(in both Crl.As)

COMMON JUDGMENT

S.M.SUBRAMANIAM, J.

FACTUAL MATRIX:

The present criminal appeals have been instituted challenging the order dated 06.02.2024 passed in Crl.M.P.No.2476 of 2023 in R.C.No.03/2018/NIA/DLI.

2. The National Investigation Agency represented by Inspector of Police / respondent filed a petition under Section 33 of Unlawful Activities (Prevention) Act, 1967 [hereinafter referred as "UA(P) Act"] seeking

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attachment of the property of the 1st appellant / Accused No.3, who is the son of 2nd appellant Mrs.Nabeesa Sulaiman.

2. It is not in dispute between the parties that the Spl.S.C.No.17 of 2022 is pending on the file of the Special Court under the National Investigation Agency Act, 2008. Charges were framed by the Trial Court on 15th February, 2022 and at the time of filing the petition 36 prosecution witnesses deposed and examined.

3. On 22.09.2016 at about 23:15 hours, Mr.C.Sasikumar, Spokesperson, Hindu Munnani (Front), Coimbatore was attacked indiscriminately by some unknown persons. He sustained grievous injuries on the neck, head, shoulder, hands and succumbed to his injuries in the KG Hospital at Coimbatore. Thudiyalur Police Station, Coimbatore Rural District registered FIR No.735 of 2016, under Section 302 of Indian Penal Code (IPC) on 23.09.2016. Initially the investigation was taken over by the Special Investigation Division, CBCID, Coimbatore, considering the gravity of the offence. The Special Investigation Division (SID), Crime Branch, Crime Investigation Department (CB-CID) came to know that the A1 to A4 being members of Popular Front of India, banned organisation, conspired to strike

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terror on particular section of people, and to create terror among the public at large by brutally murdering Mr.C.Sasikumar. The SID, CB-CID, Coimbatore arrested A1 to A4 and subsequently they were enlarged on bail. During the course of investigation, the SID, CB-CID found that the incident was not a case of simple murder, but a terrorist act committed as part of waging violent Jihad against Non-Muslims with an intention to strike terror in a section of people and general public and to create panic among them. The above facts were confirmed through the confession statements of Sadham Hussain-A2 and Subair-A3. Accordingly, the Investigating Officer invoked Sections 120-B and 153-A of IPC and Sections 16 and 18 of UA(P) Act, 1967.

4. The Government of India, Ministry of Home Affairs, vide their order dated 22.01.2018 entrusted the investigation to the National Investigation Agency as per powers conferred under Section 6(4) read with Section 8 of National Investigation Agency Act, 2008 (herein after referred as “NIA Act”). Accordingly, NIA took up investigation of the case by re-registering the original case on 29.01.2018. After collecting sufficient prosecutable evidence, the NIA filed chargesheet against Sadham Hussain-A2 and Subair-A3 for the commission of offence under Section 302 read with Sections 120-B, 302 read with 34, 153(A)(1)(b) of IPC and Sections 16(1)(a),

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18 and 20 of UA(P) Act on 07.04.2018. Subsequently, NIA had filed supplementary chargesheet against the accused Abuthagir-A1 for the offences under Section 18 of UA(P) Act and against accused Mohammed Mubarak-A4 under Section 302 read with Sections 120B, 302 read with 34, 154(A)(1)(b) of IPC and Sections 16(1)(a), 18 and 20 UA(P) Act before the Special Court on 21.06.2018. The Special Court took cognizance of the case and numbered as CC.No.3 of 2018 and CC.No.5 of 2018 respectively and trial is underway.

5. The Inspector General of Registrations, Registration Department, Government of Tamil Nadu on 08.08.2023 provided list of immovable properties belonging to the accused persons in the instant case. A search in the database revealed that a gift of Settlement Deed (Registered Document No.2268 of 2020) was handed over by (Subair-A3) to his mother Nabeesa Sulaiman / 2nd appellant herein in 2020. The Settlement Deed reads that a part of the property with Survey No.2907/2012 purchased by Subair in 2012 was handed over to his mother as Settlement in 2020 i.e., after commission of the offence in 2016 and after filing of chargesheet in apparent anticipation of action. The details in this regard has been provided by Sub Registrar, Peelamedu, Coimbatore on 11.08.2023.

