(2009) 1 ILR (Ker) 309 : (2009) 1 KLT 7

High Court Of Kerala

Case No: Writ Petition (Criminal) No. 377 of 2008 (S)

Safiya		APPELLANT
	Vs	
Rep. by Secretary, The District Magistrate and District, Superintendent of Central Prison and The District Superintendent of Police		RESPONDENT

Date of Decision: Dec. 12, 2008

Acts Referred:

- Arms Act, 1959 - Section 27
- Criminal Procedure Code, 1973 (CrPC) - Section 154, 170, 173, 173(2)
- Penal Code, 1860 (IPC) - Section 126, 143, 147, 148, 149

Citation: (2009) 1 ILR (Ker) 309 : (2009) 1 KLT 7

Hon'ble Judges: Kurian Joseph, J; K.T. Sankaran, J

Bench: Division Bench

Advocate: Rajit, for the Appellant; Government Pleader, for the Respondent

Final Decision: Dismissed

Judgement

Kurian Joseph, J.

Subjective satisfaction of the detaining authority on perusing the report of the sponsoring authority and also the materials forwarded by the Superintendent of Police is the sine qua non for preventive detention under the provisions of the Kerala Anti-Social Activities (Prevention) Act, 2007. u/s 3 of the Act the District Magistrate passes the order of detention after entering the subjective satisfaction on the basis of the information received from the police officer with regard to the activities of any Known Goonda or Known Rowdy, with a view to preventing such person from committing any anti-social activity within the State of Kerala. The crucial question is whether in a situation of the

investigating officer having filed final report u/s 173(2) of the Code of Criminal Procedure should the District Magistrate scrutinize the records leading to the final report u/s 173(2) of the Code of Criminal Procedure.

2. The Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as the Act) is intended to provide for the effective prevention and control of certain kind of anti-social activities in the State of Kerala. Anti-social activity has been generally defined to mean any conduct causing (likely to cause also) directly or indirectly, any feeling of insecurity, danger or fear among the general public or any section thereof, or any danger to safety of individuals, safety of public, public health or the ecological system or any loss or damage to public exchequer or to any public or private property. Bootlegger, counterfeiter, depredator of environment, digital data and copyright pirate, drug offender, hawala racketeer, immoral traffic offender, loan shark, property grabber are also roped in the definition of persons indulging in anti-social activity. Known Goonda is defined u/s 2(o) of the Act and Known Rowdy is defined u/s 2(p) of the Act which read as follows:

2(o) `Known Goonda'' means a goonda who had been, for acts done within the previous seven years as calculated from the date of the order imposing any restriction or detention under this Act,:

(i) found guilty, by a competent Court or authority at least once for an offence within the meaning of the term `goonda'' as defined in Clause (j) of Section 2, or

(ii) found in any investigation or enquiry by a competent police officer, authority or competent Court, on complaints initiated by persons other than police officers, in two separate instances not forming part of the same transaction, to have committed any act within the meaning of the term `goonda'' as defined in Clause (j) of Section 2;

Provided that an offence in respect of which a report was filed by a Police Officer before a lawful authority consequent to the seizure, in the presence of witnesses, of alcohol, spirit, counterfeit notes, sand, forest produce, articles, vilolating copyright, narcotic drugs, psychotropic substances, or currency involved in hawala racketeering may be included for consideration though the report had resulted from an action initiated by a police officer.

Explanation. - An instance of an offence involving a person, which satisfies the conditions specified in the definition of known rowdy referred to in Clause (p) of Section 2 can also be taken into consideration as an instance, along with other cases, for deciding whether the person is a known goonda or not.

(p) `Known Rowdy'' means any person, who had been, by reason of acts done within the previous seven years as calculated from the date of the order imposing any restriction or detention under this Act;:

(i) made guilty, by a competent Court at least once for an offence of the nature under item (i) of Clause (t) of Section 2 or any offence notified as such under the said clause; or

(ii) made guilty, by a competent Court at least twice for any offence of the nature under item (ii) of Clause (t) of Section 2 or any offence notified as such under the said clause; or

(iii) found, on investigation or enquiry by a competent police officer or other authority, on complaints initiated by persons other than police officers, in three separate instances not forming part of the same transaction to have committed any offence mentioned in Clause (t) of Section 2.

