(2002) 04 KL CK 0048

In the High Court Of Kerala

Case No : O.P. (C) No. 31108 of 2001

Delia Tony APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 11-04-2002

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1), 7(1)

Citation : (2003) 1 ILR (Ker) 397 : (2003) 1 KLT 311

Hon'ble Judges : K. Thankappan, J;Cyriac Joseph, J

Bench : Division Bench

Advocate : K. Ramakumar and P. Rajkumar, for the Appellant; P.S. Sreedharan Pillai, S.C.G.S.C. and M.A. Thomaskutty, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Cyriac Joseph, J.—The petitioner Delia Tony is the wife of Tony John Koothoor who is detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA Act") in the Central Jail, Thiruvananthapuram. Petitioner prays for a Writ of Habeas Corpus directing the respondents, namely, Union of India, State of Kerala, the Commissioner of Customs and Central Excise, Central Revenue Buildings, I.S. Press Road, Ernakulam and the Assistant Commissioner, Air Customs, Thiruvananthapuram to produce the body of Sri. Tony John Koothoor and release him from custody or detention forthwith. She also prays for quashing Ext. P12 order passed by the Government of Kerala u/s 8(f) of the COFEPOSA Act and Ext. P13 order of the Government of India rejecting the representation dated 3.8.2001 of Sri. Tony John Koothoor against his detention.

2. On 6.1.1993 the Officers of the Air Intelligence Unit, Air Customs, Thiruvananthapuram Airport visited the export baggage hall of Thiruvananthapuram Airport alongwith two independent witnesses on the reasonable belief that foreign currency and related documents were being illicitly

exported to Dubai by Air India Flight No. A1975. During the course of their check they intercepted a passenger by name Nalakathu Kunhu Mohammed who was identifying his baggage at the place where it was being loaded into the Aircraft container after completings migration and customs formalities. On verification of documents it was confirmed that the passenger was bound to Dubai. The rexin bag identified by the passenger was opened with the key handed over by him and it was examined in the presence of the passenger and witnesses. On examining the bag the rexin sheet was seen stitched on the top side of the bag and on removing the said sheet a secret cavity made of hard board sheet was found. On removing the said hard board sheet foreign currency of different countries stacked in bundles were noticed. On a detailed examination of the said foreign currency it was found that foreign currency worth Rs. 37,72,170/- were kept in the secret cavity of the bag. On enquiry the passenger informed that the had valid document for exporting those foreign currencies and that the said foreign currencies were handed over to him at the Airport by a person by name Tony for delivering them to one Basheer at Dubai. The passenger also stated that he had stayed with Tony during that night and that Tony was a travel agent dealing in flight tickets at Thrissur and Thiruvananthapuram and that he knew him for the last two months. On the reasonable belief that the foreign currencies were attempted to be smuggled from India to Dubai in contravention of the provisions of the Customs Act and Foreign Exchange Regulation Act and were liable to be confiscated to the Government; the Superintendent, Air Customs, Thiruvananthapuram seized the foreign currencies under a mahazar. The statement of Sri. Nalakathu Kunhu Mohammed also was recorded immediately. As per the statement given by Sri. Kunhu Mohammed he had contacted Tony for getting a ticket to Dubai and Sri. Tony agreed to arrange a ticket to Dubai and directed to meet him at the Airport. Sri. Tony took him to his residence on 5.1.1993 and told him to carry some goods meant for one Basheer at Dubai. Kunhu Mohammed agreed to do so. Tony handed over the rexin bag to Kunhu Mohammed and told that he would be sent to Dubai by flight A1975 on 6.1.1993. Kunhu Mohammed stayed with Tony in that night and returned to the Airport on 6.1.1993 along with Tony. After recording his statement, Kunhu Mohammed accompanied the Customs officers to the visitors'' gallery and identified Sri. Tony who was waiting there. Tony was taken to the Customs office at the Airport and his statement was also recorded. In his statement Tony admitted that he came to the Airport along with Kunhu Mohammed for sending him to Dubai by Air India flight A1975 and that the bag containing foreign currency recovered from Sri. Kunhu Mohammed was given by him. As per the statement given by Tony he is a agent. He has acquaintance with a travel agent by name Mohammed Basheer @ Basheer at Dubai. The said Basheer used to send gold to India through different passengers and requested Tony to sell the gold and purchase foreign currencies from Gulf passengers with the money so received from the sale of gold and to send such foreign currencies to Basheer through some body and Basheer agreed to give a portion of the profit to Tony also. Sri. Tony also stated that he had concealed the foreign currencies in the bottom portion of the rexin bag and had given the bag Kunhu Mohammed. In the light of the statements given by Sri. Nalakathu Kunhu Mohammed and Sri. Tony John Koothoor, they were arrested on 6.1.1993 and were produced before the Additional Chief Judicial Magistrate on 7.1.1993 who remanded them to jail. They were enlarged on bail on 19.1.1993. The Public Prosecutor endorsed that he had no objection in granting bail on condition that the accused should appear before the Investigating Officer one very Monday and Friday till the departmental adjudication was over. Thereafter Government of Kerala issued an order dated 26.5.1993 u/s 3(1)(i) of the COFEPOSA Act against Sri. Nalakathu Kunhu Mohammed and another order dated 26.5.1993 u/s 3(1)(ii) of the COFEPOSA Act against Sri. Tony John Koothoor.

