
(2006) 03 KL CK 0096
In the High Court Of Kerala
Case No : W. P. (Criminal) No. 217 of 2005

Liza Charly

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 02-03-2006

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 3(1)(i), 3(1)(ii), 3(1)(iii)
Constitution of India, 1950 — Article 19, 21, 22, 22(5), 226

Citation : (2006) 1 KLJ 942

Hon'ble Judges : M. Ramachandran, J;A.K. Basheer, J

Bench : Division Bench

Advocate : M.K. Damodaran, O.V. Maniprasad and MP. Prabhanandan, for the Appellant; John Varghese (A.S.G.) and Lai George (S.G.P.), for the Respondent

Final Decision : Dismissed

Judgement

Ramachandran, J.—The petitioner herein is the wife of Mr. K.T. Charly, who currently is detained in the Central Prison, Thiruvananthapuram as a COFEPOS A detenu. The writ petition inter alia points out that the detention as above is illegal and consequently, the petitioner prays for a writ of Habeas Corpus or any other appropriate writ directing the production of the detenu for releasing him without delay. Further, a declaration is prayed for where by, the detention is to be held as illegal, unsustainable and vitiated by illegalities and irregularities. Ext. P1 is the order passed by the notified authority, whereby in exercise of powers conferred by Sections 3(1)(i), 3(1)(ii) and 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, COFEPOSA Act), the Government had ordered detention of Sri. K.T. Charly in the Central Prison, Thiruvananthapuram. It is submitted that the order as well as Exts.P1 and P14 orders issued by the Government, disposing of the representations submitted by him rejecting his request made for release, are liable to be set aside.

2. Sri. M.K. Damodaran, senior counsel represented the petitioner as assisted by Sri. O.V. Maniprasad. We had also opportunity to hear Sri. Lai George, Special Government Pleader (Finance) appearing on behalf of the State Government and Sri. John Varghese, Assistant Solicitor General. Two counter affidavits have been filed at the instance of the State Government and in the counter affidavit filed by the Deputy Secretary attached to the Central Economic Intelligence Bureau, the Central Government had made available their point of view vis-a-vis the allegations raised in the writ petition. We had also the benefit of referring to a number of judicial pronouncements, cited by both the sides, in support of their respective stand.

3. In the matter of preventive detention, as authorised under the COFEPOSA Act, the Courts had had opportunity to examine not only the legality and sustainability of the statutes, but also the procedural requirements to be followed. It may not be necessary for us to attempt a full study at this juncture. In the nature of the proceedings, we are also not expected to go into the merits of the allegations. In view of the limited scope of jurisdiction, of course it was natural that the petitioner had highlighted even the minute circumstances which could have been in his favour for getting the detention declared as illegal. But, we have to bear in mind that the attempt of the court never has been to puncture holes and to set the proceedings at naught. The sweat spilled by the executive authority for investigation; the countless hours spent for collecting materials; the powerful undercurrents to be countered; deliberations, and the decision making process and the totality of efforts taken to come to a conclusion necessarily have to be taken cognizance of before unsetting a decision on technicalities. In a given case, if there is mishandling by the executing authority to secure detention, the edifice need not be pulled down for that reason alone, as it may be difficult to rule out, in the present scenario, as to whether the lethargy was unavoidable or one introduced by design. The effect of a detention on an individual is drastic, and even amounts, to denial of fundamental rights guaranteed under the Constitution of India. But simultaneously we have to bear in mind that the Apex Court had time and again required a caution to be maintained, since the economic offences including smuggling activities corroded the health of the economy of the State. It may be true to say that at times the stringent measures taken are to be appreciated in the general background of public well being. What is required is a pragmatic approach divorced of hyper technical contentions, as might be raised in individual cases. We feel, we may approach the question conscious of the above factors in mind.

4. Sri. Charly, the detenu, had been detained in the Central Prison, as referred to earlier, by order dated 19-08-2005 (Ext. P1). He has been supplied along with the order the grounds of detention as also the documents relied on while passing the detention order. This is not disposed. But, however, the senior counsel, appearing for the petitioner, in very well prepared submissions, catalogued certain irregularities and vitiating circumstances and they are sufficient enough, according to him, for an order of release of the detenu.

5. His first submission is on the basis that the notified authority had omitted to consider the materials, which were truly relevant, and this went into the root of the matter. Reference had been made to an order passed by this Court in Bail Application No. 3368 of 2005 dated 31 -05-2005, copy of which is marked as Ext. P4. Sri Charly had been released on bail after imposing certain conditions, which are described by the counsel as stringent. Though available in the filed, the relevance or irrelevance of the said document had not been discussed in the impugned order.

