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Case Comment: Thwaha Fasal vs Union of India

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INTRODUCTION

India has seen a plethora of cases where charges are leveled under the Unlawful Activities Prevention Act, 1967¹ and since the conception of this elusive act, many people, or rather the victims have faced the brunt of the barbaric law where even many cases go unaccounted by the Indian Judicial System.² Among them, one such case was accounted by the Hon'ble Supreme Court which bears the name-Thwaha Fasal v. Union of India.³ This case unveiled many loopholes in the above-mentioned act and the judges in the said case accounted that mere association or containing artifacts or materials that are related to a banned outfit, will not constitute an offence under UAPA unless and until there is Mens Rea (intention) to further the activities which have little/grave connection to the banned organization and took note of the fact that Constitutional Courts do not have any obligation to be bound to the provisions of UAPA.⁴

¹ Unlawful Activities Prevention Act 1967

² *Ibid*

³ *Thwaha Fasal v Union of India* Criminal Appeal No 1302 of 2021

⁴ *Ibid*

BACKGROUND

The word “Terrorism” was engendered during the French Revolution and as far as India is concerned, it emerged during the suicide bombings of the 80s and 90s. Although the term has not received any legislative assent in India, a definition was given to the term in the 8th Commission on Terrorism where it was defined as “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.”⁵

As the above-mentioned definition accounts terrorism as a criminal act with an intention, likewise the Thwaha Fasal case dealt with the same issue whether mere handling and association with a banned organization will constitute an offence under UAPA, even without any intention to buttress those acts. This case also shredded light on the fact that minimal mistakes committed while interpreting facts and circumstances can lead to erroneous outcomes and in a way, discussed the flawed provisions of the act which have wide meanings and aspects.⁶

FACTS OF THE CASE

“On 1st November 2019, the complainant who is the Sub-Inspector of Police attached to Pantheerankavu Police Station in Kozhikode, Kerala found that the accused nos.1 to 3 were standing in suspicious circumstances in front of Medicare Laboratory in Kozhikode. After seeing the police vehicle, the accused no. 3 ran away. However, the accused nos.1 and 2 were apprehended. Accused no.1 (Allan Shuaib) of the age of 20 years, was carrying a shoulder bag and accused no.2 (Thwaha Fasal) of the age of 24 years, was carrying a red plastic file. Nine items were seized from the shoulder bag of the accused no.1. From the red plastic file of the

⁵ Government of India, ‘Combatting Terrorism Protecting By Righteousness’ (8th Report, 2nd Administrative Reforms Commission, June 2008) <https://darpg.gov.in/sites/default/files/combatting_terrorism8.pdf> accessed 23 November 2021

⁶ *Ibid*

accused no.2, two items were seized.⁷ The First Information Report (FIR) was registered on the same day under Sections 20, 38, and 39 of the 1967 Act alleging that the accused nos. 1 and 2 were the members of the Communist Party of India (Maoist) [for short “CPI (Maoist)”] which is a terrorist organization within the meaning of Clause (m) of Section 2 of the 1967 Act which is listed at Item No.34 in the First Schedule to the 1967 Act.”⁸ Even prior sanction had been given by the Central Government to the Constitutional Courts of India to take cognizance of the case⁹ under “Section 45 of UAPA, 1967.”¹⁰ The special court of NIA acquitted the accused and after the subsequent prosecution in the High Court, accused no. 1 was acquitted but accused no. 2 was denied bail,¹¹ and the Union Government after taking note of the High Court’s decision appealed the same case in the Hon’ble Supreme Court and the said decision was also appealed from accused no. 2’s side.

APPLICATION OF RELEVANT LAWS

There are a plethora of statutory provisions that had been used to charge the accused under the UAPA Act, 1967. Beginning with accused no. 1, 3 provisions of UAPA had been used, namely Section 20, 38, and 39 of the Act. Section 20 states, “Any person who is a member of a terrorist gang or a terrorist organization, which is involved in a terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine.”¹²Section 38 states, “A person, who associates himself, or professes to be associated, with a terrorist organization to further its activities, commits an offence relating to membership of a terrorist organization and shall be punishable with imprisonment for a term not exceeding 10 years, or with fine, or both.”¹³ But the said provision is subject to two exceptions- Firstly, if the organization was not declared as a terrorist organization in the 1st Schedule at the time of his joining, and secondly, the person concerned did not join the alleged organization at the time of its inclusion in 1st Schedule as a terrorist organization.

⁷ *Ibid*

⁸ *Thwaha* (n 1)

⁹ *Ibid*

¹⁰ Unlawful Activities Prevention Act 1967, s 45

¹¹ *Ibid*

¹² *Ibid* s 20

¹³ *Ibid* s 38

Section 39 of the said Act states, “The person who with the intention to further the activity of the terrorist organization, provides support or arranges, manages or assists in arranging or managing the support to the terrorist organization, shall be punishable with a term not exceeding 10 years, or with fine, or with both.”¹⁴ Even, accused no. 1 was slapped with Section 120B of IPC¹⁵ which deals with “Criminal Conspiracy.” Apart from this, accused no. 2 was charged additionally with Section 13 of the above-mentioned act which states, “Whoever takes part in or commits, or advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine and whoever, in any way, assists any unlawful activity of any association declared unlawful under section 3, after the notification by which it has been so declared has become effective under sub-section (3) of that section, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.”¹⁶