3. On the basis of the detention order passed u/s 3(1)(i) of the COFEPOSA Act Sri. Nalakathu Kunhu Mohammed was arrested on 18.6.1993 and was detained in the Central Prison, Thiruvananthapuram during the period of detention. In the case of Sri. Tony John Koothoor, the detention order was executed only on 20.7.2001 and he is detained in the Central Prison, Thiruvananthapuram. Sri. Tony sent a representation dated 3.8.2001 to the Central Government against his detention. The said representation was rejected by the Central Government through Ext. P13 memorandum dated 17.8.2001. His representation dated 3.8.2001 addressed to the Government of Kerala also was rejected through Ext. P11 dated 10.8.2001. Sri. Tony was produced before the Advisory Board under the COFEPOSA Act on 16.8.2001 . After hearing the detenu in person and considering his representations, the Advisory Board in its report dated 22.9.2001 opined that there is sufficient cause for the continued detention of the detenu u/s 3(1)(ii) of the COFEPOSA Act. Subsequently Government of Kerala issued Ext. P12 order dated 27.9.2001 confirming the detention u/s 8(f) of the COFEPOSA Act and ordering u/s 10 of the COFEPOSA Act that the detention shall continue for a period of one year from 20.7.2001. Aggrieved by the above actions and orders of the respondents the wife of the detenu has filed this Original Petition.

4. Though several grounds have been raised in the petition, the main contention of the learned counsel for the petitioner is that in view of the long delay of eight years in executing the order of detention the order of detention is liable to be set aside and the detenu is entitled to be set free. It is contended in the Original Petition that the petitioner''s husband was very much in Kerala after the passing of the detention order dated 26.5.1993. He got married on 9.11.1994. in a Church in Paravattani in Thrissur District. It was not a secret affair as the marriage was attended by several persons including the relatives. After the marriage the petitioner and her husband moved to a rented house and lived there for a period of three years. Petitioner and her husband opened a joint account in the main branch of the Dhanalakshmi Bank at Thrissur on 3.11.1999. Photocopies of the certificate of marriage and the letter dated 9.10.2000 of the Branch Manager of the Dhanalakshmi Bank have been produced as Exts. P6 and P8. It is also contended in the petition that the petitioner''s husband was staying in Kerala till he surrendered on 20.7.2001 and that he was not absconding. In

this context, grounds "B" and "C" in the Original Petition are extracted hereunder:

"B. Further, the order of detention has been made on the 26th of May, 1993. However it was not executed for more than eight years. The delay was unexplained and entirely due to the negligence of the authorities. The detenu surrendered on 20th of July, 2001. Between the period of detention and its execution, not a single case of either smuggling, abetment to smuggling or any offence either under the Customs Act or COFEPOSA or any such enactment in relation to any such economic offence has ever been committed by him. The Counter Affidavit filed by the Government of Kerala in O.P. No. 29733 of 2000 states that there are no cases against the detenu except in the charging of C.C. No. 330 of 1994. Thus it has been conceded in the Counter Affidavit that as per the records of the Commissioner of Customs and Central Excise, the detenu did not indulge in the commission of any offence after the order of detention was passed.

