(1996) CriLJ 2407 : (1995) 3 ILR (Ker) 53

High Court Of Kerala

Case No: W.A. No. 323 of 1995-C

The Secretary, Home Department, Government of Kerala and Others — APPELLANT

Vs

K. Abdul Azeez — RESPONDENT

Date of Decision: March 24, 1995

Acts Referred:
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 â€" Section 3(1), 7(1)#Customs Act, 1962 â€" Section 108

Citation: (1996) CriLJ 2407 : (1995) 3 ILR (Ker) 53

Hon'ble Judges: P. Shanmugam, J; K. Sreedharan, J

Bench: Division Bench

Advocate: Govt. Pleader and Lal George, for the Appellant; P.K. Aboobacker (Edathala) and P.K. Ibrahim, for the Respondent

Judgement

K. Sreedharan, J.
Petitioner in O.P. 17244/ 1994, is a person against whom order of detention has been issued by the State Government

u/s 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, here-in after referred to as ""the

COFEPOSA Act"". That order was issued on 30-10-1989. Till date, he could not be arrested and detained pursuant to the said order of

detention, eventhough various steps were taken by the Government for the said purpose. On 25-1 -90, Government of Kerala issued notification

in the Official Gazette u/s 7(1)(b) of the COFEPOSA Act directing the petitioner to appear before the Superintendent of Police, Malappuram.

Thereafter a report was sent to the Chief Judicial Magistrate, Manjeri u/s 7(1)(a) of the COFEPOSA Act on 25-1-1990. The Magistrate on the

basis of that report, registered a case as C.M.P. 242/1990. Thereupon petitioner moved the High Court of Calcutta (The number of the

proceedings is not seen from the attested copy). Justice A. M. Bhattacherjee restrained the respondents from serving on the petitioner any order of

detention under the provisions of the COFEPOSA Act or on any of the grounds on which a criminal case has been started against the petitioner

and is pending before the Additional Chief Judicial Magistrate, Economic Offence, Ernakulam being O.S. No. 71/UB/89, on the basis of seizure

made on 15-6-89, by the officers of the Air Customs, Trivandrum. A copy of that order was directed by the Court to be given to the petitioner

duly counter-signed by the Assistant Registrar of the Court. A copy of that order was filed before the Chief Judicial Magistrate''s Court, Manjeri

along with C.M.P. 2719/1991. As a result of that, the learned Magistrate recalled the non-bailable warrant issued against the petitioner herein,

namely Shri K. Abdul Azeez. It is now agreed on both sides that the proceedings initiated before the High Court of Calcutta was transferred to the

Supreme Court at the instance of the State Government. The Supreme Court quashed the proceedings pending before the High Court of Calcutta.

It appears that the order of the Supreme Court has not been produced before the Chief Judicial Magistrate, Manjeri. So, the proceedings in

C.M.P. 242/1990, continues to be stayed.

2. O.P. 17244/1994, was filed by the petitioner challenging the order of detention before it was executed. Along with the petition, he moved CM.

P. 30454/1994, praying for stay of operation of Exhibit P. 6 (detention order passed under the COFEPOS A Act) Exhibit P. 10 (the order

passed by the Government rejecting the representation made by the wife of the petitioner to withdraw the order of detention) pending disposal of

the Original Petition. On 27-1-1995, a learned single Judge passed an order of interim stay as prayed for, for a period of one month. When the

said petition came up before the learned Judge on 24-2-1995, the learned Judge extended the order of stay for a further period of three months.

