

(1997) 08 KL CK 0047

High Court Of Kerala

Case No: O.P. No. 11165 of 1995 D

Sivaprasad,

APPELLANT

Vs

Vs State of Kerala and Others

RESPONDENT

Date of Decision: Aug. 20, 1997

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 3(1)

Hon'ble Judges: K.A. Abdul Gafoor, J

Bench: Single Bench

Advocate: T. Devdssia and R. Anil Kumar, for the Appellant; K. Janardhanan, Government Pleader for Respondents 1 and 2 and C.C. Thomas, Additional Central Government Standing Counsel for Respondent 3, for the Respondent

Final Decision: Allowed

Judgement

K.A. Abdul Gafoor, J.

This Original Petition came up for hearing on 23rd July 1997. Counsel on either side were not present. Party was also not present. The matter was taken up for hearing and was dismissed.

2. The Petitioner moved for a re-hearing, and the matter was posted for "to be spoken to" on 24th July 1997, 28th July 1997 and 4th August 1997. The matter was heard in length and a detailed judgment is being pronounced. The order of detention u/s 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act was passed against the Petitioner on 23rd February 1983. At the time of passing the said order, the Petitioner was employed in Gulf countries. The reason for passing such order was that when one Abdul Rasheed, who landed in Trivandrum Airport on 13th May 1982 was apprehended in connection with smuggling of gold, he mentioned about one Rajendran who later disclosed that the latter had obtained assistance from the Petitioner in the matter of smuggling of gold. A complaint was filed before the Additional Chief Judicial Magistrate (Economic

Offences) Court at Ernakulam against the said these three person. In that criminal case the second accused had already been acquitted. When the Petitioner returned from gulf country in 1995 he knew about the case and moved for bail and was enlarged on bail on 1st March 1995. While the Petitioner was abroad, his wife was being harassed by police. Therefore she filed an Original Petition complaining harassment by police and also challenging the detention order against the Petitioner. That Original Petition was dismissed. After the Petitioner was enlarged on bail as mentioned above, he has approached this Court with this Original Petition seeking a direction to the Respondents to refrain from taking further steps pursuant to the detention order dated 23rd February 1983.

3. When the Petitioner was enlarged on bail, the Respondents moved that Court stating that the Petitioner did not disclose about the detention order before the Magistrate Court and the bail order was cancelled and arrest warrant was issued. At that time, the Petitioner obtained an interim order in C.M.P. 19965/95 staying all further proceedings pursuant to the detention order on conditions of the Petitioner filing undertaking not to leave the limits of Kerala State, to surrender before the Superintendent of Police and file an affidavit undertaking not to leave the jurisdiction of Superintendent of Police, Trivandrum without giving prior intimation to surrender the passport or other travel documents, and that the Superintendent of Police should inform all authorities not to issue a fresh or renewed passport to the Petitioner. That order is still in force. The Petitioner later moved the Magistrate Court and the warrant was recalled and he was enlarged on bail. During the pendency of the Original Petition he was also acquitted.

4. The main contention urged by the Petitioner is that more than 14 years have now elapsed since the passing of the detention order and therefore due to the delay in its execution no purpose will be served in detaining the Petitioner and therefore the detention order shall not be implemented. The Petitioner, as such, does not challenge the detention order. So, the only question that arises for consideration is whether the detention order said to be passed in February 1983 need be executed after more than 14 years now. A detailed statement has been filed on behalf of the 3rd Respondent by Sri C.C. Thomas, Additional Central Government Standing Counsel. It is contended that the Original Petition is not maintainable on the principles of res judicata as O.P. No. 7093/85 filed by the Petitioner's wife challenging the very same detention order has been dismissed, that the Petitioner did not disclose about the detention order before the Magistrate to obtain the bail, that the bail was subsequently cancelled issuing an arrest warrant against the Petitioner and therefore the Original Petition is filed to stall the proceedings of the Magistrate with mala fide intention, that an order of preventive detention under the COFEPOSA cannot be challenged at the pre-execution stage. It is also vaguely alleged that "a person against whom an order of detention has been passed" and who has purposefully made himself not available or has been absconding in order to prevent the execution of the detention order against him cannot allege that there

is unusual delay in executing the detention order, and that the delay had occasioned "by the deliberate attempt to thwart the same by the Petitioner himself".

