
(1994) 12 KL CK 0027
In the High Court Of Kerala
Case No : O.P. No. 3136 of 1990-w

A. Mohammed

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 08-12-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 188, 4, 482, 82, 83
Customs Act, 1962 — Section 1(2), 111, 113, 2, 2(39)

Citation : (1995) CriLJ 1866 : (1995) 2 ILR (Ker) 53

Hon'ble Judges : V.V. Kamat, J;K. Sreedharan, J

Bench : Division Bench

Advocate : V.K. Hamza, for the Appellant; Lal George, Govt. Pleader, for the Respondent

Judgement

V.V Kamat, J.—It is elementary and obvious that abundant foreign exchange was the crying need as a result of highly adverse position of the balance of payments on the eve of second world war and our country required the foreign exchange as much for development of the planned industrial base. The foreign exchange needed conservation meaning prohibition of imports of certain items and close regulation of some items. The controls in the context exhibited over-all fall outs creating a class of smugglers as well as foreign exchange manipulators. Profit was the sole motive and worldly success became the sole criterion to show what is right and what is wrong in individual conduct. The Foreign Exchange Regulation Act, 1947, Imports and Exports (Control) Act, 1947, the Customs Act, 1962 which were passed on the anvil of the Parliament proved abortive and in spite thereof smuggling and violations continued spreading with a spiral character.

2. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "The said Act") was enacted for preventive detention specifically with the object to provide for preventive detention for the said purpose because violations of foreign exchange and smuggling activities showed an increasingly deleterious effect on the national economy and thereby a

serious adverse effect on the security of the State. Regard is to such persons with reference to such activities or violations organised and carried on in areas which are highly vulnerable to smuggling, smuggling activities of a considerable magnitude, and the Act makes provisions for preventive detention.

3. The "smuggling" activity gets the same meaning as is available in Section 2(39) of the Customs Act, 1962 (see Section 2(e) of the said Act) and it would be an act or omission which would render goods liable to confiscation u/s 111 or 113 of the Customs Act. Reference to Sections 111 and 113 of the Customs Act, 1962 would show that an improper import or its attempt would make the goods liable to confiscation. Suffice it to state an improper import or its attempt would brand the concerned activity as the "smuggling activity" with reference to the said Act.

4. The preventive detention under the said Act, for the purpose of controversy in this petition, depends on the subjective satisfaction of the detaining authority to prevent a person from (a) abetting the smuggling of goods, or (b) engaging in transporting or concealing or keeping smuggled goods, or (c) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods or (d) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods as per the requirements of Section 3 of the said Act. The person is detained in connection with these activities or attempts in regard thereto. Seeing the provisions of Section 111 and Section 113 of the Customs Act, when it is clear that the smuggling activities are committed when the goods become liable to confiscation on crossing the barrier. The abetment, attempt or preparation of smuggling activities are to be contemplated with regard to the activities before, during and after crossing the places or barriers making goods liable to confiscation.

5. The question that is posed for consideration on factual matrix of this petition is whether the petitioner can be justifiably and legally detained u/s 3 of the said act if his acts of attempting, dealing or engaging in smuggling activities are outside India, when acts would amount to smuggling activities or attempts in regard thereto on crossing the customs barriers making them liable to confiscation.

6. Really speaking this petition brings before us a challenge to the detention order before its execution. The principles laying down its very limited scope are more than settled by the decisions of the Supreme Court *Subhash Muljimal Gandhi Vs. L. Himingliana and Another*, , *S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others*, *S. M. D. Kiran Pash v. Govt. of A. P.*, and also of this Court 1993 (1) KLT 906, *Abdul Aziz v. Union of India* (SLP (G) 863/93, dismissed by the Supreme Court): ILR 1994 Ker 178 (S. J.), *M. V. Thomas v. State of Kerala*. The Courts have power to entertain grievances against any detention order prior to its execution and they use it in proper cases although such cases have been few and the grounds on which the Courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number viz. where the Courts are prima facie satisfied (i) that the impugned order is not

passed under the Act which 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 that the authority which passed it had no authority to do so. The jurisdiction has to be exercised sparingly and in the circumstances where no other remedy is available. The Courts cannot ignore time honoured and well-tested judicial self-restraints. Even then the refusal to exercise extraordinary jurisdiction to interfere with the detention order prior to execution, however, does not amount to abandonment of the said power, but it is only prevent its abuse and perversion of the ordinary and well settled mode of law.