6. The second point urged is that there was great delay in passing the order of detention, and thereby the nexus as between the conduct and requirement for preventive detention had been snapped. With reference to judgments of the Supreme Court and the High Courts, to which reference may be made later, it had been contended that such delay was to operate as a debilitating circumstance corrupting the detention order.

7. The third point urged was about the delay in considering the statutory representation by the Government, and the manner in which such representation was disposed of. According to him, there was callous indifference while dealing with them. This also, according to the senior counsel, was liable to weaken the order of detention and its continued operation.

8. The next submission highlighted was the delay that had been there in the execution of the order. Such delay, it had been urged, would have shown that the issue was dealt with in a haphazard manner, mechanically and the benefit arising out of such conduct ought not have been denied to the detenu.

9. Another point, to which reference was made, was about the indifferent manner in which the orders have been issued and the reason, which had been referred to in the covering letter attached thereto, including the grounds asserted as necessary for an order of detention being passed. A precision in the orders was lacking, which weakened the proceedings. Yet another point was about the non-communication of the required information to the family members at the time of arrest, which was a statutory duty, and this added on to the cumulative irregularity.

10. Advertence was made to two other aspects, namely that there was no offence of smuggling involved and therefore the proceedings under the Act were invalid. Likewise, according to the counsel, nothing had been there to indicate that the item which had been imported was liable to duty on entry to Indian Ports. However, it has been submitted by the counsel that these two aspects were not being agitated as of now, as it could have been more forcefully urged in the connected proceedings.

11. Of course, the respondents had placed their own reasons to justify the measures resorted to. It is indisputable that the Constitution has conferred rights under Article 19 of the Constitution on an individual, which are fundamental in nature. It includes right of free movement. But the State nevertheless has the

power to adopt a court of preventive detention so as to combat the greater evils imperiling the security and safety of a State. It is to be noticed that Article 21, which prohibits deprivation of life or personal liberty, also is incorporated in Para III of the Constitution, but care is taken to see that such steps are to be resorted only according to procedures established by law. Likewise, Article 22 also safeguards right of a person detained in custody, so as to ensure that a citizen does not suffer from unbridled State action. In short, the necessity for preventive detention is recognised, the Government Pleader submits, but care is bestowed so as to ensure that the power is not subjected to misuse. In the present detention, strict observations to accepted principles have been made. We may, therefore, examine the rival contentions in the above said background.

12. It appears that the Revenue Intelligence had come to know of attempts made to smuggle out containers from Cochin Port without Customs examination and without payment of duty. In the course of inspection, discrepancies were noticed in respect" of containers housed in the Cochin Port area on 15-03-2005. It is claimed that investigations had been carried out and statements had been obtained from a number of persons, including Customs House Agents, Transport Operators and the like. As a result of the operations, a few persons had been arrested, including the husband of the petitioner. They were detained in prison on 01-04-2005. Bail Applications had been submitted by them, and as far as Sri. Charly is concerned, by Ext.P4 order, bail had been granted by this Court, subject to four conditions, which are the following:

- i. The petitioner shall report before the Senior Intelligence Officer, D.R.I., Kochi, between 9 a.m. and 12 noon on all Wednesday.
- ii. The petitioner shall surrender his passport, if any, to the Senior Intelligence Officer, D.R.I., Kochi.
- iii. The petitioners shall not leave the territory of the State of Kerala without the written permission of the Magistrate.
- iv. The petitioner shall not commit any offence while on bail.

However, the Revenue Intelligence had been going on with investigations and ultimately on the basis of the report so furnished, the competent authority under the COFEPOSA Act had come to a decision that Shri. Charly was required to be detained on a preventive measure, in exercise of the powers u/s 3 of the COFEPOSA Act. Ext.P1 is the above said order. After the detention as above, the grounds of detention had been communicated to him and the detenu had been advised that he could make representations against the detention to the Principal Secretary to Government of Kerala and also to the Central Government or to the Advisory Board under the COFEPOSA Act. Such representations in due course had come to be rejected by the State Government, as could be seen from Ext. P11. The Central Government had rejected the representation by Memorandum dated 28-10-2005, copy of which is marked as Ext.P15.