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6. Based on the above details, the NIA filed petition under Section 33 of UA(P) Act seeking attachment of property of Accused No.3, who is facing trial. The Trial Court considered the petition and the petition mentioned property was attached. Having aggrieved, the appellant / A3 filed the present appeal.

CONTENTIONS OF THE APPELLANTS:

7. Mr.R.Vivekananthan, learned counsel for the appellants would mainly contend that A3 purchased subject property on 28.08.2012 measuring 600 Sq.ft. The Chargesheet was filed on 07.04.2018. Additional chargesheet was filed on 21.06.2018. The Settlement Deed was executed in favour of his mother on 10.08.2020 settling 300 Sq.ft of property. Under these circumstances, invoking Section 33 for attaching the said properties is beyond the scope of provisions of UA(P) Act.

8. Mr.R.Vivekananthan, would further contend that Chapter V of UA(P) Act, deals with "Forfeiture of proceeds of terrorism or any property intended to use for terrorism". The term "Proceeds of Terrorism" as defined under Section 2(g) of UA(P) Act denotes the properties, which have been

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obtained from commission of any terrorist act or acquired through funds traceable to a terrorist act or any property used or intended to be used, for the purpose of terrorist act / terrorism. Therefore, the NIA has to establish the property purchased by the appellant / A3 in the year 2012 is falling under the definition of "proceeds of terrorism" or acquired through funds traceable to a terrorist act. In the absence of establishing link between the purchase of property and proceeds of terrorism, the attachment made under Section 33 is beyond the scope of the provisions of UA(P) Act.

9. The prosecution in the present case has no locus standi to file an application under Section 33 of UA(P) Act as it does not confer any power on the Investigating Agency to file an application for attachment. Whereas, Section 25 of the Act empowers the Agency to make an order of attachment. Since NIA has not chosen to attach the property under Section 25 of the UA(P) Act, petition filed under Section 33 before the Special Court is untenable.

10. In support, the learned counsel for the appellants relied on the judgment of the Hon'ble Supreme Court of India in the case of ***People's Union For Civil Liberties and Another vs. Union of India***[1], wherein, the

1. (2004) 9 SCC 580

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Hon'ble Apex Court considered the meaning of Section 2(1)(c) of the Prevention of Terrorism Act, 2002 [hereinafter referred as "POTA"] relating to "proceeds of terrorism". Section 2(1)(c) of POTA contemplates "Proceeds of Terrorism" shall mean "all kings of properties which have been derived or obtained from commission of any terrorist act or have been acquired through funds traceable to a terrorist act, and shall include cash, irrespective of person in whose name such proceeds are standing or in whose possession they are found".

11. Relying on the above judgment, the appellants would submit that in the present case, the respondent has not established that the subject property purchased by the appellant in the year 2012 have been obtained from commission of any terrorist act or have been acquired through funds traceable through a terrorist act. The provisions of UA(P) Act is also akin to the provisions under POTA. Therefore, the said principles laid down by the Hon'ble Supreme Court is to be adopted.

12. In the case of ***Santhosh Construction vs. Union of India***[2], the Division Bench of Jharkand at Ranchi considered the scope of Section 33 of UA(P) Act. The Jharkhand High Court held that the provisions as contained

2. 2023 SCC Online Jhar 300

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under Section 33 of the Act, 1967 does imply that there is reason to believe that it is proceeds of the terrorism, the same can either be seized in course of investigation by the Investigating Agency under the provision of Section 25 or in course of trial by the Court under the provision of Section 33 of the Act, 1967 i.e., for the purpose of not allowing the said proceeds to be used in the terrorist activities so as to achieve the very object and intent of the Act.

REPLY BY THE RESPONDENT:

13. Mr.AR.L.Sundaresan, learned Additional Solicitor General of India appearing on behalf of the National Investigation Agency would oppose by stating that the interpretation of Sections 25 and 33 of UA(P) Act, 1967 have been misconstrued by the appellants. The circumstances warranting invocation of Section 25 is not comparable with the application under Section 33 of UA(P) Act for attaching the property through Court during the course of trial.