That order has been taken up in appeal by the State as W. A. 323/1995. When the appeal came up for admission, learned counsel representing

the respondent raised a contention that appeal is not maintainable as per the decision of this Court in K.S. Das v. State of Kerala 1992 (2) Ker LT

358. Jagannadha Rao, C. J., speaking on behalf of the majority of Judges, formulated the conclusions in paragraph 46 of that judgment. It inter lia

stated that an appeal would lie against an order only if substantially affects or touches upon the substantial rights or liabilities of the parties or are

matters of moments and caused substantial prejudice to the parties. His Lordship went on to State that normally a discretionary order is not to be

interfered with unless it was passed without jurisdiction, contrary to law or are perverse and they also cause serious prejudice to the parties in such

a manner that it might be difficult to restore the status quo ante or grant adequate compensation. In the instant case, the order that was sought to be

stayed was an order passed under the COFEPOSA Act to detain the petitioner. The execution of that order was the one sought to be stayed by

the learned single Judge. Without looking into the law on the point, it appeared that the learned Single Judge stayed its operation as a matter of

course. When it was found that the order happened to be passed in clear mistake of the provisions of law, we were of the view that the appeal has

certainly to be entertained. Accordingly, we admitted the appeal and stayed the operation of the order passed by the learned single Judge in

C.M.P. 30454/1994. That appeal came up for final hearing on 20-3-1995. On hearing counsel appearing on either side, we felt that for a proper

decision, the Original Petition has to be called to this Court to be disposed of along with the Writ Appeal. Accordingly, we passed the following

order:-

This is an appeal against an order passed in C.M.P. 30454/94. On the facts and circumstances of this case, we feel that for a proper decision, the

O. P. itself has to be called to this Court. Accordingly O. P. 17244/94, is called to this Court to be heard along with the W. A. Post O. P.

17244/94, and this W. A. on 23-3-1995.

3. On 23-3-1995, when the Writ Appeal and Original Petition were taken up for hearing, a curious argument was advanced by the learned

counsel representing the petitioner to the effect that this Court has no jurisdiction to hear the Original Petition. According to counsel, as per Section

3 of the High Court Act, an Original Petition can only be heard by a learned single Judge. It is his argument that an Original Petition can come

before a Division Bench only if the single Judge refers the same to be heard by a Bench. Another submission, even according to the learned

counsel, is that the Chief Justice of the High Court may withdraw an Original Petition pending before the single Judge and post it before a Division

Bench to hear the same. Unless the above two conditions are satisfied, no Division Bench will be having the power to hear and dispose of an

Original Petition. According to him if the Division Bench is disposing of an Original Petition, he will be losing a right to have an internal appeal to a

Division Bench. This argument of counsel, we are afraid, is based on a wrong understanding of the provisions of the High Court Act. Section 4 of

the High Court Act specifically states that a Bench of two Judges of the High Court has the power in respect of which the power of the High Court

can be exercised by a single Judge. Thus, if the single Judge has the power to dispose of an Original Petition, that power can necessarily be

exercised by a Bench of two Judges. Further, in the instant case when W. A. 323/1995, came up before the Bench, it was considered just and

proper to have the Original Petition also heard and disposed of along with the Writ Appeal. It was on account of that conclusion arrived at by us,

the Original Petition was withdrawn to be heard along with the appeal. The order by which the Original Petition has been withdrawn to this Bench

to be heard along with the Writ Appeal is not open to challenge on the ground that it has been done without jurisdiction. Had Section 4 been taken

note of by the learned counsel, the above argument would not have been advanced.

4. The jurisdiction of the High Court in pre-execution challenge to the orders of detention has been the subject-matter of many a number of

decisions by the Lordships of the Supreme Court. In Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia

and Another, the law has been clearly stated by a Bench of three Judges in the following terms :-