13. We may deal with the contentions raised by Sri. M.K. Damodaran, senior counsel, one by one. First of all, the criticism raised against the delay in passing the order of detention could be considered, which is formulated as point No.2. According to the counsel, the detention order is seen to have been passed as late as on 19-08-2005 alone, whereas the first arrest was made on 01-04-2005. Counsel submits that such delay is not explained and the link as between the offence and the detention order is snapped. The essential pleadings in this regard could be found in Ground D of the writ petition. It is stated that the illegal activities to which the detention order was to be connected occurred during the period from 18-01-2005 and 03-03-2005. It is only after 5 1/2 months that the detention order had come to be passed. There was no allegation, according to the petitioner, about her husband that after 03-03-2005 he was engaged in any illegal act. Therefore, the State would have been justified in subjecting him to trial against the alleged offences, but no circumstance existed for an order of preventive detention.

14. Our attention is invited to the decision reported as *Lekha Nandakumar Vs. Government of India*, as well as *Golam Hussain Alias Gama v. Commissioner of Police, Calcutta* (AIR 1974 SC 1336). It is pointed out that unexplained delay in passing the detention order with reference to the illegal activity is a vitiating circumstance.

15. In answer to the allegation as above, the learned Government Pleader adverted to the circumstances which had been narrated in the counter affidavit filed on behalf of the State. The allegation was about the irregularity in the imports made During January to March, 2005. However, only after a thorough investigation, it would have been possible to know about the modus operandi employed by the detenus as also his associates and when the officers had delved into the transactions, starting operation procedure and restrictive practices followed were unearthed. This took time, as statements from a number of persons were to be gathered so as to get a clear picture of the complicity of persons involved. Later on, the matter had been presented for consideration of the appropriate authorities so as to arrive at a decision whether a case for preventive detention existed. Counsel submits that after a mature consideration of the attendant circumstances, the competent authority had come to a subjective satisfaction that it was a case where preventive detention should have been ordered as against Shri. Charly. That he was arrested in the meanwhile or let out on bail on conditions, were not to influence the decision ultimately to be taken by the competent officer, when he was expected to arrive at a subjective satisfaction about detention, on the basis of materials placed. The order indicated that each and every aspects had been duly examined. It is not as if there is unexplained or inordinate delay, and according to the Government Pleader, the time gap is satisfactorily explained. Facts sufficiently would convince that it was not such a case where it could have been urged that inordinate and unexplained delay was there.

16. We are not referring to the innumerable decisions that had been placed by Sri." Lai George, Special Government Pleader in support of his contention as above, since the principle is settled that if the delay is adequately explained, the resultant action could be upheld. We are satisfied that the delay in passing of the order of detention has been satisfactorily explained.

17. Skipping the 3rd point for the time being, now we will go to the 4th point that had been highlighted by the senior counsel, namely about the delay in execution of the order. According to him, such orders had been passed on 16-08-2005 (although dated 19-08-2005) and had been executed only on 28-08-2005. The learned counsel also refers to the circumstance that in the meanwhile in obedience to the order in the Bail Application Shri. Charly had reported before the Senior Intelligence Officer on 24-08-2005 between 9 a.m. and 12 Noon, as he had obliged to be present during the week. At that point, there was no detention attempted and the indifferent approach was sufficient to indicate that the detention order was passed in a routine manner and not without any definite idea to detain the detenu in prison. In other words, it was a mechanical affair and it was not having the sanctity that is usually attached to a detention order.

18. We are, however, satisfied that in respect of the above allegation also, sufficient explanations have forth come from the State Government. It is pointed out that the order was passed on 19-08-2005. The following two days were holidays for the State Government. The draft of the order had been approved on 24-08-2005 and detention order was sent by speed post for execution to Thrissur, which was received at the office of the Superintendent of Police, Thrissur on 27-08-2005. On the next day itself it was executed. When Sri. Charly had reported before the Senior Intelligence Officer at Kochi on 24-08-2005, obviously the said officer might not have been aware of the detention order. The delay also cannot be dubbed as protractive or unexplained. Therefore, here also, it is not possible to concur with the contention of the petitioner that there was inordinate and unexplained delay.

