

(1997) 05 KL CK 0013

High Court Of Kerala

Case No: O.P. No. 335 of 1997-S

Smt. B. Shareefa Ummer

APPELLANT

Vs

Joint Secretary to the Govt. of
India and Others

RESPONDENT

Date of Decision: May 2, 1997

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 3(1), 7, 7(1)
- Constitution of India, 1950 - Article 226(1A), 226(2)
- Extradition Act, 1962 - Section 24, 7(4)
- Foreign Exchange Regulation Act, 1973 - Section 40

Citation: (1998) CriLJ 185 : (1997) 3 ILR (Ker) 268

Hon'ble Judges: U.P. Singh, C.J; S. Sankarasubban, J

Bench: Division Bench

Advocate: Sunny Varghesc and K.A. Jabbar, for the Appellant; George Poonthottam Addl, Central Govt. Standing Counsel, for Nos. 1 and 2 and K. Sasikumar Govt. Pleader for No. 4, for the Respondent

Judgement

S. Sankarasubban, J.

This original petition is filed by Shareefa Ummer, wife of Urntner Ibrahim for a writ of habeas corpus to produce the body of the husband of the petitioner (hereinafter called "the detenu"), who is detained in the Central Prison, Trivandrum, as per the order of detention u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called "the COFEPOSA Act"). According to the petitioner, both the petitioner and the detenu have got their permanent residence in Calicut District in the State of Kerala. The order of detention dated 17th May, 1993 was passed on the basis of the following allegations: On 20-11-1992 the Enforcement Officers, Bombay intercepted the detenu at Bombay, Sahar International Airport when the detenu was about to leave for Dubai and seized from

him 1,17,000 Saudi Riyals, 74,500 UAE Dirhams and 12,500 Qatar Riyals from the slippers worn by the detenu, under the provisions of the Foreign Exchange Regulation Act.

2. The detenu gave a statement u/s 40 of the Foreign Exchange Regulation Act stating among other things that his brother Mohammed introduced him to one Babu-Bhai who promised to give Rs. 5,000/- for each trip if he smuggles foreign currencies out of India. The detenu was arrested on 21-11-1992 and he was remanded to judicial custody. Subsequently, the detenu was released on bail by the Chief Metropolitan Magistrate, Bombay on 4-12-1992. On the basis of the above allegations, the first respondent, viz., Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi passed detention order u/s 3(1) of the COFEPOSA Act, on 17-5-1993. The detention order stated that Ummer Ibrahim, the detenu, be detained and kept in custody in the Central Prison, Trivandrum. Even though the detention order was passed on 17-5-1993, the detenu was arrested and detained in the Central Prison, Trivandrum only on 4-6-1996, three years after the order of detention was passed. The grounds of detention and documents were also served on the detenu. The case of the detenu was referred to the Central Advisory Board. The detenu filed representations to respondents 1 and 2. Both die representations were rejected. After obtaining the opinion of the Central Advisory Board, the Detaining Authority confirmed the order of detention by issuing Ext. P. 10 dated 20-8-1996. By this order, the detention of Ummer Ibrahim, the detenu, was confirmed for a period of one year from the date of actual detention, viz., from 4-6-1996.

3. Even though many grounds are urged in the original petition challenging the detention, the main ground urged is the delay in executing the order of detention. According to the petitioner, the detention order was passed on 17-5-1993, but the detenu was arrested only on 4-6-1996. Petitioner submits that during this period, the detenu has not absconded, but he was very much available in the places known to the authorities. The detenu was granted bail and he was allowed to remain at large complying with the conditions in the bail order. According to the petitioner, the authorities did not take any proper steps for executing me order of detention u/s 7 of the COFEPOSA Act. The bail Order granted was not even attempted to be cancelled. The failure of the authorities to take prompt action in executing the detention order shows that the apprehension of the Detaining Authority is not real or genuine, but it is only a colourable exercise of power. After a lapse of three years, the detention will become punitive.

