

(1974) 01 KL CK 0016
In the High Court Of Kerala

Kuruvilla Abraham

APPELLANT

Vs

The State of Kerala and Another

RESPONDENT

Date of Decision : 15-01-1974

Acts Referred:

Penal Code, 1860 (IPC) — Section 408, 477A

Citation : (1975) CriLJ 1372

Hon'ble Judges : George Vadakkal, J

Bench : Single Bench

Judgement

George Vadakkal, J.—The petitioner prays for a declaration that his arrest on 14-12-1973 and detention thereafter are illegal, and for a further direction by this Court to release him forthwith. In connection with some irregularities alleged to have been done by the petitioner in his business as an authorised retail distributor of rationed articles, the District Supply Officer initiated certain proceedings Under the Kerala Rationing Order, 1966, against the petitioner. Exts. P-3 to P-5 and P-8 and P-9 evidence those proceedings which are still pending. The District Supply Officer informed the police also of the matter and the latter has registered a crime case against the petitioner under Sections 408 and 477A of Indian Penal Code, Ext. P-6 is the First Information Report. Ext. P-7 order shows that the petitioner was enlarged on bail on 12-12-1973. In the meanwhile, the District Supply Officer had on 13-11-1973 informed the 2nd respondent also of these irregularities. Based on that information, the 2nd respondent made Ext. P-1 order u/s 3 (1) (a) (iii) of the Maintenance of Internal Security Act, 1971 (for short, the Act) directing the petitioner's detention. However, the 2nd respondent did not report the fact of his having made such an order to the 1st respondent as contemplated by Sub-section (3) of Section 3. According to the 2nd respondent, the petitioner "wilfully evaded the execution of the order" or in other words absconded. He therefore on 14-12-1973 made another order on the same facts. The petitioner was arrested on 14-12-1973. At that time only Ext. P-1 order was served on him. Subsequently, on 16-12-1973, Ext. P-2 memorandum dated 15-12-1973 detailing the grounds for detention was also, admittedly, served on

the petitioner. The 2nd respondent has a case that on 16-12-1973 a copy of the second order dated 14-12-1973 was also served on the petitioner, but the petitioner's brother who has filed a reply affidavit denies this. Whatever it be. Ext. P-2 makes mention of the two orders, the one dated 14-11-1973 and the other dated 14-12-1973. These in short are the relevant facts.

2. The main point raised by Shri Sivasankara Panicker, the learned Counsel for the detenu, is based on Section 14 (2) of the Act. The substance of his argument is that the first order dated 14-11-1973 ceased to have force and lapsed or expired after 12 days of the making of it for want of approval by the 1st respondent; that On 14-12-1973 the petitioner could not be arrested and thereafter detained on the force of the first order for detention : that the second order (dated 14-12-1973) for detention is illegal and without jurisdiction in so far as it is not based on any fresh fact that had arisen after the expiry (on 26-11-1973) Of the first order. The petitioner in ground C of the petition has stated that no fresh facts came into existence. Not only that this averment stands uncontroverted, but from a reading of paragraph 11 of the counter-affidavit what I gather is that no fresh facts had arisen. Besides, Ext. P-2, which refers to the two orders, is silent about any fresh facts. There was no suggestion also on behalf of the respondent that fresh facts had arisen after 26-11-1973. The point raised by the learned Counsel for the petitioner is answered by the learned Government Counsel by pointing out that the petitioner was absconding, that he thus successfully evaded execution of the first order, that therefore the first order did not take effect at all, that the word "expiry" in Section 14 (2) means expiry after the order has taken effect, and that in so far as the first order had not taken effect there could not be any question of expiry of that order.

3. The case in hand, I am afraid, is an example of the slipshod exercise of the power conferred by the Act, by the 2nd respondent. I am not in this case concerned about the merits and demerits or the sufficiency of the grounds which is not justiciable and are matters within the purview of the authorities functioning under the Act. (See principle No. 2 laid down by the learned Chief Justice in paragraph 10 of his judgment delivered on behalf of the Court in Goyal and R.P. Goyal and Another Vs. The State of Kerala and Others, . I, therefore, refrain from expressing any opinion about the sufficiency of the grounds.

