(2006) 08 KL CK 0018

In the High Court Of Kerala

Case No : Writ Petition (Criminal) No. 130 of 2006

Alima APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 16-08-2006

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 7(1)(a), 7(1)(b), 8(f)
Constitution of India, 1950 — Article 22, 22(5), 226
Criminal Procedure Code, 1973 (CrPC) — Section 82, 83, 84, 85
Foreign Exchange Management Act, 1999 — Section 13(1), 3, 37(3)
Income Tax Act, 1961 — Section 132

Citation : (2006) 2 KLJ 901

Hon'ble Judges : V. Ramkumar, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : Joshi N. Thomas, for the Appellant; John Varghese (ASG) and M.P. Prakash (SGP), for the Respondent

Final Decision : Dismissed

Judgement

Radhakrishnan, J.—This writ of habeas corpus is preferred by the wife of the detenu under Article 226 of the Constitution of India to release the detenu by name C.K. Beerankutty from custody as well as seeking a writ of certiorari to quash Ext. P1 order of detention dated 3-12-2003 and also the order of confirmation passed by the Government of India u/s 8(f) of the COFEPOSA Act. Enforcement Directorate, Chennai on getting secret information conducted a search at the residential premises of the detenu on 3-2-2003 at No. 19/23, Dinesh Niwas, Dharachand Nagar 3rd Street, Venkatesh Nagar. Chennai-96 and the detenu, one Kunhi Mohamed K., Mohamed Sheriff, Ashraf A.P., Safeer P. and Sameer Babu K. were present at the time of search. Search resulted in the seizure of Indian currency of Rs. 72,70,000/- and documents consisting of note book, pocket note and bunch of loose sheets consisting of accounts, telephone bill and summary account of M/s. Airtel etc. and currency counting machine of M/

s. Albert and Sons (Electronic) Model ANCM-02 bearing No. 01351-12/02. During the course of search on 3-2-03 the detenu''s statement was recorded on oath. Detenu had stated that the seized amount of Rs. 72,70,000/- was received by him on 3-2-03 from one Arjun at Chennai as per the instructions of one Sherif alias Mash residing at Dubai. Further he had also stated that had this amount not been seized by the officers it would have handed over to one C.K. Musthafa as instructed by Sherif of Dubai. Further he had also stated that Musthafa was having a jewellery shop at Perinthalmanna, Kerala. He had also made another statement to the Assistant Director of Enforcement Directorate on 4-2-2003 that whatever he had stated in his statement dt. 3-2-2003 was correct.

2. Detenu in his statement had admitted that he had been regularly receiving payments locally on behalf of Sherif of Dubai from October 2002. The modus operandi was that certain unknown persons would deliver various amounts to the detenu and the detenu would hand over the same to Musthafa either himself or through his drivers S.P. Safeer, K. Sameer Babu, Mohamed Sherif, K. Kunhi Mohamed and A.P. Ashraf. Detenu had also admitted that the from October 2002 till the end of January 2003 he had handed over Rs. 96.76 crores as per the instructions of Sherif of Dubai. As a follow-up action the police authorities had also intercepted the Toyota Qualis car bearing No. KL-10-M-8859 near Seelanaickenpatty Round Tana, Saled District 3-2-2004. Three person by name Abbas, Vinodkumar and K. Manoj were found in the car. The search of the car resulted in the seizure of Indian currency of Rs. 75,00,000/ - kept concealed in secret cavities. The Toyota Qualis Car was also seized by the police authorities and all the above mentioned three persons were arrested by the police. Abbas gave a voluntary statement before the police authorities at Salem on 4-2-2003. Statements were recorded from all the above mentioned three persons and they were arrested by the Inspector of Police and produced before the Judicial Magistrate, Salem on 4-2-2003 and they were remanded to judicial custody. When the detenu was informed about the interception of the qualis car and also the result of the search and also the fact that Indian currency of Rs. 75,00,000/- was seized the detenu had stated that the money was also taken for handing over to C.K. Musthafa and that the amount was included in the amount of Rs. 96,76,08,375/-. All the three persons had stated that they had received this money from Kutty for handing over the same to C.K. Musthafa. Later the detenu on 12-2-2003 retracted from the said statement. Retraction was made by him from statements made on 3-2-2003 as well as on 4-2-2003.