4. On behalf of respondents 1 and 2, the Joint Secretary in the Ministry of Finance, Government of India has filed a counter-affidavit. In the counter-affidavit, the maintainability of the original petition is challenged. According to the counter affidavit, the cause of action for the arrest of the detenu had arisen outside the territorial jurisdiction of this Court, beginning from the apprehension of the detenu

at the Bombay Sahar Airport on 20-11-1992. The apprehension of the detenu at Bombay Sahar Airport, the recommendation of the sponsoring authority at Bombay and the detention order passed in New Delhi all had arisen outside the territorial jurisdiction of this Court. According to the counter-affidavit, the arrest of the detenu is not the real cause of action. It is only the culmination of the execution of the order of detention passed. Hence, according to respondents 1 and 2, the writ petition is not maintainable in this Court.

5. Regarding the contention of delay in executing the detention order, the counter-affidavit states as follows: The detention order was issued on 17-5-1993, but the same could not be executed as the detenu was absconding from his all known places till he was detained on 4-6-1996. The Enforcement Directorate, Calicut made enquiries at the detenu's residential premises as many as 14 times, viz., 12-9-1993, 15-12-1993, 10-2-1994, 15.4.1994, 12-8-1994, 11-11-1994, 3-1-1995, 6-4-1995, 8-7-1995, 11-10-1995, 9-1-1996, 12-4-1996, 15-5-1996 and 29-5-1996, which revealed that the detenu was not found available at the given addresses. The relevant enquiry reports submitted by the officers of Enforcement Directorate, Calicut in this regard are self-explanatory. Secondly, the order u/s 7(1)(b) of the COFEPOSA Act was issued against the detenu by the Central Government as per Order F. No. 673/48/93-CUS. VIII dated 28-4-1994. It is then submitted that in view of the above facts, it is clear that the detenu was absconding right from the beginning and hence the detention order in question could not be executed despite the concerted efforts made by the sponsoring authorities as well as the local police at Kerala.

6. Subsequently, an additional affidavit was filed by the Chief Enforcement Officer, Enforcement Directorate, Bombay. In paragraph 2 of the counter-affidavit, it is stated thus:

As stated in the affidavit filed on behalf of the first respondent enquiries were made at the address given by the detenu while he was arrested and the report of the enquiries would show that the detenu was consciously evading the process of law. As revealed from the records enquiries were only made at the address given by the detenu and also the enquiries have resulted in evasive answer from the relations and the local people.

7. Before we deal with the contention raised by the petitioner, we will consider the objection raised by the respondents as to the maintainability of the petition in this Court. According to the respondents, this Court has no jurisdiction, since the entire cause of action arose beyond the territorial limits of this Court. The detenu was apprehended at Sahar Airport, Bombay on 20-11-1992. It was the authority at Bombay that sponsored the detention of the detenu and the order of detention was passed by the Joint Secretary, Government of India, Ministry of Finance, Department of Revenue, New Delhi. Hence, according to the respondents, the mere fact that the detenu was arrested in Kerala and kept in the custody in the Central Prison, Trivandrum does not give rise to a cause of action enabling the petitioner to file the

petition before this Court. On behalf of the petitioner it was contended that the fact of detention is one of the essential facts to be proved in a petition for habeas corpus and hence since the detention has taken place in the State of Kerala, this Court has got jurisdiction to entertain the original petition.

8. The learned Central Government Standing Counsel brought to our notice the decision of a Division Bench of this Court in O.P. No. 18007/94. In that case, petitioner's-husband was arrested by the police from his residence at Ernakulam on 12-4-1989 and he was produced before the Magistrate at Delhi on 17-4-1989 whereupon he was sent to Tihar Jail in Delhi. Pursuant to a request by the Government of the United States of America for his extradition to that country to stand trial for violation of Federal fraud states and related offences allegedly committed by him during the period he had worked as an officer of the Chase Manhattan Bank, New York, proceedings have been initiated under the Extradition Act. In view of the letter of request received from the US Embassy in New Delhi for the extradition of the petitioner's-husband, the Central Government after being satisfied directed the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi to conduct an enquiry into the alleged offences. The Magistrate after enquiry submitted his report on 19-11-1993 to the Central Government reporting that a prima facie case existed against the petitioner's-husband. That was done u/s 7(4) of the Extradition Act. In the counter-affidavit, the contention raised by the respondent was that the Original Petition was not maintainable in this Court. This contention was accepted by a Division Bench of this Court and Pareed Pillay, C.J., on behalf of the Bench, held as follows:

Admittedly the order was passed by the Additional Chief Metropolitan Magistrate, New Delhi. As this Court has no jurisdiction over the Magistrate who submitted the report regarding the petitioner's-husband she can only approach that High Court having jurisdiction over the Magistrate who submitted the report to the Central Government with regard to her husband. As the report has been sent by the Magistrate, petitioner can only move before the High Court having jurisdiction over that Magistrate. Contention of the petitioner that it is open to her to move for the discharge of her husband from this High Court as her husband was arrested while he was residing within the jurisdiction of this Court is not tenable. It is under valid orders of the Magistrate that her husband was arrested and produced before the Additional Chief Metropolitan Magistrate. That Magistrate u/s 7(4) opined that a prima facie case has been made out in support of the requisition against the petitioner's-husband and accordingly committed him to prison to await the orders of the Central Government. As that Magistrate has reported the result of his enquiry and as the detailed representation of the petitioner's-husband was also forwarded to the Central Government, it is true that the Central Government had to pass the order within two months from the date of report of the Magistrate. In a case where a petition has to be filed u/s 24 of the Act, it can only be filed before the High Court having jurisdiction over the Magistrate who submitted his report to the Central

Government as provided u/s 7(4). Aggrieved party cannot pick and choose any other High Court with a prayer to discharge him u/s 24 of the Act.

Regarding the contention that the order was served on the petitioner's husband in Kerala, the Division Bench held that will not give rise to a cause of action. The Court further took the view that after the arrest, petitioner was detained in Tihar Jail, which was outside the jurisdiction of this Court. It was in the above context that the Division Bench held that the Original Petition for habeas corpus was not maintainable in this Court.

9. Under Article 226(2) of the Constitution of India, High Court has got jurisdiction with regard to matters where the cause of action, wholly or in part, arises within its jurisdiction notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. In the present case, the detention order is issued by the authority in Delhi, which is admittedly outside the territorial jurisdiction of this Court. But the detention order itself says that the detenu is to be detained in the Central Prison, Trivandrum. In pursuance of this, the detenu was arrested and was detained in the Central Prison, Trivandrum. In a petition for habeas corpus, detention is one of the important facts, which has to be established for securing the release of the detenu. Thus, the detention forms part of the cause of action to be proved in a petition for habeas corpus. In the Law of Extraordinary Legal Remedies by Forrest G. Ferris at page 58 dealing with the writ of habeas corpus, it is held as follows:

Venue :- Application for the writ should, unless otherwise provided by statute, be made to the Court or Judge exercising jurisdiction over the place or territory where or within which the party in custody is held; the place of detention fixes the jurisdiction, without reference to the residence of the person detaining.

10. In *Manjulaben v. C.T.A. Pillay* 1976 Cri LJ 889, a similar question came up for consideration before the Gujarat High Court. There the detenus, who were ordinarily resident of the Gujarat State, were detained under orders passed under the Maintenance of Internal Security Act, 1971 and were kept in Jail at Baroda. Subsequently, they were removed to the jail at Jaipur outside the State. Fresh orders of detention were issued under the COFEPOSA Act without releasing them from the Jail. Petitioners challenged the maintainability of the writ petitions. Repelling the contention, a Division Bench of the Gujarat High Court held as follows :

as the initial detention of the detenus at Baroda was continued by virtue of the impugned order of detention, the same furnished a part of the cause of action to the detenus which arose within the jurisdiction of the Gujarat High Court.