This still leaves open the question as to whether the detenu is entitled to the order of detention prior to its execution at least to verify whether it can

be challenged at its pre-execution stage on the limited grounds available. In view of the discussion aforesaid, the answer to this question has to be

firmly in the negative for various reasons. In the first instance, as stated earlier, the Constitution and the valid law made thereunder do not make

any-provision for the same. On the other hand, they permit the arrest and detention of a person without furnishing to the detenu the order and the

grounds thereof in advance. Secondly, when the order and the grounds are served and the detenu is in a position to make out prima facie the

limited grounds on which they can be successfully challenged, the Courts as pointed out earlier, have power even to grant bail to the detenu

pending the final hearing of his petition. Alternatively, as stated earlier, the Court can and does hear such petition expeditiously to give the

necessary relief to the detenu. Thirdly, in the rare cases where the detenu, before being served with them, learns of the detention order and the

grounds on which it is made, and satisfies the Court of their existence by proper affirmation, the Court does not decline to entertain the writ petition

even at the pre-execution stage, of course, on the very limited grounds stated above. The Court no doubt even in such cases is not obliged to

interfere with the impugned order at that stage and may insist that the detenu should first submit to it. It will, however, depend on the facts of each

case. The decisions and the orders cited above show that in some genuine cases, the Courts have exercised their powers at the pre-execution

stage, though such cases have been rare. This only emphasises the fact that the Courts have power to interfere with the detention orders even at

the preexecution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases. Much less can a detenu

claim such exercise of power as a matter of right. The discretion is of the Court and it has to be exercised judicially on well settled principles.

After stating the law, Their Lordships stated that the decision in S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others, , and the

decisions of all the High Courts which are contrary to or inconsistent with the above decision must be deemed to have been disapproved and

overruled. The main argument advanced by the learned counsel was based on the decision in S.M.D. Kiran Pasha Vs. Government of Andhra

Pradesh and Others, . In view of the decision in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and

Another, it is not necessary for us to consider the impact of that decision on the facts of this case.

5. The real question that calls for consideration by us is whether the petitioner is entitled to challenge the order of detention without himself

submitting or surrendering to that order. The question is whether the petitioner is entitled to challenge the detention order even before he submits

himself to that order. Only in exceptional circumstances can the Court go into the question regarding the validity of the order of detention. As the

law laid down by the Supreme Court now stands, where the Courts are prima facie satisfied:

(i) that the impugned order is not passed under the Act under which it is purported to have been passed,

(ii) that it is sought to be executed against a wrong person,

(iii) that it is passed for a wrong purpose,

(iv) that it is passed on vague, extraneous and irrelevant grounds, or

(v) that the authority which passed it had no authority to do so,

the Courts can go into the order of detention in a pre-execution stage. The order of detention issued against the petitioner is certainly one under the

COFEPOS A Act. So the first ground mentioned therein is not available to the petitioner herein. Petitioner has no case that the second ground also

applies in the instant case, because nowhere has he stated that he is the wrong person sought to be detained as per the order of detention. The

purpose mentioned in Exhibit P. 6 cannot be stated to be an irrelevant or wrong person vis-a-vis the provisions contained in the COFEPOS A

Act. So, the third ground is also not available to the petitioner. The main contention raised by the counsel representing the petitioner is that the

order of detention was issued on vague, extraneous and irrelevant grounds. At this stage, petitioner is not entitled to know the gorunds under which

he has been detained. Law does not allow him to have the grounds divulged to him before he surrenders. The detention order passed by the

detaining authority simply states that the order was passed u/s 3(1)(ii) of the COFEPOS A Act with a view to prevent him from abetting the

smuggling of goods. The said purpose cannot be stated to be extraneous or irrelevant to the order of . detention. Petitioner has no case that the

Secretary to Government, Home Department, who issued Exhibit P. 6 order of detention, is not having the authority to issue the same. In these

circumstances, we are of the opinion that the petitioner''s case will not fall in any of the five grounds mentioned by the Supreme Court for this Court

to interfere with the order of detention.