3. Enforcement Directorate had also issued show cause notice to all the parties to show cause why adjudication proceedings as contemplated u/s 13(1) of FEMA, 1999 should not be initiated. Further the entire materials collected were forwarded to the detaining authority. Detaining authority noticed that the detenu is indulging in activities of receiving the amounts locally and making payments to several persons in India as per the instructions of a person resident outside India and that he has contravened the provisions of section 3 of the Foreign Exchange Management Act,-1999. Considering the nature and gravity of the offence the

detaining authority was satisfied that unless the detenu is detained, he is likely to engage in activities which would prejudice the interests of the country and therefore it is necessary to detain him under the COFEPOSA Act, 1974 with a view to prevent him in future from acting in any manner prejudicial to the augmentation of country''s foreign exchange resources. While passing the detention order the detaining authority had considered and relied upon various documents and copy of the grounds of detention and the copies of relied upon documents translated into Malayalam were supplied to the detenu. Detenu was asked to submit detailed representation in the grounds of detention order by the detaining authority as well as on the basis of the documents supplied to him. List of documents was also supplied to the detenu. Detention order dated 3-12-2003 could not be served on the detenu. Consequently action u/s 7(1)(b) and 7(1)(a) was initiated against him on 17-2-2004 and 7-4-2004 respectively. Detention order along with a covering letter dated 9-1-04 was forwarded to the Superintendent of Police, Malappuram for execution. The letter was received in the Office of the Superintendent of Police on 13-1-04 and the same was in turn forward to the Office of the Circle Inspector of Police, Manjeri for urgent execution. Detailed enquiry was made, but the detenu could not be traced. Earlier the Central Government as per notification RNo.673/29/03-CUS. VIII dated 17-2-04 ordered the detenu to appear before the Commissioner of Police, Malappuram within seven days of the publication of the said order in the official gazette. Office of the Superintendent of Police, Malappuram sent registered notice dated 29-3-04 directing the detenu to appear in person within ten days of the receipt of the said notice. Detenu did not respond. The effort taken by the police to find out the detenu is elaborately stated in the counter affidavit filed by the Circle Inspector of Police, Manjeri.

4. Government of India as per report R No. 673/29/03-CUS. VIII dated 7-4-04 reported before the Chief Judicial Magistrate that the detenu has absconded and requested the Chief Judicial Magistrate, Manjery that the proceedings under sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 may be initiated against the detenu. Later detenu had surrendered before the police on 15-2-06. Detenu on receipt of the grounds of detention filed objections to the detention order as well as representation before the Advisory Board. Further he has also filed Ext. P5 petition for copies of the bail applications filed by Abbas, Vinodkumar and Manoj before Magistrate Court, Salem and orders passed therein, memorandum issued in adjudication proceedings F.No.T-4/135/SZ/CLLT/2003 dated 8-10-03 and the replies, cross examination etc., details regarding the verification conducted by the sponsoring authority regarding his financial ability, details regarding the enquiry conducted regarding the telephone number alleged to be belonged to Sheriff and the details regarding the disposal of two vehicles bearing No. KL-10/N 7296 and TN-37/Y-3051 surrendered by the detenu on 4-2-2003 at the office of the sponsoring authority. Detenu was served with Exts. P7 and P8 reply rejecting his representations. Later the order of detention was confirmed by the Government of India u/s 8(f) of the COFEPOS A

Act by order dated 7th April, 2006 and he was ordered to be detained for a period of one year from 15-02-06.