ISSUES

The Thwaha Fasal case carried a mammoth of issues that the apex court took cognizance of. The first and the foremost issue among all was whether the accused can be booked for committing an offence under Section 38 and Section 39 respectively, even when no intention behind committing the activities can be prima facie gauged from the facts and circumstances of the case. The second issue that is pertinent to note was whether Section 13 under which, accused no. 2 was held, holds any ground to allege the accused of committing any offence under this provision.¹⁷ Further, the next issue that the court had to deal with was whether the Constitutional Courts of the land, i.e. India can waive off the charges, owing specifically to Section 43D (5) of UAPA Act, 1967¹⁸, when no reasonable grounds can be found to be prima facie true after the perusal of facts and circumstances of the case. The next pertinent issue that

¹⁴ *Ibid* s 39

¹⁵ Indian Penal Code 1860, s 120B

¹⁶ Unlawful Activities Prevention Act 1967, s 13

¹⁷ *Ibid*

¹⁸ *Ibid* s 43D (5)

arose, that was not overt from the facts was whether individual interests and activities can be bottled down to be given the name of terrorist activities under the stringent and barbaric Act.¹⁹

JUDGEMENT

Different issues have been dealt with taking note of which, various revelations have been made by the learned judges in the apex court. The apex Court delivered that mere association or professing to be a member of a terrorist organization will not be alleged to be an offence committed under Section 38, and likewise, mere support provided or assistance provided to other members to support a terrorist organization will not constitute an offence under Section 39 of the act until and unless they are bridged with an intention to further the activities in support of the terrorist organization, the rationale was supported by PUCL case where it was held that “any offence committed would be counted under Sections 20,21, and 22 of POTA, 2002 only when an element of Mens’ Rea can be gauged from the facts and circumstances of the case.”²⁰

The court also pronounced that the stringent provision of the UAPA Act, particularly Section 43D (5) cannot negate the constitutional courts from granting bail to the accused if it confers with the violation of the provisions of Part 3 of the Indian Constitution.²¹ and the court cited the K.A. Najeeb case²²in which, the apex court provided the same judgement and justification as mentioned above.²³ Even citing the Zahoor Ahmad Shah Watali case²⁴, the court also held, “the courts of the land should not indulge in holding a mini court to cross-examine the evidence itself, instead they should emphasize on taking cognizance of the evidence and based on it, deliver the judgement.” Apart from this, the court cited that since NIA failed to comply with the provision of Section 45 of the 1967 Act (it holds for taking prior sanction of the central/state government to prosecute the cases under the UAPA Act),²⁵ the prosecution

¹⁹ *Ibid*

²⁰ *PUCL & Anr v Union of India* [2004] 9 SCC 580

²¹ *Ibid*

²² *K A Najeeb v Union of India* [2021] 3 SCC 713

²³ *Ibid*

²⁴ *National Investigation Agency v Zahoor Ahmad Shah Watali* [2019] 5 SCC 1

²⁵ *Ibid*

cannot take place under Section 20 and also, as Section 13 comes under Chapter 3 of the Act and Section 43D (5) can only be applied for offences committed under Chapters 4 and 6 of the Act, the court held that Section 13 cannot thus be invoked to charge accused no. 2. Therefore, the Hon'ble Supreme Court not finding any of the shreds of evidence mentioned in the charge sheet to be prima facie true, waived off all the charges from both the accused and subjected them to have been let off only with a nominal punishment of fine or in a way, acquitted them.²⁶

ANALYSIS OF THE CASE

The Thwaha Fasal case dealt with different aspects of the UAPA Act and also, a plethora of pronouncements have been made which can have an immense persuasive value. Coming onto the critical analysis of the case, the judges have emphasized to pass two pre-requisites to prosecute an individual under Sections 38 and 39- Firstly, there must be an association or support provided to the terrorist organization, and secondly, there must be an intention (mens rea) to further the activities of the terrorist organization. It is also pertinent to note that the court reemphasized the need of the Constitutional Courts to guard the basic interests and liberty of an individual if reasonable grounds cannot be found to be prima facie true, which cannot be negated by Section 43D (5), as citing the K.A. Najeeb case, thus upholding the supremacy of the Constitution and the autonomy of the judiciary.

One major flaw that was unveiled by this case is that a wide spectrum has been given to the word "Terrorist Act" under Section 20, thus making it difficult for the custodians of justice to draw a line between the acts with a bonafide and malafide intention and sometimes, as is evident from the above-mentioned case, even the investigating officers also travel along the wrong course during their investigation. The court also held that mere sloganeering like "INQUILAB ZINDABAD" and "MAOISM ZINDABAD" will not constitute any of the offences

²⁶ *Ibid*

under the 1967 Act, thus advocating the cause of Article 19(1)(a) of the Indian Constitution, i.e. Freedom of Speech and Expression.²⁷

CONCLUSION

The Thwaha Fasal case showcases to the future course of adjudication that how mere wrongful interpretations can lead to serious implications and can complicate every spectrum of the Judicial System. It also describes that it is indispensable on the part of the investigating officials to cautiously interpret the facts and circumstances of the case charged under the UAPA Act. Also, it unveils that mere association or support provided to a terrorist organization will constitute any offence unless it gets amalgamated with an intention to further those activities. The case has also advocated that mere wrongful interpretation of the provisions cannot subserve the liberty and freedom of an individual, thereby maintaining the supremacy of the Fundamental Right enshrined in the Indian Constitution. Hence, the case likewise, the earlier judicial pronouncements, will be remembered for advocating the cause of natural justice against the facet of the UAPA Act that “an innocent will be guilty until proven innocent”, and even advocates the fact that how a wrongfully interpreted case can act as a scourge to the society and encumber the judicial system by way of appeals made only because of erroneous interpretation.

²⁷ Constitution of India 1950, art 19(1)(a)