4. The power to detain a person is primarily conferred by Section 3 (1) of the Act on the Central and State Governments. Sub-section (2) of Section 3 confers such power on certain specified officers also. Under Sub-section (3) when an order is made by an officer he shall "forthwith" report that fact to the State Government together with the grounds on which the order was made and such other particulars as have a bearing on the matter. In such a case Sub-section (4) provides that, on approval of the order by the State Government it shall within seven days report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as have a bearing "on the necessity for the order". Under the latter portion of Sub-section (3) of

Section 3, no order made by an officer shall remain in force for more than 12 days (or if the case is one governed by the proviso to that Sub-section, 22 days) after the making thereof unless in the meantime it has been approved by the State Government. It is therefore plain and clear that the period of 12 days or 22 days, as the case may be, is to be counted from the day on which the order is made. The order made is an effective order from the moment it is made and is executable and enforceable during the period of 12 (or 22) days by its own force. Section 4 of the Act. as per which the order may be executed in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1898, is attracted at once the order is made. And Section 7 (1) (a) provides that if the person for whose detention the order is made is absconding Sections 87 to 89 of the Code of Criminal Procedure could be applied in respect of the said person. On compliance with the procedure prescribed in Section 7 (1) (b), absconding itself becomes, u/s 7 (2) a cognizable offence punishable with imprisonment for a term which may extend to one year or with fine or with both, so that the concerned person shall thereafter be liable for punitive detention instead of preventive detention. The argument advanced by the learned Government counsel that an order, in enforcement and execution of which alone a person could be arrested, takes effect only on the arrest of that person is ingenious but without any merit, for if the order does not take effect prior to and till the person is arrested, the arrest cannot be said to be under the authority of law. The argument therefore needs only to be stated to be repelled.

5. The first order having taken effect, as stated above, on the making of it itself, it remained in force for 12 or 22 days as the case may be, and ceased to remain in force thereafter since in the meantime the State Government had not approved it. Admittedly the State Government had not approved the first order dated 14-11-1973. In fact the 2nd respondent failed to report the fact of making that order with the grounds and other relevant particulars at any time within that period. Therefore, that order lapsed or expired after that period. In Masood Alam etc. Vs. Union of India (UOI) and Others, the Supreme Court said (at p. 902):

The power of preventive detention being an extraordinary power intended to be exercised only in extraordinary emergent circumstances the legislative scheme of Sections 13 and 14 of the Act suggests that the detaining authority is expected to know and to take into account all the existing grounds and make one order of detention which must not go beyond the maximum period fixed. In the present case it is not urged and indeed it is not possible to urge that after the actual expiry of the original order made by the Dist. Magistrate which could only last 12 days in the absence of its approval by the State Government, any fresh facts could arise for sustaining the fresh order of detention.

(Underlining by me).

Quoting this passage with approval, the principle was further elaborated by the Supreme Court in the subsequent decision of that Court in Chotka Hembram Vs. State of West Bengal and Others, In the latter case it was laid down:

The matter can also be looked at from another angle. Section 13 of the Act provides that the maximum period for which any person may be detained in pursuance of any detention order, which has been confirmed u/s 12, shall be 12 months from the date of detention. It is, therefore, plain that the maximum period for which a person can be detained on account of specified acts should not exceed 12 months. If for the same acts repeated orders of detention can be made, the effect would be that for the same facts a detenu would be liable to be detained for a period of more than 12 months. The making of subsequent order of detention in respect of the same acts, for which an earlier order of detention was made, would run counter to the entire scheme of the Act. It would also set at naught the restriction which is imposed by Section 13 of the Act relating to the maximum period for which a person can be detained in pursuance of a detention order.