5. There is no point in contending that this Original Petition is not maintainable on the principles of res judicata. O.P. No. 7093/85 was not "between the same parties" litigating under the same title. Moreover, even admittedly in the statement of the 3rd Respondent, the Petitioner's wife filed the Original Petition "also not to harass the said Petitioner in the said Original Petition". Therefore, the main grievance in that Original Petition was harassment by police. Even if it is taken that the detention order has been challenged in the Original Petition filed by the Petitioner's wife, the points raised in this Original Petition is whether the said detention order can be enforced after a delay of about 15 years. Therefore, as the points for decision are different, the principles of res judicata will not be attracted.

6. The statement of the 3rd Respondent or the counter-affidavit of the 1st Respondent does not disclose any attempt made by them to implement the detention order. The submission of the Petitioner that detention order has been passed while the Petitioner was away in Gulf, is not disputed. In such circumstances, it cannot be taken that the Petitioner had absconded and evaded the detention order. Merely because he did not disclose the detention order in the bail application before the Magistrate, it cannot be stated that he had evaded the detention order. The pendency of C.C. 51/92 before the Magistrate Court was also taken note of by this Court in the interim order. The Petitioner approached the Magistrate Court immediately on his arrival. Without further delay he approached this Court also with this Original Petition. In such circumstances, it cannot be said that this Original Petition is filed with any mala fide intention to stall criminal case against him pending before the Magistrate Court. Moreover, the Petitioner was acquitted by the Magistrate later.

7. The Counsel for the 3rd Respondent mainly relied on the decision in Addl. Secretary, Government of India v. Smt. Alka Subhash Gadia and Anr. 1922 Supp. (1) S.C.C. 496. Paragraph 5 in the said judgment discloses that,

the neat question of law that falls for consideration is whether the detenu or anyone on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it.

Accordingly, the Court, considering the earlier decisions held that the Court can interfere with a detention order when,

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.

Certainly, when a detention order is challenged at a pre-execution stage as held by the Supreme Court, that order can be interfered with only on the said limited grounds. But in this case, there is no challenge against the detention order. Whether the detention order was rightly passed or whether there were sufficient reasons to pass such an order, is not a matter in issue; but whether any useful purpose will be served by detaining the Petitioner after 14 years of the passing of the detention order is the real issue involved. Therefore, the said decision of the Supreme Court does not apply to the issue on hand.

8. The Counsel then relied on the decision of this Court in *Secretary, Home Department v. Abdul Azeez* 1995 (1) KLT 709. That was a case where a detainee first approached the Calcutta High Court alleging that he was residing at Hadoo, Andaman and Nicobar Islands, Port Blair describing "himself to be a business carrying on businessman of fish from Port Blair". He obtained an interim order from the High Court of Calcutta. When he approached this Court, he described himself as residing in "Kalayathu House, Muttippalam, Anakkayam P.O., Malappuram District" and styled himself as "peacefully living and eking his livelihood as Auto Consultant at Manjeri", and noted that he had "concealed the factum of his approach to the High Court of Calcutta" and that "he has come to this Court with unclean hands". The Court observed that,

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.

The delay of three years in executing the detention order was found to be "on account of the detainee's evasion from arrest". This Court noted the observation of the Supreme Court in [Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another](#), and found that "even after the expiry of the three year, the order of detention was still effective if the detainee himself was to be blamed for the delay in execution". This Court also, relying on the decision of the Supreme Court in [Subhash Muljimal Gandhi Vs. L. Himingliana and Another](#), found that in that case also, a delay of more than two years in executing the detention order "was also caused on account of the detainee absconding from the place". In the case considered by the Division Bench, "the main contention raised by the Counsel representing the Petitioner is that the order of detention was issued on vague, extraneous and irrelevant grounds", and the Court found that "at this stage the Petitioner is not entitled to know the ground under which he has been detained". Thus, the decision in *Secretary, Home Department v. Abdul Azeez* 1995 (1) KLT 709 does not apply to the facts in this case.