C. The detenu was granted bail on 19.1.93 by the Additional Chief Judicial Magistrate (Economic Offences). The order of detention was made on the 26th of May 1993. Pursuant to the order of detention, the detenu appeared before the investigating officer on every Monday & Friday till the departmental adjudication was over. The authorities could have moved for cancellation of bail if it was found that the conditions are not complied with. Admittedly this has not been made.

Even on 21.3.97 when the case against the detenu was split up, no attempt was made to report to the court about the attempts made by the authorities. Nor were any steps taken to detain the detenuor produce him before the court for violation of the order of bail. This again shows that there were no attempts to execute the warrant in spite of its issuance in 1993 and it was kept alive without execution for more than 8 years."

5. The delay in executing the detention order is explained in para. 10 of the counter affidavit filed on behalf of the second respondent-State of Kerala in the following words:

"10. The grounds alleging that the detention order is not executed for more than 8 years and as such vitiate the order is also without merit. It is submitted that the detenu after getting the bail was absconding for a long period because of which he could be detained only on 20.7.2001. Though the detenu has not indulged in the commission of offence after passing the detention order, as per the intelligence gathered by the Customs Officers at Calicut it was reliably understood that the detenu was again indulging in smuggling activities in and around Calicut area. Based on the above information, the Customs Authorities raided the hiding place of the detenu and apprehended the detenu and handed over to the Police Authorities. The averments in the grounds i.e. that the detenu surrendered before the Police is incorrect. The very reason for the delay in apprehending the detenu was that he was absconding immediately when he was released from bail from judicial custody. The Police Authorities had several times enquired about the detenu and his address at Trichur and Trivandrum and they had reported that his whereabouts are not known. The enquiries conducted by the Police Authorities in this case are very clear and that the detenu was not available at his address. Government of Kerala had also issued order dated 12.8.1993 u/s 7(1)(b) of the COFEPOSA Act, 1974 declaring the warrantee to appear before the Police Authorities of Trivandrum City and Trichur at their office within 30 days of publication of the order. Sri. Tony John Koothoor had failed to comply with the said order. This alone indicates that the warrantee was deliberately and consciously concealing himself to prevent execution of the detention of the above order. It is immaterial on the part of the detenu to submit that his marriage was taken place during the pendency of the execution of the detention order and that he had opened a bank account along with his wife. If the detenu was in Kerala and not absconding for the last 8 years he could have surrendered before the authorities and seek legal remedies against the issue of the detention order against him and also he could have replied to the show cause notice issued by the Additional Commissioner of Customs, Trivandrum and also he could have appeared before the Hon''ble Additional Chief Judicial Magistrate (Economic Offences) Court, Ernakulam in the prosecution case."

6. in para. 16 of the counter affidavit filed on behalf of respondents 1, 3 and 4 the delay in executing the detention order has been justified in the following words:

"16. The detention order against the detenu was issued on 26.5.93 and he was apprehended on 20.7.2001. The very reason for the delay in apprehending the detenu was that he was absconding immediately when he was released from bail from judicial custody. The Police authorities were not able to apprehend him. The Police authorities had several times enquired about the detenu and his address at Trichur and Trivandrum and they had reported that his whereabouts are not known. The enquiries conducted by the Police authorities in this case are very clear and that the detenu was not available at his address. Despite the declaration made by the Government of Kerala vide order No. 30311/SSA1/93/ Home dated 12.8.93 u/s 7(1)(b) of the COFEPOSA Act, 1974 declaring the warrantee to appear before the Police authorities of Trivandrum City and Trichur at, their office within 30 days of publication of the order, Sri. Tony John Koothoor, warrantee, had failed to comply with the said order. This alone indicates that the warrantee was deliberately and consciously concealing himself to prevent execution of above order. It is immaterial on the part of the detenu to submit that his marriage was taken place during the pendency of execution of the detention order and that he had opened a bank account along with his wife. If the detenu was in Kerala and not absconding for the last 8 years he could have surrendered before the authorities and sought legal remedies against the issue of the detention order against him and also he could have replied to the show cause notice issued by the Additional Commissioner of Customs, Trivandrum in the above case and also he could have appeared before the Hon''ble Additional Chief Judicial Magistrate (Economic Offences) Court, Ernakulam in the prosecution case filed against him and Shri. Nalakathu Kunhu Mohammed. But he has not even replied to the show cause notice and appeared before this Hon''ble Court to defend the case filed against him. O.P. No. 29733/2000 filed by the detenu before this Hon''ble Court challenging the detention order issued against him was dismissed as infructuous by the court on 31.7.01 consequent on his apprehension 20.7.2001 and detention in the Central Prison Trivandrum in terms of the detention order issued by the Government of Kerala under the provisions of the COFEPOSA Act, 1974."