6. Another contention raised by the learned counsel representing the petitioner is that the order of detention was passed on 30-10-1989. The said

order has not been executed till date. The detaining authority and the police have not taken prompt action to apprehend the petitioner till date. So,

the purpose of issuing the order of detention has failed and so it should not be allowed to be executed. This argument, on the facts and

circumstances of this case, has only to be stated to be rejected. Smuggling of gold into India was detected on 15-10-1989. Exhibit P. 6 order of

detention was passed on 30-10-1989. That means, within fifteen days of the incident the order of detention has been passed. So, the order was

issued promptly. When the petitioner was found absconding, notification u/s 7(1)(b) was issued in the Official Gazette dated 25-1-1990. The

matter was reported to the Chief Judicial Magistrate, Manjeri on 25-1-1990 itself, u/s 7(1)(a) of the COFEPOSA Act. Immediately thereon, he

moved the Calcutta High Court giving his address as :

Kalayath Abdul Aziz, residing at Hadoo, Andaman & Niaibar Islands, Port Blair.

He described himself to be a businessman carrying on business of fish and dry fish from Port Blair. Thus he got an order of stay of the proceedings

of the Magistrate''s Court, Manjeri from the High Court of Calcutta. In this Original Petition he has given his address as:

Kalayathu House, Muttippalam, Anakkayam P. O., Mallappuram District.

He stated that he was peacefully living and eking his livelihood as Auto Consultant at Manjeri. He has concealed the factum of his approach to the

High Court of Calcutta. This shows that he has come to this Court with unclean hands. A person who was eluding the dragnet of the detention

order is not entitled to take advantage of his concealment and contend that on account of delay in execution of the order of detention the said order

is to be quashed. This point is concluded by the decision of the Supreme Court in Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, ,

and Commissioner of Sales Tax Vs. M/s. Northern Railway Catering Department, U.P., In the first case, the delay of three years in the execution

on account of the detenu''s evasion from arrest was not considered as fatal to its execution. According to Their Lordships, even after the expiry of

the three years, the order of detention war still effective if the detenu himself was to be blamed for the delay in execution. In the second decision,

the delay in execution of the order was more than two years. That was also caused on account of the detenu absconding from the place. The

detenu was not allowed to get the order vacated on account of the alleged delay which was caused by his own action.

7. On behalf of the respondent, a detailed counter-affidavit has been filed, wherein it has been stated that petitioner was absconding and he was

evading the arrest. The fact that he was evading the arrest is established beyond all doubts by his action in moving the High Court of Calcutta. For

that purpose, he gave a false address, which has been quoted earlier. In order to show that he was available in his native place, he relied on a

statement given before the Chief Judicial Magistrate''s Court, Manjeri in S. T. 153/1993. Attested copy of that statement is marked as Exhibit P.

13. That document was not produced along with the Original Petition. It was filed along with the reply affidavit. So. the respondent had no

opportunity to refer to that in the counter affidavit. Exhibit P. 13 is seen to be a statement given by him in a private complaint lodged by him on

account of the bouncing of a cheque issued to him by another for an amount of Rs. 38,300/-. When we asked about the further progress of the

case S. T. 153/1993 on the file of the Chief Judicial Magistrate, learned counsel representing the petitioner submitted that the matter had been

settled between the petitioner and the accused therein. Since that proceeding has been settled between the parties and since this statement was

produced along with the reply affidavit, we do not consider it proper to place any reliance on it. We discard that document.

8. Another argument advanced by the learned counsel representing the petitioner is (hat there is no material to connect him with smuggling of gold

into India. We are not impressed with (his argument. Though the factual submissions are not relevant consideration at this stage in the. context of

the principles laid down in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, we proceed

to examine the facts to satisfy our judicial conscience. One K. A. John was in Dubai. He was in an impunious situation and he was finding it difficult

to go over to India. Then he came across one Abdul Rahiman. He agreed to give him the required air ticket and a sum of Ks. 10,000/-, provided

he smuggles into India gold concealed in an Air Conditioner. Shri K. A. John agreed to that course and gave photo copy of his passport and the

details required to reach him in his residential address in Kerala. An Air Conditioner was sent to Trivandrum as unaccompanied baggage in the

name of John. One Haris, brother-in-law of the petitioner, met John at his house with money, on the basis of the details which John had given to

