
(1995) 07 KL CK 0034
In the High Court Of Kerala
Case No : O.P. No. 6484 of 1995

Mrs. Kadeeja

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 28-07-1995

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 10, 3(1), 8, 9, 9(1)
Constitution of India, 1950 — Article 22
Customs Act, 1962 — Section 104

Citation : (1996) 2 ALT(Cri) 377 : (1996) CriLJ 132 : (1996) 3 ILR (Ker) 209

Hon'ble Judges : M.M. Pareed Pillay, C.J;P. Shanmugam, J

Bench : Division Bench

Advocate : Sunny Varghese and K.A. Jabbar, for the Appellant; Lal George, Govt. Pleader for R. 1 C.G.S.C. and C.C. Tomas, Addl. for R 2 and R 3, for the Respondent

Final Decision : Allowed

Judgement

P. Shanmugam, J.—Petitioner is the wife of the detenu detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA Act"). The petitioner has prayed for the issue of a writ of habeas corpus to produce the detenu before this Court and setting him at liberty and for the issue of a writ of certiorari to quash the detention order (Ext. P.1) and declaration (Ext. P5).

2. On 4-1-1992 the Superintendent of Customs, Malappuram and his party intercepted ambassador car bearing registration No. KRM 5176 near Angadipuram leading to the recovery of 18 gold biscuits besides other recoveries. The detenu and other co-accused were arrested by the Customs Officer on 5-1-1992 u/s 104 of the Customs Act and ultimately leading to the passing of the detention order by the Government of Kerala dated 4-8-1992 (Ext. P1) u/s 3(1) (iii) of the COFEPOSA Act. The Government of India passed an order of declaration (Ext. P5) No. 20/95 dated 3-2-1995 u/s 9(1) of the COFEPOSA Act.

The representations submitted by the detenu against the orders u/s 3(1)(iii) as well as u/s 9(1) were rejected by the State and the Central Government respectively. The State Government passed the confirmation order in G.O. (Rt) No. 495/95/Home dated 13-3-1995 (Ext. P11) confirming the detention of the detenu and ordering that the detention shall continue for a period of two years with effect from 4-1-1995.

3. Though several grounds were raised and argued before us, ultimately the learned Counsel appearing on behalf of the petitioner confined himself to ground raised by him in the O.P. According to the learned Counsel though Section 9(1) declaration was issued against the detenu, the Advisory Board has failed to consider whether there is sufficient cause for the continued detention of the detenu, and if the State Government really applied its mind, it would not have confirmed the detention of the detenu for a period of two years. Therefore, the submission is that in view of the serious infirmity, the opinion of the Advisory Board and the confirmation order are vitiated.

4. We have heard the learned Counsel at length, perused the records and considered the matter. The question that arises for consideration is whether the confirmation order passed by the Government of Kerala (Ext. P11) dated 13-3-1995 is valid in the light of the opinion of the Advisory Board.

5. Sub-clause (4) of Article 22 of the Constitution of India states that no person can be preventively detained for more than three months unless the Advisory Board opines that there is sufficient cause for such detention. Sub-clause (c) of Section 8 of the COFEPOSA Act lays down the procedure for the Advisory Board in submitting the report. The crucial portion in Section 8(c) is as follows:

"(c)...prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned...."

Sub-clause (f) of Section 8 enables the appropriate Government to confirm the detention order and continue the detention of the person concerned. The maximum period of detention u/s 8 shall be one year and u/s 9 shall be two years.

6. Section 9 of the COFEPOSA Act enables the Central Government to make a declaration against whom the detention order had been made under the COFEPOSA Act on certain specified conditions stated under Clauses (a), (b) and (c) of Sub-section (1) of Section 9. Sub-section (2) of Section 9 says that in case the person is detained u/s 9 then the provisions of Section 8 dealing with the advisory opinion will have to be correspondingly modified. Clause (ii) of Sub-section (2) of Section 9 states that for the words "the detention of the person concerned", the words "the continued detention of the person concerned" shall be substituted. Similarly Clause (iii) of Sub-section (2) of Section 9 states that for the word "detention" in Clause (f); of Section 8, the words "continued detention" shall be substituted.

7. In effect, if the orders u/s 3(1)(iii) and Section 9(1) are to be confirmed then the Advisory Board should opine that there is sufficient cause for the continued detention of the person concerned and the appropriate Government while confirming the detention order should also state that they confirm the continued detention.

8. These provisions were the subject-matter of interpretation by the Supreme Court in *Satar Habib Hamdani Vs. K.S. Dilipsinhji and Others*, . The Supreme Court held as follows:

"That is why in a case to which Section 9 applies it is important that the Advisory Board specifically considers and answers the question whether in its opinion there is sufficient cause for the "continued detention" of the person concerned. If the Advisory Board merely states that the detention of the person is necessary it is not for any one else to supplement the Advisory Board's opinion and substitute the words "continued detention" for the word "detention". The matter is of vital importance for that. The omission of the words "continued detention" in the opinion of the Advisory Board cannot be slurred over in the fashion we are invited to do in the counter-affidavit. Nor can we treat the omission as a mere clerical or typographical error when that is not the express case of the respondents. We are of the opinion that in the absence of the Advisory Board's opinion to the effect that there is sufficient cause for the "continued detention" of the detenus, their detention for a period exceeding one year is without legal sanction. It is already much more than one year since the appellants have been detained. They are directed to be set at liberty forthwith."

9. This Court in *M.P.M. Aiysha Beevi v. State of Kerala* (1992 (1) Ker LT 870), allowed the Writ petition and directed the release of the detenu after following the Supreme Court decision cited above and taking the view that there is no separate finding except the recommendation of the Board of there being sufficient cause for the "detention" of the detenu.

10. In the case on hand, we find from the records and the orders impugned, the opinion that was referred to related only to the sufficiency of the detention and not the continued detention. Hence the confirmation order u/s 8(f) of the COFEPOSA Act read with Section 10 of the said Act against the detenu cannot exceed beyond the period of one year. In these circumstances Ext. P11 Order of the Government in G.O. (Rt) No. 495/95/Home dated 13-3-1995 is quashed to that extent only and consequently the detenu cannot be detained beyond one year from the date of detention. The detenu is directed to be released after completion of the period of one year from the date of detention.

The Original Petition is allowed as above. No order as to cost.