7. The term "smuggling activities", when considered with reference to Section 2(39) along with Sections 111 and 113 of the Customs Act, 1962 becomes wide enough and would operate on different fields, which would many times overlap providing for different grounds and the intention of the legislature would have to be assumed, as observed by the Supreme Court : Narendra Purshotam Umrao Vs. B.B. Gujral and Others, ., for treating direct smuggling of goods and abetting the smuggling of goods as grounds of detention and would include all activities which result in accomplishment of smuggling of contraband goods. Activities prior to the actual act of smuggling may take place outside the territorial limits of the country.

8. The petitioner has approached this Court through his Holder of Power of Attorney, his elder brother. The petitioner, aged 35 years, is a petrol bunk boy employed is Rasal Khaima, U.A.E. for several years. He knows one Abdul Rahiman, as one from his native place Vengara, Malappuram District. This Abdul Rahiman, on July 6, 1987, was intercepted by the Customs authorities at Trivandrum Airport. A refrigerator concealing gold biscuits was recovered from him. One Shri K. C. Kunjahmed Kutty @ Kunjahan @ Bava was also arrested. The Deputy Collector of Customs, Cochin, held adjudication and by an order dated March 22, 1988, confiscated concealed 26 gold biscuits: 3029 grams, valued at Rs. 8,17,830/-, along with refrigerator and imposed penalties on Abdul Rahiman, the petitioner and also Kunhammed Kutty by the adjudication order.

9. The material collected by the Customs Authorities revealed that the refrigerator concealing 26 gold biscuits carried by Abdul Rahiman was under instructions of the petitioner to be delivered to Shri K. C. Kunjan @ Bava and circumstances in which Abdul Rahiman acted and the particulars of the contacts of these three persons were collected in the process of interrogation by the authorities.

10. The detaining authority passed detention order No. 13272/SSA1/88/Home on March 9, 1988, before the adjudication order. It appears that the Appellate Authority the Collector of Customs (Appeals) Madras - (Ext. P-III) set aside the order directing to issue fresh show cause notice to the petitioner at Rasal Khaima address and pass a speaking order. The petitioner was required to move the Appellate Authority in view of the order of this Court in O. P. 61 of 1989, D/-

6-1-1989 (Ext. PV).

11. It also appears from the record that criminal proceedings: C.C. No. 108 of 1988 before the Addl. Chief Judicial Magistrate (Economic Offences), Ernakulam, also came to be quashed by this Court (Crl. M.C. 833 of 1988, D/- 22-12-1989 - Ext. PVI) holding that the confession of co-accused would not be substantive evidence, and would be of no utility at the trial. This Court exercised inherent powers u/s 482, Cr. P. C, 1973 to order deletion of the petitioner's name from party array.

12. Earlier O.P. No. 7288/1988 of the Petitioner before this Court to challenge the report to the Magistrate for action u/s 7 of the said Act, 1973 was dismissed and the judgment (Ext. PVII) dt. 30-9-1988 shows that as it could not be said that the petitioner was absconding, this could be showed to the Magistrate proposing to move u/s 82 to Section 85 of Cr. P.C., 1973. It is contended that the petitioner came to know of the detention order by reason of its disclosure in the counter to O.P. No. 1097/1990 and therefore the present petition was filed on March 28, 1990.

13. The learned counsel for the petitioner, after taking us through previous orders and proceedings urged that challenge at pre-execution stage would be justified. It is urged that the said Act, 1974 extends to whole of India and has no extra-territorial application and cannot reach anyone who is out-side the territorial limits of this country, in view of applicability clause : Section 1(2) of the Act. It is then contended that there is no material except confession of co-accused and this Court itself has quashed criminal proceedings. It is urged that criminal proceedings having been quashed finally, proceedings of detention order would not be maintainable. It is urged that facts, circumstances and subsequent orders would show that the detention order is without any material, based on extraneous consideration and unwarranted. It is a product of non-application of mind. It is also urged that this very Court by order dated 11-4-1990 in C.M.P. No. 5560/1990 in this very petition, has granted stay of further proceedings of the detention order on conditions and the said interim stay is still in force and it would not be that the petition is entertained only for grant of interim stay alone. It is therefore submitted that on the well-established principles the pre-execution challenge to the detention order deserves to be endorsed by confirming the order of stay.