5. Sri. Joshi N. Thomas, counsel appearing for the detenu referring to Ext. P10 search warrant submitted that the name shown in the search warrant is one Siddique. Ext. P10 search warrant showing the name of one Siddique cannot be executed so as to implicate the husband of the petitioner since his name is C.K. Beerankutty. Counsel submitted that the information gathered by the department was that one Siddique was indulging in illegal activities and not the detenu. Therefore search conducted in the residential premises of the detenu is without jurisdiction. Counsel also submitted that Ext. P11 Panchanama also does not show the name of Siddique, consequently the search was unauthorised and illegal and all proceedings initiated pursuant thereto has to be declared as non est. Second respondent has filed a detailed counter affidavit wherein it has been specifically stated that the detenu is also known as Siddique. Detenu in his statement dated 4-2-03 has categorically admitted that he is also known as Siddique in his business circle. Search was therefore conducted at the residence of the detenu at Chennai on the basis of the information that one Siddique residing at the said address was carrying on activities in violation of the Foreign Exchange Management Act. Detenu had also stated that he was Siddique and his real nanu was C.K. Beerankutty. The hotel bill also bears the name of Siddique which was found out from the resident of the detenu.

6. We are of the view that there is reliable evidence in this case to show that both Siddique and C.K. Beerankutty are the same person. Detenu had admitted in his statement that he is also called as Siddique. Hotel bill seized from the premises of the detenu refers his name Siddique. If Siddique is a different person normally the hotel bill addressed to Siddique would not find a place at his resident. Facts would indicate that Siddique is the call name of the detenu. Under such circumstance we find no illegality in the search warrant issued u/s 37(3) of the Foreign Exchange Management Act. 1999 read with section 132 of the Income Tax Act.

7. Counsel appearing for the detenu further submitted that the cause of action for issuance of the detention order arose on 3-2-03 when search and seizure was effected at the residence of the detenu, however the order of detention was issued by the detaining authority only on 3-12-2003, after the delay of ten months. Counsel submitted that there is no explanation for the inordinate delay in passing the detention order and the delay in the issuance of detention order, according to the counsel, would vitiate the order of detention. Counsel placed reliance on the decision of the apex court in Ahamed Mohaideen Zabbar v. State of T.N. (1994) 4 SCC 417 and submitted that there is no proper explanation for the delay in issuing the detention order.

8. Counter affidavit filed by the second respondent shows the steps taken before the issuance of the COFEPOSA proposal by the detaining authority. Ext. R1(a) is the details of the events which happened between 3-2-2003 and 5-8-03 and

30-12-2005. Relying upon the decision of the apex court in M. Ahamedkutty Vs. Union of India (UOI) and Another, Sri. John Varghese, Assistant Solicitor General submitted that the department has satisfactorily explained the delay in issuing order of detention.

9. Apex court in Shafiq Ahmad Vs. District Magistrate, Meerut and Others, has held that what amount to unreasonable delay depends on facts and circumstances of each case. The passage of time being the result of full and detailed consideration of facts and circumstances of the case after thorough examination at various levels apex court held in Ashok Narain Vs. Union of India (UOI) and Others, that it could not be said that the detention was in any way illegal in as much as the detaining authority had fully and satisfactorily applied his mind to the question of detention. Steps taken by the authorities from 3-2-2003 to 5-8-2003, the date on which COFEPOSA proposal was sent, in our view would show sufficient reasons explaining delay of six months. Counsel for the detenu submitted that there was delay in issuing proposal as well as issuing detention order on 4-12-2003 which cannot be sustained. The steps taken after sending the COFEPOSA proposal on 5-8-03 till the issuance of detention order on 4-12-2003 have also been explained in Ext. R1(a). Proceedings initiated against Abdul Khader, Vinodkumar and Manoj and the enquiry conducted against the detenu and others have also been explained in R1(a) produced by the second respondent. We are therefore satisfied that there has not been any inordinate delay in issuing the detention order and the delay has been properly explained by giving full details by respondents.