19. One other contention (raised as item No. 3) was the delay in considering the representations by the Government and also the indifference, which according to the counsel, could be found while passing the order. Ext. P11 is the order passed by the Government so as to satisfy the Constitutional mandate arising from Article 22(5) of the Constitution of India. The contentions of the senior counsel in this regard are three fold. The first submission is that there was inordinate delay in disposing of the representations. The second point urged was that the order did not indicate as to which of the representations had been disposed of, as admittedly a representation dated 10-09-2005 had been submitted as Ext.P6, followed by Ext. P7 dated 13-9-2005 and yet another representation dated 07-10-2005 (Ext. P10). Counsel submits that Ext. P6 had been submitted by the detenu requiring copies of the documents and for translated copies of materials, in a language known to him. Ext. P7 was a comprehensive representation,

wherein he had raised legal contentions about the inadequacy of the grounds and other vitiating circumstances attached to the detention. Notwithstanding Ext.P11 can only be considered as laconic. It refers to a representation dated 20-09-2005 alone and obviously it could not have been either Ext. P6 or Ext. P7. It is therefore suggested that the representation was considered light heartedly, although there was a solemn duty on the part of the State Government to examine it with a purpose. This was sufficient to vitiate the detention. The learned counsel had adverted to judicial pronouncements, which required the State authority to discharge the duties with promptitude and concern. Adherence was made to the observations made in the reported decisions, Union of India (UOI) Vs. Paul Manickam and Another, and Celiner Victor v. State of Kerala (2000 CrL.J.2015). A few other decisions also had been brought to our attention, which dealt with situations more or less similar. The submission was that, in the solemn duty imposed by the Constitution, there was failure and the detention consequently became vitiated requiring the detenu to be discharged.

20. But it appears that the petitioner was not in possession of precise details while preferring the writ petition. It is stated in paragraph 9 of the counter affidavit filed by the State Government that the detenu had not submitted any representation on 10-09-2005. The original of Ext. P6 representation is stated as bearing the date 20-09-2005. Another representation had been submitted on 01-10-2005 only, which is marked as Ext. P7, but its date is wrongly given as 13-09-2005. It was actually signed by the detenu and submitted to the jail authorities on 02-10-2005. It is submitted by the Government Pleader that Ext. P6 refers to the illegality of the order of detention as well, although predominantly the request was for copies of the documents. According to him, while it was being examined, a new representation had come to the Government and by a composite order, both the representations had been disposed of on 04-10-2005.

21. If that be so, it could not be stated that there was any appreciable delay on the part of the State Government in disposing of the representations. The original filed produced before us show that the relevant dates referred to in the counter affidavit are true and acceptable.

22. Adverting to Ext. P10. the learned senior counsel submits that the Minister, to whom it was addressed represented the Government, and this should also have been independently considered and orders passed, since there is no dispute about the circumstance that it had been received by the Government. The counsel refers to the provisions of the statute and submitted that it was permissible to make such a representation.

23. Although argument was there about the rights and prudence of filing such a representation, we accept the argument of the learned Government Pleader that the statute does not recognise a right for the detenu to make repeated representations in short intervals. Of course, if there are further materials to be placed by the detenu, the rights could be exercised. When Ext.P11 had come to

be passed on 04-10-2005, we are of the opinion that there was no duty cast on the Government to respond to another representation dated 07-10-2005, although-addressed to the Minister, as no further grounds had been raised. We find that the grounds raised have been examined, as expected of in exercise of the duty cast by Article 22(5) of the Constitution.

24. Although not specifically under attack, Exts.P13 and P15 passed by the Central Government are also criticized during the course of the arguments. The submission is that the merits of the case had not been gone into by the Central Government and routinely representations had been disposed. Our attention had been invited to the decision in Lekha Nandakumar's case (cited supra) in this context. Of course the Division Bench had observed that an order without going to the merits of the contentions was not acceptable, but the Government Pleader as also the Assistant Solicitor General point out that well settled principles evolved as arising from the decisions of the Supreme Court do indicate that there was no necessity for passing any detailed orders, but the orders were to have indicated that the issue had been made subject of examination by the competent authority. Advertence is made to the Constitution Bench decision of the Supreme Court reported as John Martin Vs. State of West Bengal, and especially paragraph 4 thereof. Similar view had been expressed in the decisions reported as Ahamed Nassar Vs. The State of Tamil Nadu and Others, and K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, . We hold that therefore nothing turns out from the attack made against Exts.P13 and P15.

25. There was not much of contentions raised about the default committed by the respondents in intimating the relatives of the detenu, while the arrest and detention was made. It is not disputed that the arrest was made from his house, where he was residing along with his wife, and the Jail Superintendent had informed the relatives, of the place where he had been incarcerated. Likewise, it is not possible to accept the contention that the detention order was vague, and not coherent. Need for further discussion on the issues therefore do not arise.