Provided that any offence committed by a person:

(i) By virtue of his involvement as a member of the family or a close relative of the family, in an incident which took place by a reason of a family dispute or quarrel involving family members of close relatives on either side; or

(ii) By virtue of his involvement as a neighbour or as a close relative of the neighbour in an incident which occurred due to a dispute between immediate neighbours; or

(iii) By virtue of his involvement as a employee of any establishment in an incident which occurred in connection with a dispute between himself and the establishment with regard to the conditions of service; or

(iv) As a member of the student community in a recognized educational institution, by virtue of his involvement, merely by his presence but without any overt act constituting the offence mentioned in clause (t) of Section 2 without being involved in any criminal conspiracy facilitating the same, in an incident which occurred due to the general involvement of students of the institution in that particular incident; or

(v) As a member of a recognized political party, by virtue of his involvement merely by his presence, but without any overt act constituting the offence mentioned in Clause (t) of Section 2 without being involved in any criminal conspiracy facilitating the same in an incident which occurred due to the general involvement of the workers of that party in an agitation or protest or programme organized by the party with prior information given to the police officer or Magistrate having jurisdiction; or

(vi) by virtue of his involvement in a criminal act committed by him before he had attained the age of 18 years; shall be omitted from the computation of the number of offences taken into account for deciding whether the person is a known rowdy" Section 3 empowers the Government or the authorized officer to preventively detain known goondas and known rowdies. The provision reads as follows:

3. Power to make orders detaining Known Goondas and Known Rowdies.-- (1) The Government or an officer authorised under Sub-section (2) may, if satisfied on information

received from a Police Officer not below the rank of a Superintendent of Police with regard to the activities of any Known Goonda or Known Rowdy, that with a view to preventing such person from committing any anti-social activity within the State of Kerala in any manner, it is necessary so to do, make an order directing that such person be detained.

(2) If having regard to the circumstances prevailing, or likely to prevail in any area, the Government, if satisfied that it is necessary so to do, may, by order in writing, direct that during such period as may be specified in the said order, the District Magistrate having jurisdiction may exercise the powers under Sub-section (1) in respect of such persons residing within his jurisdiction or in respect of such persons not so resident who have been indulging in or about to indulge in or abet any anti-social activities within such jurisdiction.

(3) When any order is made under this section by the authorised officer under Sub-section (2), he shall forthwith report the fact to the Government and the Director General of Police, Kerala together with a copy of the order and supporting records which, in his opinion, have a bearing on the matter and no such order shall remain in force for more than 12 days, excluding public holidays, from the date of detention of such Known Goonda or Known Rowdy, unless, in the mean time, it has been approved, by the Government or by the Secretary, Home Department if generally so authorised in this regard by the Government.

3. Law is now well settled that the District Magistrate should be satisfied on perusing the information furnished by the Superintendent of Police or an officer not below the rank of the Superintendent of Police and on the materials forwarded along with the report that such person is to be detained so as to prevent and control his anti-social activities. In Elizabeth George v. State of Kerala 2008 (4) KLT 425 it has been held that a final report as envisaged u/s 173(2) of the Code of Criminal Procedure is not essential for an action u/s 3 of the Act. Even though investigations are pending against the persons who are accused in various crimes, and though such investigations are not completed for various reasons, the detaining authority is free to examine the matter with reference to the report and the materials in order to arrive at a subjective satisfaction, even in the absence of a final report. In situations where the investigating officer has filed a final report u/s 173(2) of the act, in common parlance known as having filed a police charge, can the District Magistrate or should the District Magistrate go beyond the final report -- finding -- of the investigating officer and enter the subjective satisfaction while exercising the power for detaining a person under preventive detention? Under the scheme of the Act a known rowdy is a person, who is involved in the defined circumstances within a previous period of seven years calculated from the date of the order u/s 3 of the Act. The defined circumstances are, the person (1) made guilty by a competent court, at least once, for an offence punishable with five or more years of imprisonment at a time, (2) made guilty by a competent court at least twice for any offence punishable less than five years of imprisonment at any time excluding those punishments with less than one year of

imprisonment; and (3) who is found on investigation or enquiry by a competent police officer or other authority on complaints initiated by persons other than police officers, in three separate instances not forming part of the same transaction to have committed any offence mentioned under the definition of the word `Rowdy'' as appearing u/s 2(t) of the Act. Known goonda is a person who is, within a period of previous seven years calculated from the date of the order of detention, found guilty by a competent court or authority at least once for an offence within the meaning of the word `Goonda'' as defined u/s 2(j) of the Act or who is found on any investigation or enquiry by a competent police officer or authority or competent court on complaints initiated by persons other than police officers in two separate instances not forming part of the same transaction, to have committed any act within the meaning of the term `goonda'' as defined in Clause (j) of Section 2.

4. The process leading to a final report by a police officer u/s 173(2) starts with Section 154 of the Code of Criminal Procedure, 1973 (Chapter XXII). After the detailed procedure prescribed under the Chapter, the Police files a final report u/s 173(2). To the extent relevant Section 173 reads as follows:

173. Report of police officer on completion of investigation.--(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating:

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody u/s 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given.