10. Counsel for the detenu further submitted that nonsupply of material documents disabled the detenu for filing a proper reply to the grounds for detention. Counsel also submitted that the detenu has submitted Ext. P5 petition specifically addressed to the COFEPOSA Advisory Board as well as respondents J and 3 requesting to supply copies of bail applications filed by Vinodkumar, Abbas and Manoj containing their retractions and the orders passed on the bail applications. Non-furnishing of relevant documents, according to the counsel, prevented the detenu from filing an effective representation under Article 22(5) of the Constitution. Counter affidavit filed by the first and 2nd respondents would indicate that the statements made by Abbas, Vinodkumar and Manoj who were occupying the Qualis car at the time of seizure of Rs. 75 lakhs were already supplied to the detenu along with the grounds of detention order. Further, detenu''s request for copies of certain other documents was not acceded to because they were not relied upon by the detaining authority. We notice that the request for supply of documents was rejected vide Exts. P7 and P8 memorandum dated 29th March, 2006 by the detaining authority. True, details have not been stated in those communications. All the same, facts would indicate that all documents referred to in the detention order were supplied to the detenu. Apex court in Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, held that where there is an express statutory obligation to communicate not merely the decision but also the grounds communicated, that is, the grounds so made

known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. Same is the view expressed by the apex court in Sophia Gulam Mohd. Bham Vs. State of Maharashtra and Others, . Apex court in Radhakrishnan Prabhakaran Vs. The State of Tamil Nadu and Others, held that only documents which were relied upon by detaining authority in reaching its subjective satisfaction about necessity of preventive detention of the detenu required to be furnished. Facts in this case would evidently indicate that all the documents relied upon by the detaining authority were made available to the detenu. Under such circumstance we are not prepared to say that the detenu was hot given an effective opportunity to file his representation against the order of detention.

11. Counsel appearing for the detenu further submitted that the detaining authority was not justified in rejecting his representation in a casual or mechanical manner without application of mind. Counsel made reference to Exts. P7 and P8 replies received by him to his representations. In support of his contention counsel placed reliance to the decision of the apex court in John Martin Vs. State of West Bengal, , Smt. Gracy Vs. State of Kerala and another, and also few other decisions. Counsel for respondents on the other hand contended that detailed reply was not warranted in the facts and circumstances of the case since whatever documents relied upon by the detaining authority were supplied to the detenu. Placing reliance on the decision of the apex court in K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, counsel submitted that there is no constitutional mandate under clause (5) of Article 22, much Jess any statutory requirement to consider the representation before confirming the order of detention. Counsel further submitted, there need not be a speaking order in disposing of such representation as well.

12. We are of the view that Exts. P7 and P8 communications sent to the detenu would in no way prejudice him since documents relied upon by the detaining authority were supplied to the detenu. Therefore, even if Exts. P7 and P8 are non-speaking orders that will not vitiate the order of detention.

13. Counsel appearing for the detenu further submitted that the cause of action arose as early as 3-2-2003, but the order of detention was issued only on 3-12-2003 and that the detenu was arrested only on 15-2-2006. Delay in execution of the detention order, according to the counsel vitiates the order of detention. Counsel submitted that there was no proper explanation for the delay in execution of the order of detention. Counsel also referred to the decision of this court in Asia v. State of Kerala, 2000 (1) KLT 673. The steps taken for executing the detention order has been stated by respondents 1 and 2 as well as in the counter affidavit filed by the Circle Inspector of Police, Manjeri Sri. M.P. Prakash, Senior Government Pleader referring to the counter affidavit explained the steps taken by the police to arrest the detenu who was absconding.

14. We have perused the counter affidavit. We notice that several steps have been taken by the police to apprehend the detenu who was absconding. The Central Government had also issued notification dated 17-2-2004 directing the detenu to appear before the Commissioner of Police, Malappuram and the same was published in the official gazette as well. Government of India had also as per its report dated 7-4-2004 reported before the Chief Judicial Magistrate that the detenu had absconded. Government of India requested the Chief Judicial Magistrate, Manjeri to initiate proceedings under sections 82,83,84 and 85 of the Code of Criminal Procedure, 1973. Under such circumstance the detenu surrendered on 15-2-06. We are therefore not prepared to say that there was delay in execution of the order of detention. In view of the above mentioned circumstances we find no illegality in the order of detention. All the procedural formalities for detaining the detenu have been followed. Necessary opinion of the COFEPOSA Advisory Board has also been obtained. Under such circumstance writ petition lacks merits and the same would stand dismissed.