7. The third respondent has filed an additional affidavit dated 18.2.2002 stating that the Government of Kerala on 17.8.1993 sent a report to the Chief Judicial Magistrate Court, Thiruvananthapuram and Chief Judicial Magistrate Court, Thrissur for action u/s 7(1)(a) of the COFEPOSA Act stating that Sri. Tony John Koothoor was evading apprehension and purposely concealing himself so that the order of detention could not be executed. The Government also published a proclamation dated 12.8.1993 u/s 7(i)(b) of the COFEPOSA Act directing Sri. Tony John Koothoor to appear before the Commissioner of Police, Thiruvananthapuram or the Superintendent of Police, Thrissur within thirty days. Along with the said additional affidavit the third respondent has produced true copies of the calendar of action taken by the Assistant Commissioner of Police, D.C.R.B. during the period from 1997 to 2001. But it is stated in the additional affidavit that the third respondent is not in a position to produce the calendar of action taken by the State of Kerala to apprehend the detenu during the period from 1993 to 1997. It is further stated that the said information is available only with the State Government. It is also stated that the detenu was granted bail by the Economic Offences Court on condition that he should appear before the Investigating Officer on every Monday and Friday till the departmental adjudication was over, but the detenu did not comply with the condition and the said fact was reported to the Economic Offences Court and an application for cancellation of bail was filed on 17.6.1993 and on 6.7.1993 the Economic Offences Court cancelled the bail and issued notice to the sureties.

8. In Chitranjan Dass Vs. State of U.P., the Supreme Court has held that it is the obligation of the State or the Detaining Authority to place all the relevant facts before the Court and to give reasons explaining the delay, if there is any delay, in arresting the detenu pursuant to the order of detention, which is prima facie unreasonable. In P.U. Iqbal Vs. Union of India (UOI) and Others, the Supreme Court has held that if there is unreasonable delay between the date of the order of detention and the date of arrest of the detenu, such delay, unless satisfactorily explained, throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the Detaining Authority in passing the detention order and consequently renders the detention order bad and invalid because the "live and proximate link" between the grounds of detention and the purpose of detention is snapped in arresting the detenu. The Supreme Court has also pointed out that a question whether the delay is unreasonable and stands unexplained depends on the facts and circumstances of each case. In T.A. Abdul

Rahaman Vs. State of Kerala and others, the Supreme Court has held that 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. In A. Mohammed Farook Vs. Jt. Secy. To G.O.I. and Others, the Supreme Court has pointed out that there is a catena of judgments wherein the Supreme Court emphasized that the Detaining Authority must explain satisfactorily the inordinate delay in executing the detention order or otherwise the subjective satisfaction gets vitiated. In Manju Ramesh Nahar Vs. Union of India and Others, the Supreme Court has held that as soon as the Government or its Officer feels satisfied that an order u/s 3 of the COFEPOSA Act is necessary, it has to be passed and implemented forthwith so that the prejudicial activities carried on by the person against whom the order has been passed, may be stopped immediately or at the earliest and that this object can be achieved if the order is immediately executed. The Supreme Court has further held that if the authorities or those who are responsible for the execution of the order, sleep over the order and do not execute the order against the person against whom it has been issued, it would reflect upon the satisfaction of the Detaining Authority and would also be exhibitive of the fact that the immediate necessity of passing that order was wholly artificial or non-existent. The Court has also pointed out that individual liberty is one of the most valuable fundamental rights guaranteed by the Constitution to the citizens of this country. In Subhash Muljimal Gandhi Vs. L. Himingliana and Another, the Supreme Court has held that from an unusual and long delay in execution of an order of detention an inference that the detention was punitive and not preventive could be legitimately drawn unless the Detaining Authority satisfies the Court that such delay was occasioned not by an omission or commission on its part but owing to the abscondence of the detenu. In Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, the Supreme Court has held that if the delay in executing the detention order is found to be the result of there calcitran to refractory conduct of the detenu in evading arrest, there is warrant to consider the ''link'' not snapped but strengthened.