26. Now we have to come to the principal submissions that had been made by the counsel viz., with reference to his arguments on point No. 1 formulated by him. He submits that Exts.PI adn P2 orders do not refer to Ext. P4 bail order and although this formed part of the documents, which had been placed before the competent authority, in so far as the same has not been subjected to specific consideration, the order is vitiated to the core. The contentions in this regard are formulated in paragraph 5 of the writ petition. Mr. M.K. Damodaran had adverted to the authoritative pronouncements of the Supreme Court in the reported decision in Asa Devi v. K. Sivaraj & Another (AIR 1979 SC 447). To the same effect, the counsel had cited a few other decisions, among which advertence may be made to Dharamdas Shamlal Agarwal Vs. Police Commissioner and Another, , Sita Ram Somani Vs. State of Rajasthan and Others, , Abdul Sathar Ibrahim Manik Vs. Union of India and others, and Rakesh Kumar Miglani v. Union of India

and others (2005 (10) SCC 504). Statements of retraction, bail applications, orders passed on bail applications etc., in the above cases were not seen as having noticed by the notified authority while passing the detention order. The Supreme Court had found the circumstances as vitiating, and the order of detention had been set aside for such reason. Authorities have duty to supply documents to the detenu, enabling him to make a statutory representation, and it is as much their obligation to advert to the materials, which are placed and presented, to come to a subjective conclusion as to whether extreme step of detention in the first instance in fact is the only alternative. If so viewed, counsel submits, the order on the bail application was most relevant, and since it is not adverted to, Ext. P11 has to be declared as illegal.

27. However, we have to take notice of the submissions made by the learned Government Pleader in this context as well. Advertence is made to the decisions in *Ashadevi v. K. Shivraj* (AIR 1979 SC 447) and other decisions, which according to him, are authorities to show that non-observance of an employ formality was never considered as a circumstance to upset an order of detention, in any point of view, adverting to paragraph 48 of Ext.P3 order, namely the grounds of detention, the learned Government Pleader points out that there is an express statement that the State Government had taken into consideration all the facts and materials referred to and relied upon. The bail order was one of them. He also refers to the later decision of the Supreme Court, namely *J. J. Abdul Hakeem Vs. State of Tamil Nadu and Others*, . I the above case, reference is made to the decision in *Kamarunnissa and Others Vs. Union of India* and another, and the Court found that a duty and obligation is cast on the detailing authority to supply copies of documents, but a rider has been put that it is not that non supply of each and every documents provides a ground for setting aside the detention order. It is for the detenu to establish that non-supply of copies of the documents has impaired the detenu's right to make an effective and purposeful representation. Of court, it refers to non-supply of documents. Mr. Lai George submits that there is no dispute about the position that the document, namely the order in bail application was among the records. But he points out that there is nothing stated in the writ petition to suggest that specific non-advertence to the above would have made any difference to the decision, even if it is for argument sake conceded that there was no specific reference to the above said order.

28. Mr. Damodaran refers to the conditions prescribed in Ext. P4 order as most stringent, in that there was an obligation for Sri. Charly to report on every Wednesday before the Senior Intelligence Officer and there is also a direction that he should not partake in any activities, which are offensive. According to him, the authority, which passed the order, alone is the competent person to come to a subjective satisfaction as to whether such conditions were sufficient to avoid a preventive detention. Even the High Court sitting in jurisdiction under Article 226 of the Constitution may not be competent to substitute his findings. According to him, the above position has always been maintained, as could be

seen from the decisions cited.

29. However, we have to see realities, as they are. The order indicates that the materials placed have been adverted to. The necessarily ropes in Ext. P4 as well. It is presumed to have been noticed by the authority.

30. Mr. Lai George also points out that the contention as noticed above is too feeble. Excepting a few minutes on every Wednesday, the detenu was a free bird, capable of attending to do or undo whatever he liked. He could travel freely in the State and without fetters. He points out that if it was a case where the person was already in Jail, the circumstance would have had relevance. The converse could not have been true. We have to agree with the above. The argument of senior counsel is too technical, and at least at this point of time, as we cannot put the clock backwards, we are of opinion that the order granting bail or any of the stipulations there would have been in no manner equivalent to a requirement of detention, if on proper grounds detention had been decided to be enforced. We are of the opinion that the contentions raised in the writ petition do not appear to be sufficiently convincing enough for us to hold that the detenu was incarcerated arbitrarily. Nor was he entitled to a release as of now. The writ petition fails. It is dismissed. No order as to costs.