
(2009) 12 KL CK 0064

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 35838 of 2009 (Y)

Ajikumar

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 11-12-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 12 KL CK 0064

Hon'ble Judges : R. Basant, J;M.C. Hari Rani, J

Bench : Division Bench

Advocate : Sojan Micheal, for the Appellant; No Appearance, for the Respondent

Final Decision : Dismissed

Judgement

Basant, J.—The petitioner has come to this Court to challenge an order passed u/s 3 of the Kerala Anti-social Activities (Prevention) Act, 2007 (hereinafter referred to as the 'KAAPA') directing his preventive detention. The petitioner has not been arrested. He claims that he is entitled for an opportunity to challenge the order of detention prior to its execution and actual detention.

2. The law on the point is well settled. Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, has been explained in Deepak Bajaj Vs. State of Maharashtra and Another, . It is certainly not the law that invariably in every case the detenu has to wait till he is detained to challenge the order. But it is a salutary rule of self restriction imposed by the courts that unless there are compelling and clinching circumstances, the powers under Article 226 of the Constitution will not be invoked in a case of preventive detention before the actual detention takes place. After Deepak Bajaj (supra) also the position of law though modified is not substantially altered. Where compelling reasons are there, a pre detention challenge can be entertained. Addl. Secy., Govt. of India v. Alka Subhash Gadia (supra) cannot be reckoned as exhaustive, rigid or inflexible. But all the same this Court must be satisfied that there are sufficient and compelling reasons in the given case to invoke the

powers under Article 226 of the Constitution prior to detention.

3. The question then is whether there are such circumstances in this case. What are the circumstances? The counsel was specifically queried to point out the circumstances that should persuade us not to follow the ordinary rule of procedure and to entertain this challenge prior to actual detention.

4. The counsel first of all contends that mind has not been applied. We shall not embark on a detailed discussion on the acceptability of the grounds raised. Suffice it to say that we are not persuaded to agree that the same can operate as a reason to entertain the challenge prior to actual detention.

5. Secondly it is contended that there is delay in execution. The order of detention, it is said, was passed in January, 2009. The mere fact that the order passed in January, 2009 has not been executed till now, is by itself, no reason for this Court to invoke the powers under Article 226 of the Constitution prior to actual detention. Of course in a case where the detention has taken place it will be open to the detenu to contend that the nexus has been snapped because of the delay in execution. Obviously the petitioner has not surrendered before the authority which has issued the order of detention even after coming to know of the order of detention. In these circumstances, such alleged delay in execution does not also persuade us to invoke the powers under Article 226 of the Constitution prior to detention.

6. The learned Counsel for the petitioner thirdly contends that the petitioner is on bail in all the 3 cases and in these circumstances the court below ought to have pointedly considered the question whether in the light of the conditions imposed in the bail order an order of detention is necessary or warranted. That question raised also cannot and does not persuade us to consider the challenge prior to actual detention. We record that the petitioner is not present before Court today. We do so to avoid a possible incorrect contention later on that the petitioner was available for arrest when he appeared before this Court in connection with this petition.

7. This Writ petition is, in these circumstances, dismissed without any fetter on the rights of the petitioner to raise all appropriate grounds at later stages if he chooses to challenge the impugned order of detention, after his actual arrest and detention in pursuance of the impugned order.