9. Hence the question to be considered in this case is whether there was undue or unreasonable delay in executing the detention order and whether such delay has been explained by the respondents by giving satisfactory reasons. It has also to be examined whether the delay was the result of the recalcitrant or refractory conduct of the detenu in evading arrest. In this case, admittedly the detention order was executed eight years after the said order was issued. The delay of eight years is certainly undue and unreasonable. The reason pointed out by the respondents for such a long delay is that ever since the detenu was released on bail by the Economic Offences Court on 19.1.1993, he had been absconding and evading arrest. A bald statement that the detenu had been absconding and

evading arrest cannot satisfactorily explain the delay in executing the detention order. The respondents are bound to satisfy the Court that prompt and effective steps were taken to execute the detention order and necessary materials should be placed before the Court to support such claim. In an effort to show that the respondents had taken effective steps to execute the detention order the third respondent has placed on record Ext. R3(b) report dated 12.8.1993 sent by the State Government to the Chief Judicial Magistrate, Thiruvananthapuram u/s 7(1)(a) of the COFEPOSA Act and Ext.R3(c) order dated 12.8.1993 issued by the Government of Kerala u/s 7(1)(b) of the COFEPOSA Act directing Sri. Tony John Koothoor to appear before the Commissioner of Police, Thiruvananthapuram City or the Superintendent of Police, Thrissur within thirty days. The third respondent has also stated in the additional affidavit dated 18.2.2002 that since the detenu did not comply with the condition contained in the bail order that he should report before the Investigating Officer on every Monday and Friday till departmental adjudication was over, an application for cancellation of bail was filed on 7.6.1993 and the bail was cancelled by the Economic Offences Court on 6.7.1993. Sending a report to the Chief Judicial Magistrate u/s 7(1)(a) of the COFEPOSA Act and issuing an order u/s 7(1)(b) of the COFEPOSA Act will only show that according to the respondents the detenu was absconding and evading arrest. But it will not prove that the respondents had taken prompt, adequate and effective steps to execute the order of detention. That can be proved only by placing on record materials to show that the Officers entrusted with the duty of executing the order had been making continuous enquiries at all places where the detenu could have been suspected to be present. Even though the third respondent has produced along with his additional affidavit dated 18.2.2002 the reports sent by the Commissioner of Police, Thiruvananthapuram City to the Government enclosing the calendar of action taken to apprehend Sri. Tony John Koothoor the said reports relate only to the period from 1997 to 2001. No materials have been produced in respect of the period from 1993 to 1997. In the absence of materials to show that the officers entrusted with the duty of executing the detention order had been making continuous enquiries and taking effective steps to apprehend the detenu during the period of four years from 1993 to 1997, it has to be held that the respondents have not satisfactorily explained the unreasonable delay in executing the order of detention. In the facts and circumstances of this case it is not possible to hold that the delay was the result of the recalcitrant or refractive conduct of the detenu in evading arrest. There is no merit in the contention of the respondents that if the detenu was not absconding and evading arrest he would have surrendered before the Commissioner of Police, Thiruvananthapuram City or the Superintendent of Police, Thrissur in response to Ext. R3(c) order dated 12.8.1993 issued u/s 7(1)(b) of the COFEPOSA Act. Firstly, there is nothing to show that the detenu was aware of the said order. Secondly, even if the detenu was aware of the said order, the respondent cannot be absolved from the responsibility and obligation to take prompt, adequate and effective steps to execute the order of detention. The respondents have no case that during the relevant period the detenu had left the country and therefore he was beyond the reach of the Officers entrusted with the duty of executing the order.

10. In the light of the facts and circumstances stated above and in view of the legal position explained by the Supreme Court in the judgments mentioned earlier, an inference can legitimately be drawn that the detention in this case was punitive and not preventive. In our view, the subjective satisfaction of the Detaining Authority is vitiated on account of the unusual and long delay in executing the detention order which has not been satisfactorily explained by the respondents. The detention order is vitiated by reason of non-execution of the detention order within a reasonable time.

11. Since the Original Petition is liable to be allowed on the ground of delay in executing the order of detention, we are not considering the other grounds raised in the Original Petition.

12. Hence Ext. P9 order dated 26.5.1993 Ext. P12 confirmation order dated 27.9.2001 are set aside and the detenu Sri. Tony John Koothoor is set free. The respondents are directed to release the detenu Sri. Tony John Koothoor from detention forthwith. The Original Petition is allowed as above.