In Masood Alam's case the first order of detention was on 14-6-1972, and the detenu was arrested on 15-6-1972. The Government did not accord its approval. A fresh order of detention was passed on 25-6-1972. At about 12 noon on 26-6-1972 an order releasing the detenu was served on him, and at about 3-30 p. m. on 26-6-1972 the second order of detention was served on him. It is in these circumstances that the Supreme Court said that after the "expiry of the original order which could only last 12 days in the absence of approval by the State Government", no fresh facts arose on the basis of which a fresh order could be made. It is therefore clear that Section 14 (2) Of the Act is attracted also to cases where the order ceases to remain in force due to lack of approval by the State Government. I may also refer to another decision of the Supreme Court which is also to the same effect. In *Har Jas Dev Singh Vs. State of Punjab and Others*, Jaganmohan Reddy, J.. speaking for the Court said (at p. 2472):

There is no doubt that since the first order of detention dated November 19, 1971, was not approved by the State Government that order of detention ceased to have force after 12 days from the date of the order and that detention order had therefore expired on December 1, 1971 Even if the first order was revoked due to a technical defect the same result follows.

... In these circumstances after the date on which the order ceased to be in force, unless fresh facts had arisen on the basis of which the Central Government or a State Government or an officer, as the case may be, was satisfied that such an order should be made, the subsequent detention on the very same grounds would be invalid.

6. In view of these pronouncements of the Supreme Court in respect of the provisions of Maintenance of Internal Security Act, 1971, I need not refer in detail to *Hadibandhu Das Vs. District Magistrate and Another*, and *Kshetra Gogoi Vs. The State of Assam*, both of which were cases that arose under the Preventive Detention Act. 1950, Section 13 (2) whereof was identically worded as Section 14 (2) of the present Act. The first of these two cases was a case of revocation of the first order whereas the second case was one where the first

order "automatically lapsed because that order did not receive the approval of the State Government as required by Section 3 (3) of the Act." In each of these cases it was ruled that the second order based on the same facts was illegal and incompetent.

7. After the case was adjourned for judgment, and after the judgment was ready, but before it was pronounced and signed, today, the learned Government Counsel sought permission to rely on two decisions, one of the Supreme Court and another of the Patna High Court, which, according to him, supports him. Permission was granted, and the two decisions were discussed at the bar. It therefore becomes my duty to examine them in the light of the arguments advanced by Counsel on both sides which I shall do presently.

8. The decision of the Supreme Court relied on by the learned Government Counsel is Naranjan Singh Nathawan Vs. The State of Punjab, corresponding to (1952) SCR 395 : 1952 Cri LJ 656, where accepting the arguments advanced by the Advocate-General of the Punjab relying on Basanta Chandra Ghose's case (1945) FCR 81 : (1945) Cri LJ 559, the Court held:

Once it is conceded that in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold, in the absence of proof of bad faith, that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf.

The decision starting from Basanta Chandra Ghose's case including the decision now cited and relied on by the learned Government counsel before me were surveyed and reviewed in Hadibandhu Das Vs. District Magistrate and Another, earlier referred to which was a case that arose after Section 13 (2) of the Preventive Detention Act, 1950 was amended by Act 61 of 1952. With reference to Section 13 (2) as amended and repelling a like argument advanced there, the Court said:

Relying upon these cases the Solicitor-General contended that it was settled law before Section 13 (2) was amended by Act 61 of 1952 that a detaining authority may issue a fresh order after revocation of an earlier order of detention if the previous order was defective in point of form or had become unenforceable in consequence of failure to comply with the statutory provisions of the Act, and that by the Amending Act it was intended merely to affirm the existing state of law, and not to enact by implication that revocation of a defective or invalid order attracts the bar imposed by Section 13 (2). There is, in our judgment, nothing in the language used by the Parliament which supports that contention. The power of the detaining authority must be determined by reference to the language used in the statute and not by reference to any predilections about the legislative intent. There is nothing in Section 13 (2) which indicates that the expression

"revocation" means only revocation of an order which is otherwise valid and operative : apparently it includes cancellation of all orders invalid as well as valid. The Act authorises the executive to put severe restrictions upon the personal liberty of citizens without even the semblance of a trial and makes the subjective satisfaction of an executive authority in the first instance the sole test of competent exercise of power. We are not concerned with the wisdom of the Parliament in enacting the Act, or to determine whether circumstances exist which necessitates the retention on the statute book of the Act which confers upon the executive extraordinary power of detention for long period without trial. But we would be loath to attribute to the plain words used by the Parliament a restricted meaning so as to make the power more harsh and its operation more stringent. The word "revocation" is not, in our judgment, capable of a restricted interpretation without any indication by the Parliament of such an intention.