14. At the first instance, the learned Additional Solicitor General of India would contend that the Division Bench of Jharkhand High Court judgment would have not application with reference to the facts of the present case. More so, in the said judgement the scope of Section 33 has not

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been independently interpreted with reference to the facts. The general observations made by the High Court of Jharkhand may not be of any avail to the appellants so as to succeed in the present criminal appeal. Regarding the judgment of the Hon'ble Supreme Court in People's Union for Civil Liberties case cited supra, the learned Additional Solicitor General of India would contend that the case was under the provisions of POTA. In paragraph 29, the Hon'ble Supreme Court considered the meaning of “Proceeds of Terrorism” and the said principles are relating to the attachment of property by the Investigating Officer under Section 25 of UA(P) Act and the scope of Section 33 was not considered by the Hon'ble Supreme Court. Therefore, the said judgments and the facts therein are distinguishable.

15. Learned Additional Solicitor General of India, further said that with reference to the Jharkhand High Court judgment in ***Santhosh Construction's*** case cited *supra*, an appeal was preferred by M/s. Santhosh Construction and the Hon'ble Supreme Court of India dismissed the SLP on 07.08.2023 with an observation that “the question(s) of law involved in this case is left open to be considered in an appropriate case”. Therefore, the said judgment cannot be construed as precedent for the purpose for considering the facts of the present case.

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16. The UA(P) Act, 1967 was enacted to provide for more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therewith.

ANALYSIS:

17. Considering the submissions of the parties to the *lis,* let us now look into the relevant provisions of the UA(P) Act, 1967 to consider the issues raised in the present Criminal Appeals.

18. Section 2(1)(g) defines "Proceeds of Terrorism" means; (i) "all kinds of properties which have been derived or obtained from commission of any terrorist act or have been acquired through funds traceable to a terrorist act, irrespective of person in whose name such proceeds are standing or in whose possession they are found; or (ii) any property which is being used, or is intended to be used, for a terrorist act or for the purpose of an individual terrorist or a terrorist gang or a terrorist organisation. Explanation – For the purposes of this Act, it is hereby declared that the expression "proceeds of terrorism" includes any property intended to be used for terrorism".

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19. Chapter V of the Act deals with "forfeiture of proceeds of terrorism or any property intended to be used for terrorism". Any property intended to be used for terrorism was inserted by Act 3 of 2013 with effect from 01.02.2013.

20. Section 24-A deals with "Forfeiture of proceeds of terrorism". Section 25 provide "Powers of Investigating Officer and Designated Authority and appeal against order of Designated Authority".

21. Sub Section (1) to Section 25 stipulates that "If an officer investigating an offence committed under Chapter IV or Chapter VI, has reason to believe that any property in relation to which an investigation is being conducted, represents proceeds of terrorism, he shall, with the prior approval in writing of the Director General of the Police of the State in which such property is situated, make an order seizing such property and where it is not practicable to seize such property, make an order of attachment directing that such property shall not be transferred or otherwise dealt with except with the prior permission of the officer making such order, or of the Designated Authority before whom the property seized or attached is produced and a copy of such order shall be served on the person concerned".

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22. Section 25 amplifies that the an Officer investigating an offence is empowered to seize property involved in proceeds of terrorism. Therefore, to invoke powers conferred under Section 25, the Investigating Officer has to establish that the property sought to be seized is "proceeds of terrorism" within the meaning of Section 2(1)(g) of the UA(P) Act. Therefore, powers of the Investigating Officer to seize, if has reason to believe, that any property in relation to which an investigation is conducted represents the proceeds of terrorism, he shall seize the said property. Therefore, the powers under Section 25 is to be exercised by the Investigating Officer during conduct of investigation.