14. The illustrative aspects under which the Court can properly exercise extra-ordinary jurisdiction are neatly established. It cannot be said that the present order is not passed under the proper Act, or is sought against a wrong person or for a wrong purpose. The petitioner on material (on record) is connected with the smuggling of gold in this country and the grounds could not be considered to be vague, extraneous or irrelevant. It also cannot be said that the detaining authority is not the legal authority.

15. The contention of the learned counsel that criminal proceedings are quashed

and adjudication also is over long back and therefore there is no justification for the detention order is neatly answered by the Supreme Court : Haradhan Saha Vs. The State of West Bengal and Others, , and with benefit, paragraph 32 (at page 2160) can be reproduced:

"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 or 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."

Additionally, paragraph 19 (at page 2157) would be an advantage in the context. It is as follows:-

"The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a Court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case a person is punished to prove (sic) (on proof of?) his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in Section 3 of the Act to prevent."

16. The submission of the learned counsel regarding the aspect of territoriality has also difficulties of acceptance. The Act relates to person and his smuggling activities in the context. Preparation and attempts reflect activities bound to occur beyond the territorial limits. If acts amount to an offence under ordinary criminal law and are committed outside this country, powers under Sections 4 and 188 Cr. P. C, 1973 contemplate investigation outside this country. It is obvious. This Court 1994 (1) KLT 464, Muhammed v. State of Kerala, has if need be, held that if a citizen does acts abroad amounting offences under the Penal Code, admits of no doubt regarding investigation, inquiry and trial in this country in a competent and proper Court.

17. On facts, the material reveals basic fact that the petitioner instructed Abdul Rahiman to carry the Refrigerator concealing gold biscuits - contraband -to India to be delivered to Shri K. C. Kunjan @ Bava. Factual material includes factual inference. The material in the context refers to the basic fact and has to be

understood meaningfully in tune with the contemporary notions of the realities of the society and the purpose of the Act in question, and therefore, the material or as it is called "grounds" are required to be considered meaningfully with reference to Section 3 of the said Act. Therefore, grounds would include not only conclusions or inferences from facts, but also "basic facts" which are wholly different from "subsidiary facts or further particulars" in relation to the "basic facts" in relation to the subjective satisfaction required. The provisions are to be appreciated not as rules for the passing hour, but principles for an expanding future.

18. In our judgment, the approach to deal with the smuggling activities sought to be prevented under the provisions of the said Act 1974, would have to be looked and viewed with the approach set out by Thomas Jefferson (quoted by the Supreme Court : Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, - in para 82). "To lose our country by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means". It is observed further in the context that by the said approach, both justice and power can be brought together and whatever is just may be powerful and whatever may be powerful may be found to be just. Within the limited powers and view, in question of exercise of extra-ordinary jurisdiction in regard to pre-execution challenge to the detention order will have to be looked into keeping in view the objects and purposes of the said Act, 1974.

19. One misfortune of the situation would have to be stated and dealt with. The order of detention dated 8-3-1988 has under the order of stay not been executed as yet. The learned counsel was more than strenuous in throwing considerable doubt on genuineness of subjective satisfaction of the detaining authority. Heavy reliance was placed on the decision of the Supreme Court : T.A. Abdul Rahaman Vs. State of Kerala and others, illustratively, that even delay of three months in securing arrest of detenu in pursuance of the detention order is to be held doubtful as regards the required subjective satisfaction. With all consentaneousness at our command, we would see the situation differently with regard to a petition challenging detention order at the pre-execution stage as against the detention itself, where there is material vis-a-vis requirement of subjective satisfaction, on a wider spectrum.

20. Keeping in view the observations that refusal to exercise extraordinary powers at the pre-execution stage of the detention order, does not amount to abandonment of the said power, but it is only to prevent its abuse and perversion of the ordinary and well-settled mode of law, we hereby dismiss this petition and consequently, hereby vacate the stay order dated 11-4-1990 in C.M.P. 5560 of 1990 in this petition. There shall be no order as to costs. Ordered accordingly.