It will be useful here to note the objects and reasons of recasting Section 13 (2) of the Preventive Detention Act, 1950.

OBJECTS AND REASONS

Sub-section (2) - "The Joint Committee have completely recast Sub-section (2) of Section 13 so as to make it clear that a fresh detention order can be passed against a person only on the basis of fresh facts arising after the date of the revocation or expiry of the last detention order". - J. C. R. Gaz. Ind., 1952, Pt. II - Section 2, page 380.

Hadibandhu Das Vs. District Magistrate and Another, was thereafter referred to with approval in Masood Alam etc. Vs. Union of India (UOI) and Others, , the first case that arose under the present Act, and this decision was followed in the subsequent cases by the Supreme Court. It is also pertinent to notice that the observations made by the Supreme Court about the language of Section 13 (2) (as amended) of the Preventive Detention Act, in Hadibandhu Das's case were before Parliament when the present Act came on the Statute Book in 1971, and yet the Parliament did not deviate from the language which it adopted in recasting Section 13 (2) of the previous Act.

9. The Patna decision referred to by the learned Government Counsel is Karamvir Singh Vs. State of Bihar and Others, . That case no doubt arose with reference to Section 13 (2) (as amended) of the Preventive Detention Act, 1950. The question decided was whether the decision of the Court that the first order Of detention was illegal would amount to "expiry" within the meaning of Section 13 (2) It was held that it would not because the declaration of the Court that an order is illegal amounts to a declaration that that order never existed. Whether this view is sustainable in the light of the decision in Hadibandhu Das Vs. District Magistrate and Another, wherein, with reference to the word "revocation" it was said that it means cancellation of all orders "invalid as well as valid" is another question. So far as the case before me is concerned, this point does not arise; the first order in this case, ceased to be in force not on account of any declaration by any court,

but automatically.

10. There was a feeble suggestion by the learned Government Counsel that the stage has not yet arrived for this Court to interfere with the detention of the petitioner. Reliance was placed by the learned Counsel on the decision of this Court in *R.P. Goyal and Another Vs. The State of Kerala and Others*, already referred to. In that case this Court was invited to go into the question of sufficiency of the grounds, and it was held:

The protection envisaged by the constitution of an Advisory Board for looking into the matter is a substantial protection. It cannot be termed illusory. Normally, therefore, before the order has become final by the State Government applying its mind to the question of the existence or otherwise of grounds justifying detention and the Advisory Board expresses its opinion as to whether there is cause for detention or not, it should not be interfered with by this Court and this Court should not deal with the question on insufficient material. (Paragraph 14 - at p. 620).

The question raised in this case is not about the sufficiency of the grounds or about the cause for detention; but about the competency of the 2nd respondent to make the second order of detention. This in my view is a matter that can be examined by this Court at any stage of the detention.

11. I hold that the detention of the petitioner and the deprivation of his personal liberty, in so far as they are purported to be under orders made by the 2nd respondent on the 14th day of November 1973 and On the 14th day of December, 1973, as mentioned by him in Ext. P-2 memorandum, are not in accordance with procedure established by law, viz., the provisions of the Maintenance of Internal Security Act, 1971, in that the first of the aforesaid two orders had automatically lapsed u/s 3 (3) of the said Act, and the second of the two orders has been made in violation of Section 14 (2) of the same Act. I therefore further direct release of the petitioner who is now being detained in the Central Prison, Trivandrum, unless he is otherwise liable to be detained under any other valid and lawful order of a competent authority.

12. The original petition is disposed of as above. In the circumstances of this case there will be no order as to costs.