23. Section 33 deals about Forfeiture of property of certain persons. Sub Section (1) stipulates "Where any person is accused of an offence under Chapter IV or Chapter VI, it shall be open to the court to pass an order that all or any of the properties, movable or immovable or both, belonging to him, shall, during the period of such trial, be attached, if not already attached under this Chapter". Section 33(1) provides power to the Court to pass an order of attachment during the trial. Therefore plain reading of Sections 25 and 33 would reveal that both are not connected, Section 25 confers power to

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the Investigating Officer and Section 33 provides power to the Court to attach the property during trial. Section 33 is a stand alone provision provides power to the Court to attach the property during course of trial. The distinction would be under Section 25 an Investigating Officer if has reason to believe that property represented proceeds of terrorism, he shall with the approval in writing of the Director General of Police or Director General of National Investigation Agency shall seize the property.

24. However, Section 33 is independent and stand alone provision providing powers to the Courts to attach the property during the course of trial. The circumstances under which the Court can attach the property have been narrated under Section 33 itself. In order to invoke the powers conferred under Section 33 by the Court, an application is necessary from the NIA. Therefore, the contention of the petitioner that the respondent has no locus standi to file a petition under Section 33 is untenable. Court has to exercise the powers under Section 33 if an application is moved for attaching the property by the Investigating Agency.

25. Section 33 states that “it shall be open to the court to pass an order that all or any of the properties, movable or immovable or both, belonging to

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an accused, the power to attach the property shall be exercised during the period of trial". Section 33 do not speak about the property in relation with "proceeds of terrorism". Therefore, all or any of the properties, movable or immovable or both, belonging to an accused is attachable by the order of the Court under Section 33 of UA(P) Act.

26. The legislative intention is to provide balance between the powers conferred on the Investigating Officer and the Court. The power to attach the property is conferred on the Investigating Officer, if such property is identified as "proceeds of terrorism". However, if the Investigating Agency found that other properties are also to be attached, while dealing with the terrorist activities under the UA(P) Act, then the Investigating Agency has to file an application before the Court concerned for passing an order of attachment.

27. Let us now consider the scope of attachment made by the Court in exercise of the powers conferred under Section 33 UA(P) Act, 1967.

28. Sub Section (2) to Section 33 clarifies that "Where a person has been convicted of any offence punishable under Chapter IV or Chapter VI,

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the court may, in addition to awarding any punishment, by order in writing, declare that any property, movable or immovable or both, belonging to the accused and specified in the order, shall stand forfeited to the Central Government or the State Government, as the case may be, free from all encumbrances".

29. The very objective of the Act is to impose by law reasonable restrictions in the interest of the sovereignty and integrity of India. Prevention of terrorism has been globally viewed seriously and by virtue of resolution adopted by Security Council of United Nations measures are taken by all the States to combat international terrorism.

30. After due consideration and examination, the Government has to cover various facets of terrorism, terrorist activities, including financing of terrorism, which were not fully covered before the enactment of UA(P) Act.

31. The Unlawful Activities (Prevention) Amendment Bill, 2011 inter-alia provides;

(i) for attachment or forfeiture of property equivalent to the counterfeit Indian currency involved in the offence, including the face value of such

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currency which are not defined to be of high quality but are part of the common seizure along with the high quality counterfeit Indian currency;

(ii) for attachment or forfeiture of property equivalent to or the value of the proceeds of terrorism involved in the offence;

(iii) for confiscation of movable or immovable property on the basis of the material evidence where the trial cannot be concluded on account of the death of the accused or the accused being declared as a proclaimed offender or any other reason.

32. With reference to the objectives and to prevent terrorist activities, the properties both movable or immovable belonging to an accused, necessarily to be attached, if the Court finds that such attachment is just and necessary. Sub Section (2) to Section 33 proceeds by stating that the Court may in addition awarding any punishment forfeit any property movable or immovable or both belonging to an accused. In order to impose the punishment under Sub Section (2) powers are conferred on the Court under Section 33 to attach the properties.

33. Sub Section (4) to Section 33 states that “Where a person is accused of an offence punishable under Chapter IV or Chapter VI, the court

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may pass an order directing attachment or forfeiture, as the case may be, of property equivalent to or the value of the proceeds of terrorism involved in the offence". Therefore, attachment of all or any of the properties movable or immovable or both belonging to an accused may under Section 33(1) is an interim measure and cannot be construed as a final decision taken by the Court. Such attachment of property can be defended during trial by the accused persons. Once the property is attached under Section 33(1), the said properties, which may not be proceeds of terrorism can be dealt with by the Courts at the time of passing final judgment under Sub Sections (2) to (5) of Section 33.