Abdul Rahiman. Haris and John,went to Trivandrum Air Customs Office for clearing the unaccompained baggage. When the baggage was opened,

the Customs authorities found 9320 gms. of gold rods concealed in it. Haris, who was keeping out to get the consignment, was immediately

apprehended by the Customs authorities. He gave a statement u/s 108 of the Customs Act. That statement clearly brings out the involvement of

petitioner in getting the gold smuggled into India. From the above evidence, it has come out that petitioner gave Haris the address and the route to

John''s house, written in a photostat copy of John''s passport and directed him to go to John''s house at Kottayam to get the baggage from

Trivandrum Air Cargo Complex. Petitioner has provided funds with Haris to meet the entire expenses and also to give any amount if found payable

to the Customs authorities. On the basis of this material, we are not in a position to hold that the order of detention was issued on irrelevant

grounds.

9. Learned counsel representing the petitioner cited before us many decisions of the Supreme Court, wherein orders of detention were interfered

with on account of the delayed execution. In all those cases, the detenus were arrested and the issue was considered by Their Lordships in the

proceedings for issue of writ of habeas corpus. In the instant case since the delay in execution of the order of detention has been occasioned on

account of the wrongful action on the part of the petitioner, he cannot be allowed to take advantage of the same. Consequently the above-

mentioned decisions are not applicable to facts before us.

10. Since the petitioner has not been served with the grounds of detention, we are not in a position to hold that there is no justifiable reason for his

detention.

11. Another argument advanced by the learned counsel representing the petitioner was that nocriminal proceeding or proceedings under the

Customs Act has been initiated against him and so no order of detention under the COFEPOSA Act can be issued. We are not impressed with

this argument. This aspect was considered by a Constitution Bench of the Supreme Court in Haradhan Saha Vs. The State of West Bengal and

Others, . Their Lordships observed:-

The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power

exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution

even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made

before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge of

even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to

prosecution.

Therefore, the fact that the petitioner was not proscuted for smuggling gold into India or that he was not proceeded against by Customs authorities

is no reason to hold that no order of detention can be passed against him under the COFEPOSA Act.

12. In Mrs Saraswathi Seshagiri Vs. State of Kerala and Another,). Their Lordships, held that the Legislature has made only the subjective

satisfaction of the authority making the order of detention; it is not for the Court to question whether the grounds given in the order are sufficient or

not for the subjective satisfaction of the authority. In the instant case, we are called upon to interfere with the order of detention at a time when the

ground of detention was not given to the petitioner. The petitioner, as on today, is not entitled to get the grounds of detention served on him.

Therefore, the arguments based on the decision arising out of detention orders passed under Maintenance of Internal Security Act, Essential

Commodities Act, etc. cited by the learned counsel are not relevant to the issue before us. Those decisions are not of any assistance in deciding the

issue.

13. In view of what has been stated above, we quash the order in C.M.P. 30454/1994 in O.P. 17244/1994, and dismiss O.P. 17244/1994.

14. O.P. I6455/1994,is one filed by the wife of the petitioner in O. P. 17244/1994. The petitioner therein had filed a representation before the

State Government to get the order of detention passed against her husband revoked. Since that representation was not disposed of, she moved

this Original Petition for the issuance of a writ of mandamus directing the respondent to consider and pass final order on that representation. That

representation has been disposed of by the Government on 2-11-1994, and that fact was communicated to her in Government letter No.

71576/SSA1/94/ Home, dated 29-11-94. In view of that order, O. P. 16455/94, has become infructuous. Accordingly it is dismissed.

15. Writ Appeal and Original Petitions are disposed of as indicated above.

16. Immediately after the judgment was pronounced, learned counsel representing the petitioner made an oral application for certificate to file an

appeal before the Supreme Court. We do not think that any substantial questions of law of general importance which needs to be decided by the

Supreme Court arise in these matters. So, the request is declined.