The Court relied on Article 226(1A) (as it stood then) of the Constitution of India as a part of the cause of action, namely initial deprivation of liberty of the detenus took place within the territorial jurisdiction of the Court. It held that the Court has jurisdiction.

11. In *Ishwarlal Hiralal Gunderia v. Union of India* 1990 Cri LJ 615 (Bombay), the facts were different. The detention was outside the jurisdiction of the Nagpur Bench of the Bombay High Court. Petition was filed before the Nagpur Bench on the ground that the close relative of the detenu was residing within the territorial jurisdiction of the Nagpur Bench. In that context, the Court held as follows (at p. 617 of Cri LJ):

However, there can be no doubt about the place of detention providing a cause of action. That place in the instant case is Bombay and hence, High Court at Bombay will have jurisdiction to entertain this petition.

A similar question arose before the Madras High Court in the decision [P. Subramani Vs. State of Karnataka and Others](#), In that case, the detenu was apprehended at Gulbarga in Karnataka State. On search, it was found that the detenu was carrying gold weighing 933.280 gms. The order of detention was passed by the Government of Karnataka u/s 3(1)(iii) of the COFEPOSA Act. The order of detention was served upon the detenu in Salem in Tamil Nadu and the grounds of detention were also served on the detenu at the same place. The question arose whether the Madras High Court has jurisdiction. The Court held that it has jurisdiction. The decision reported in [State of Rajasthan and Others Vs. Swaika Properties and Another](#), - was distinguished on the ground that it was not a mere service of notice that happened in the state of Tamil Nadu. The Court held that the liberty of the detenu was deprived and the grounds of detention were served on him. Hence, according to the Court, the essential, act of detention physically happened in Tamil Nadu. Since part of the cause of action had arisen in the State of Tamil Nadu, it was held that that Court had jurisdiction. So far as the present case is concerned, the order of detention was served on the detenu in Kerala. He was arrested in Kerala and he was detained in the prison at Trivandrum in the State of Kerala. According to us, these are essential facts which form part of the cause of action. Hence, we hold that this Court has got jurisdiction and hence the Original Petition is maintainable in this Court.

12. Now we shall consider the contention raised by the petitioner that the detention of the detenu is illegal, since there was long delay in executing the order of detention. The order of detention was passed on 17-5-1993. The detenu was arrested only on 4-6-1996, after a delay of three years. In ground No. 2 of the Original Petition, it has been stated that the detenu had not absconded and that he was very much available in the places known to the authorities. According to the petitioner, the authorities had not taken proper steps for executing the order of detention. The bail granted was not even cancelled. The incident that happened on 20-11-1992 has become stale and irrelevant. Failure of the authorities to take prompt action in executing the order of detention shows that the apprehension of the Detaining Authority is not real or genuine, but is only a colourable exercise of power. After a lapse of more than three years, the detention will become punitive.

13. A counter affidavit was filed by the first respondent on behalf of respondents 1 and 2. In paragraph 6 of the counter affidavit, it is stated that the detention order could not be executed as the detenu was absconding from his all known places until he was detained on 4-6-1996. According to the counter affidavit, the Enforcement Directorate, Calicut made enquiries at the detenu's house as many as 14 times. The relevant enquiry reports submitted by the officers of Enforcement Directorate, Calicut show that the detenu was not available in his residence. Further it is stated that an order was issued u/s 7(1)(b) of the COFEPOSA Act. Subsequently an additional affidavit was filed by K. A. Kuruvila, Chief Enforcement Officer, Enforcement Directorate, Bombay. This affidavit stated that the detenu was consciously evading the process of law. The enquiries had resulted in evasive answer from the relations and the local people.