9. Relying on the decision in [Haradhan Saha Vs. The State of West Bengal and Others](#), , the Counsel further contends that the subsequent development cannot also be a reason for challenging the detention order. In this case, the subsequent development of acquittal by the criminal Court is not relied on by the Petitioner. Moreover, there is no challenge also against the detention order. Therefore, that contention also does not help the 3rd Respondent.

10. Counsel for the Petitioner relying on a recent decision of this Court in *Shareefa Ummer v. Joint Secretary and Ors.*, 1997 (1) KLJ 740 contended that by reason of 14 years delay in execution of the detention order, the Respondents cannot any more enforce the detention order and detain the Petitioner. In that case, the detention order was passed on 17th May 1993 and the detenu was arrested and detained on 4th June 1996, three years after the order of detention was passed. As noted by the Division Bench in that case, "the main ground urged is the delay in executing the order of detention". It was disclosed in the counter-affidavit filed in that case about the efforts taken by the Enforcement Directorate at Calicut to find out the detenu and the details of enquiry made as many as times on various dates. Thus, there was some effort on the part of the Enforcement Directorate to find out the detenu to detain him. On the other hand, the statements and the counter-affidavit filed in this case do not divulge any such effort. At the time of detention order, the Petitioner was away in Gulf. It is stated in the counter-affidavit that "he unauthorisedly left the country to defeat the due process of law" and that he left the country to avoid detention and other proceedings. It was also stated that he "was declared as an absconder". It is so stated in the counter-affidavit filed on behalf of the 1st Respondent. But, the specific averment in the Original Petition is that the Petitioner had left India prior to the passing of the detention order. The detention order was passed on 23rd February 1983. Therefore, it cannot be stated that he was absconding. It cannot be stated that he left India after the detention order. Either the counter-affidavit or the statement does not disclose any effort made by the Enforcement Authorities or by the Kerala Police to execute the detention order. An order of detention under the COFEPOSA Act is issued when the authority gets satisfied that presence of the detenu outside the jail will be prejudicial to the interest of the State. The maximum period of detention is only two years. There is no averment or allegation that the Petitioner was indulging in any illegal activities for the last 15 years. In such circumstances, no purpose will be achieved in interfering with the personal liberty of the Petitioner executing the detention order. When the detention order is executed belatedly, the contention on the delay in execution had been accepted as a good reason as "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 See [T.A. Abdul Rahaman Vs. State of Kerala and others](#), .

11. In the judgment in O.P. No. 16273/96, a Division Bench of this Court considered the delay of 61/2 years in executing the detention order. The Division Bench while quashing the order of detention held that,

There was absolutely no effort by these authorities on which we can place reliance. Even the Respondent's 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.

12. These decisions were followed in the recent decision in Shareefa Ummer v. Joint Secretary and Ors., 1997 (1) KLJ 740 and quashed the detention order "as the authorities have not been able to explain the reason for delay in executing the order of detention".

13. As already pointed out in this case, the detention order had been passed on 23rd February 1983, more than 14 years have elapsed. Even if the detenu had been detained, he would have been released. There is no averment in the counter-affidavit or the statement by the Respondents about the conduct of the Petitioner with regard to his activities subsequent to the passing of the detention order. At the time of passing the detention order he was away in Gulf countries. Even if the said order is executed, following the said decisions including in Shareefa Ummer v. Joint Secretary and Ors., 1997 (1) KLJ 740 and those decisions referred to therein, the detention order would be quashed.

14. Sufficiency of grounds for passing the detention order and the legality or otherwise of the detention order is not canvassed in this Original Petition and therefore such aspects are not gone into. There is no challenge also against the detention order as such.

15. In such circumstances, there is no point in enforcing the detention order. The detention order is passed with a view that the presence of the detenu outside the jail will be prejudicial to the interest of the State at the time of detention. When there is no case for the Respondents that the Petitioner did indulge in any unlawful activities after the detention order, the enforcement of that order after 14 years will certainly result in impairing the fundamental liberties of the Petitioner. Therefore, the original petition is allowed making it clear that the detention order dated 23rd February 1983 passed against the Petitioner u/s 3(1)(ii) of Act 52 of 1974 cannot be enforced. No costs.