34. The powers of the Court conferred under Section 33 is wider enough to attach all or any of the properties during the course of trial and take final decision, regarding such attached properties and at the time of passing judgment. Thus, the application made by the NIA under Section 33(1) for attachment of all or any of the properties, need not be the properties in connection with proceeds of terrorism. It is an interim measure and the attachments made during the pendency of the trial are to be dealt in accordance with Sub Sections (2) to (5) of Section 33.

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35. Though the provision appears to be draconian, since it deals with all the properties of a person involved in terrorist activities, the Parliament thought fit to confer powers to the Court to make such attachment after conducting an enquiry. Therefore, this Court do not find any justifiable reason to consider the contention of the appellants that the NIA has no locus standi to file an application under Section 33. Courts has to exercise powers under Section 33 if any applications are received from the Investigating Agency for attachment of property during the pendency of trial.

36. It is relevant to consider the judgment of the Constitution Bench of the Hon'ble Supreme Court of India in the case of ***Kartar Singh vs. State of Punjab***[3], wherein, the Constitution Bench in a similar provision under the Terrorist and Disruptive Activities (Prevention) Act, 1987, held as follows;

> "**150.** This argument is resisted by the learned Additional Solicitor General contending that Section 8 only vests the property or interest of the 'terrorist' in the State and does not forfeit the third party's interest and that the third party can always enforce its rights against the 'terrorists' in respect of its interest in the forfeited property according to law notwithstanding the forfeiture.

3. (1994) 3 SCC 569

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151. Section 8(1) of the Act gives discretionary power to the Designated Court while awarding any punishment on conviction of an offence under the Act or any rule made thereunder, to pass an order in writing, declaring that any property whether moveable or immovable or both, specified in the order belonging to the convicted person, shall stand forfeited to the Government free from all encumbrances.

152. Sub-section (2) of Section 8 states that it is open to the Designated Court trying an accused for any offence under the Act or any rule made thereunder to pass an order attaching all or any of the properties belonging to the accused during the period of his trial and in case the trial ends in conviction, the property will stand forfeited to the Government free from all encumbrances.

153. .....

154. .....

155. .....

156. The discretionary power given to the Designated Court under Section 8(1) and (2) is to be exercised under strict contingencies, namely that (1) there must be an order of forfeiture and that order must be in writing; (2) the property either moveable or immovable or both must belong to the accused convicted of any offence of TADA Act or rule

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thereunder; (3) the property should be specified in the order; (4) even though attachment can be made under Section 8(2) during the trial of the case, the forfeiture can be ordered only in case of conviction and not otherwise.

157. The very fact that the order should be in writing implies that the Designated Court must give reasons for such an order even though the section does not specifically require the Designated Court to record its reasons for so doing, because the word 'order' even according to the lexicon meaning is that it is a decision or direction either interlocutory or preliminary or final by the court trying the offence. Secondly, under Section 19 of the Act, an appeal lies straight to the Supreme Court as a matter of right from any order not being interlocutory order both on facts and law."

37. The Special Court in the present case has considered the scope of Section 2(g) and Section 33 of UA(P) Act, 1967. The understanding of the Special Court to invoke the powers conferred under Section 33 of UA(P) Act is in consonance with the spirit and the legislative intention explicitly traceable under the said provision. Thus, the order of attachment made by the Special Court under Section 33 is in accordance with Section 33 and we do not find any infirmity of perversity.

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38. Accordingly, the order under challenge is confirmed and consequently the Criminal Appeals stand dismissed. Connected Miscellaneous Petition is closed.

[S.M.S., J.] [N.S., J.]
01.10.2024

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Index : Yes
Speaking order
Neutral Citation : Yes

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To

1.The District and Sessions Judge,
Special Court under the National Investigation Agency Act, 2008,
Sessions Court for Exclusive Trial of Bomb Blast/POTA Cases,
Poonamallee, Chennai.

2.The Inspector of Police,
The National Investigation Agency,
NIA, Chennai.

3.The Special Public Prosecutor,
High Court of Madras,
Chennai – 600 104.

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