14. In this context, we called for the files for being satisfied as to the veracity of the delay in executing the detention order. The detenu was initially arrested by the Enforcement Authorities in Bombay. He was released on bail by the Chief Metropolitan Magistrate, Bombay. The Assistant Director, Enforcement Directorate, Bombay by his letter dated 28-1-1997 informed the Under Secretary of the Government of India, Ministry of Finance, Department of Revenue, New Delhi, as follows:

As the Detention Order was executed by the Kerala Police and as this office is not having any records, it is requested that you may ascertain the reference No. of Government of Kerala from the report sent to Ministry on the execution of Detention Order from the Ministry's file....

No doubt, from the files, we find certain reports made with regard to the arrest of the detenu. We find that three persons had visited the detenu's house. The reports, which are almost identical, state that the detenu was not then residing in the above address and there is nobody in the locality to give his present whereabouts. It was in this context that we directed the respondents to file an additional affidavit. But the additional affidavit also does not improve the situation. It is not enough if the authorities report that the detenu was not available in the address and hence the warrant of arrest could not be executed. No details are given as to what steps were taken to trace out the detenu. The order of detention shows two addresses of the detenu. It is not clear from the reports whether enquiries were made in both the addresses. Further, the detenu had obtained bail from the Metropolitan Magistrate, Bombay. We are told that the bail was granted on the security of two sureties. No enquiries appear to have been made about the two sureties when the authorities found that the detenu could not be found in his address. Further, no action had been taken to move for canceling the bail order. These facts show that no bona fide attempt has been made by the authorities to trace out the detenu in order to execute the detention order. We are sorry to state that no bona fide attempts have been made by the authorities to execute the detention order. Neither the

Enforcement Directorate in Kerala nor the Police Authorities in Kerala have cared to file any affidavit before this Court to show the efforts taken by them to execute the order of detention. This shows callous indifference on the part of the authorities, This indifference will work in jeopardising the liberty of the individual as well as the interest of the State. We find that in many other cases also the authorities have been slow in executing the detention order. An order of detention under the COFEPOSA Act is issued on being satisfied that the presence of the detenu outside the jail will be prejudicial to the interest of the State and the maximum period of detention is only two years.

15. The question whether the delay in execution of arrest will vitiate the detention has come up for consideration before the Supreme Court in T.A. Abdul Rahaman Vs. State of Kerala and others . In that case the Supreme Court held as follows (at p. 582 of Cri. L.J.):

Similarly, when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner.

There, the detenu was arrested after a period of 2 1/2 months from the order of detention. The Court was not satisfied with the counter affidavit with regard to the delay. It further held as follows (at p. 583 of Cri LJ) :

The Superintendent of Police, Malappuram to whom the detention order was forwarded for execution has not filed any supporting affidavit explaining the delay in securing the arrest of the detenu. Under these circumstances, we hold that leaving apart the question of delay in passing the order of detention from the date of the seizure of the gold, the fact remains that the detaining authority has failed to explain the long delay in securing the arrest of the detenu after three months from the date of the passing of the detention order and this non- explanation in our view throws a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority vitiating the validity of the order of detention.

16. This Division Bench also dealt with the same question in O. P. No. 16273/96. In that case, there was a delay of 6Vi years in executing the detention order. This Court quashed the detention order on the ground of delay. In the course of the judgment, my Lord, the Chief Justice, said as follows:

Therefore, although we have a bald statement that the Special Squad met these persons in Kerala of Ponnani and learnt and the warrantee was in Gulf Country, but that again was of no effect, because neither any effort was made by them to obtain the address of the detenu from those persons whom they met not any enquiry whatsoever was made to apprehend the alleged detenu at Abu Dhabi. There was

absolutely no effort by these authorities on which we can place reliance. Even the respondents" counsel could not point out any averment to the effect that any such effort was made by the Investigating Authorities to apprehend the detenu at Abu Dhabi.

17. Thus, on going through the records and affidavit, we are satisfied that the authorities have not been able to explain the reason for the delay in executing the order of detention. Mere saying that the detenu was absconding is not enough. Hence we quash the impugned order of detention and direct release of the detenu forthwith, if he is not required in any other case.