It is clear from the provision that the report shall contain an inference by the police officer as to whether any offence appears to have been committed, and if so, by whom. It is this inference by the police officer that is referred to as the finding u/s 2(o)(ii) of the Act in

defining a known goonda and u/s 2(p)(iii) of the Act while defining a known rowdy. Once the investigating officer has come to a conclusion that the accused person has committed an offence referred to in Clause (j) or Clause (t) of Section 2 as the case may be and when that finding (police report) is forwarded along with the information by the police officer not below the rank of the Superintendent of Police to the detaining authority under the Act, the detaining authority cannot look into the sufficiency or otherwise of the materials leading to the finding by the police officer regarding the commission of the offence. That is within the exclusive jurisdiction of the criminal court. The detaining authority cannot and shall not appreciate the materials leading to the police report and come to a different finding or comment on the finding as to whether on the materials thus made available by the police officer a report u/s 173(2)(i)(d) regarding the commission of offence could have been made or not. As held by the Supreme Court in Union of India (UOI) Vs. Paul Manickam and Another, "In case of preventive detention no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence" (para 14). Thus if the detaining authority cannot go beyond the finding of the investigating officer, it is not necessary for the Superintendent of Police to furnish the materials leading to the police report to the detaining authority in a situation of Section 173(2) report. The subjective satisfaction of the detaining authority is to be made based on the information furnished by the police officer not below the rank of Superintendent of Police which includes the finding u/s 173(2)(i)(d) of the Code of Criminal Procedure. Of course, such finding by the investigating officer cannot automatically lead to an order for preventive detention. The findings are only one of the materials furnished along with the information by the police officer not below the rank of the Superintendent of Police. On perusal of the report and the findings, the detaining authority has to enter the satisfaction that such a person is to be preventively detained with a view to prevent him from committing any anti-social activity within the State of Kerala.

5. Therefore in circumstances where the detaining authority has furnished the police report u/s 173(2)(i)(d) of the Code of Criminal Procedure, the competent officer need not furnish materials leading to the finding of the investigating officer to the detaining authority since the detaining authority cannot make a different assessment as to the sufficiency of the materials leading to the finding in the report. The satisfaction of the detaining authority need only be based on the final report and the further information furnished by the police officer not below the rank of the Superintendent of Police regarding the need for preventive detention under the Act.

6. Now coming to the facts of the case, Ext.P1 is the order of detention passed by the District Magistrate, Thrissur. The order is dated 8-7-2008. The detenu is the son of the petitioner. It is seen from the report that the following materials have been perused by the District Magistrate along with the report of the Superintendent of Police, Thrissur:

(a) Crime No. 492/04 of Chavakkad Police Station u/s 143, 147, 148, 427, 447, 307, 149 IPC is on an offence committed by him on 31-10-2004. The case is that the detenu and

his accomplices, trespassed, attacked with deadly weapons and caused grievous injuries to the complainants and his brothers and damaged an autorickshaw. The case is now under trial as SC No. 126/08 in the Additional Sessions Court, Thrissur.

(b) Crime No. 76/2005 of Chavakkad Police Station u/s 323, 324, 427, 308, 34 IPC is an offence committed by him on 10-02-2005. The case is that the detenu and his accomplices attacked the complainant with deadly weapons and caused grievous injuries and damaged an autorickshaw. The case is now under trial as SC No. 211/2008 in Addl. Assistant Sessions Court, Thrissur.

(c) Cr. No. 739/05 of Chavakkad Police Station u/s 126, 308, 34 IPC and Section 27 of Arms Act is an offence committed by him on 14-11- 2005. The case is that the detenu and his accomplices attacked the complainant''s brother with deadly weapons and injured him grievously. The case is under trial as SC No. 883/07 in Additional Assistant Sessions Court, Thrissur.

(d) Cr. No. 235/06 of Chavakkad Police Station u/s 436, 427, 34 IPC is an offence committed by him on 17-4-2006. The case is that the detenu and his accomplices, due to previous enmity, burnt down the complainant''s thatched house along with Rs. 2 lakhs worth of fish boxes stored in the house. The case has been charge sheeted in Judicial First Class Magistrate, Chavakkad on 27-12-2007.

(e) Cr. No. 272/07 of Chavakkad Police Station u/s 143, 147, 148, 452, 506(ii), 427, 149 IPC is an offence committed by him on 29-4- 2007. The case is that the detenu and his accomplices trespassed into the complainant''s house and destroyed the windowpanes and utensils worth Rs. 25,000/-. The case is under trial in Judicial First Class Magistrate, Chavakkad as CC No. 1436/07.

All the above five cases are pending trial before the criminal court. All the alleged offences have been committed within the period of seven years. In all the above five cases the police reports have been perused by the detaining authority. The contention of the learned counsel for the petitioner is that the detaining authority was not furnished with materials leading to the final report of the police officer. As already held by us, once a final report on the finding of commission of the offence referred to under the Act is given to the detaining authority, no further materials are necessary. The only further information is as to whether, in the background also of such findings, a person is to be detained for the effective prevention and control of the anti-social activities. In that regard it is seen from the impugned order as well as the counter affidavit that the background of the person has been assessed with regard to his involvement in other cases also and in the light of the report of the Superintendent of Police regarding the need for preventive detention under the Act. It is seen that the detenu had made his representation before the Government and that the advisory board has also considered his case. Since all the procedural formalities have thus been duly complied with, we do not find any merit in the writ petition. It is accordingly dismissed.