

(2009) 06 KL CK 0034

In the High Court Of Kerala

Case No : Writ Petition (Criminal) No. 123 of 2009 (S)

Nisha Salim

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 08-06-2009

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 32
Kerala Anti-Social Activities (Prevention) Act, 2007 — Section 10(4), 2, 3(2)
Penal Code, 1860 (IPC) — Section 120B, 379, 392, 394, 403

Citation : (2009) 2 KLJ 561 : (2009) 3 KLT 22

Hon'ble Judges : P. Bhavadasan, J;A.K. Basheer, J

Bench : Division Bench

Advocate : K. Ramakumar, R. Ramprasad Unni and M.H. Hanis, for the Appellant; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Basheer, J.—This writ petition is a sequel to an earlier petition filed by the petitioner under Article 226 of the Constitution of India seeking release of her husband from preventive detention.

2. The order of detention (Ext.P1) issued u/s 3(2) of the Kerala Anti Social Activities (Prevention) Act, 2007 was challenged by the petitioner in the earlier proceeding contending inter alia that the detaining authority had issued the order without any application of mind at all since, according to the petitioner, her husband would not have fallen within the ambit of the definition of "known rowdy" as defined u/s 2(p) of the Act. But, the above and the other contentions were repelled and the writ petition was dismissed by judgment dated January 21, 2009, a copy of which is on record as Ext,P4.

3. The present writ petition is filed primarily impugning Ext.P5 order issued by the Government u/s 10(4) of the Act confirming the order of detention after receipt of the opinion of the Advisory Board.

4. It is contended by Sri. Ramakumar, learned Senior counsel for the petitioner, that the detaining authority has passed the order of detention in a mechanical manner, merely for the reason that the detenu is involved in six criminal cases. The investigation is still in progress in those crimes, and so long as the investigation is not complete and charge sheet is not laid before the competent court, it cannot be said that Section 2(p)(iii) would be attracted. It is further contended by the learned Senior Counsel that Chapters XI, XII and XXII to which reference has been made in Ext.P3 grounds of detention, have absolutely no application as far as the crimes allegedly registered against the detenu are concerned. This, according to the learned Senior Counsel, will show that the detaining authority has not applied its mind at all while issuing the order of detention. In any view of the matter, preventive detention is not at all warranted, even assuming some crimes registered against the detenu are under investigation.

5. As indicated earlier, the very same order of detention (Ext.PI) was under challenge in W.P. (C) No. 455/2008, Identical contentions were raised by the petitioner while impugning the order of detention in the earlier writ petition. At the time of disposal of the earlier writ petition, opinion of the Advisory Board had not been received by the Government However, the Government confirmed the order of detention as contemplated u/s 10(4) of the Act after accepting the opinion of the Advisory Board that there was sufficient reason to continue the detention of petitioner's husband for six months with effect from the date of his detention, i.e., December 6, 2008.

6. Petitioner has now sought to challenge the order of detention on almost identical grounds, of course with some improvisation which at the first blush may appear to be attractive. But, the underlying issue was in fact considered by this Court in the earlier judgment itself. The mere fact that the detaining authority has referred to one or two chapters of the Indian Penal Code which have no relevance to the facts of the case will not, in our view, invalidate the order of detention.

7. Admittedly, the detenu is involved in not less than six crimes involving offences punishable under Sections 392, 394, 379, 120B, 403, 406 etc. All the above crimes were registered against the detenu and his accomplices between 2006 and 2008. Having regard to the nature of the offences allegedly committed by the detenu and his accomplices, particularly the modus operandi we are satisfied that the order issued by the detaining authority cannot be assailed.

8. It is undoubtedly true that personal liberty of a person cannot be trifled with by the Police or the executive authority at their whims and fancies. The power of detention has to be exercised by an authority authorised under law with utmost diligence and caution. The order of detention has to satisfy the test of reasonableness and fair play. The detaining authority has to arrive at the subjective satisfaction about the imperative need to detain a person after due application of mind. All the inputs gathered by the detaining authority must lead

to the irresistible conclusion that the freedom of movement enjoyed by the detenu may be misused by him to create havoc or breach of peace in the society, thereby putting the peaceful life of the people in peril. It would be a shame if the law enforcing authorities throw up their arms in desperation saying that a particular individual in a given area or locality cannot be controlled by the Police force. The Indian Penal Code and other relevant enactments should, under normal circumstances, take care of situations which may have a propensity to disturb the peaceful life of the local people. The Magisterial powers given under the Code of Criminal Procedure are also sufficient to tackle any untoward situations. The Police authorities are given wide powers under the Police Act and other allied enactments to see that "law and order" and public order are maintained. If an individual creates any law and order problem, he can be dealt with by the Police using the powers vested in them.

8A. It is true that preventive detention can become a draconian power if it is wielded by the executive or the Police at the drop of a hat. The threat to the society from the proposed detenu should be such that his activities cannot be controlled or curtailed by using the ordinary means of prevention. It is trite that no citizen can be put behind the bars on the specious ground that he is likely to cause breach of peace in the locality or he may commit some crime in future, if he is allowed to move about freely. As contended by the learned Counsel, involvement of a person in "several cases" may not as such be a ground to use the power of preventive detention, particularly when the crimes allegedly registered against him are still under investigation.

9. Learned Senior Counsel while trying to highlight the fact that the alleged involvement of the detenu in a few criminal cases may not have any impact on the public order to warrant his preventive detention, has drawn our attention to a decision of their Lordships of the Supreme court in K.K. Saravana Babu Vs. State of Tamil Nadu and Another, . The apex court after referring to a series of earlier decisions in Pushkar Mukherjee and Others Vs. The State of West Bengal, , Babul Mitra Vs. State of West Bengal and Others, , Dipak Bose alias Naripada Vs. State of West Bengal, , Kuso Sah Vs. The State of Bihar and Others, , Ashok Kumar Vs. Delhi Administration and Others, , Ramesh Yadav Vs. District Magistrate, Etah and Others, , Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, and The Commissioner of Police and Others Vs. Smt. C. Anita, and also R. Kalavathi Vs. The State of Tamil Nadu and Others, which dealt with the distinction between "law and order" and "public order", held that cases affecting "public order" are those which have great potentiality to disturb peace and tranquility of a particular locality or disturb the even tempo of the life of the community of that specified locality".

10. Learned Senior Counsel has invited our attention to a decision of the Apex Court in Rajesh Vasbdev Adnanl v. State of Maharashtra 2005(8) SCC 390. In this case, the apex court noticed that the order of detention was in fact a verbatim reproduction of the sponsoring authority's proposal except to the

extent that the word "he" occurring in the proposal was substituted by the word "you". It was further noticed by their Lordships that the detaining authority had passed the order of detention after holding discussions with "certain officials". While setting aside the order of detention, the apex court held that keeping in view the safeguards envisaged under the statute, it was absolute essential for the detaining authority to apply its mind at the time of issuing the order of detention. In the facts and circumstances of that case, the apex court held that the order of detention was vitiated.

11. In *Chowdarapu Raghunandan Vs. State of Tamil Nadu and Others*, it as held that the mere fact that the detenu had visited Singapore on two occasions as a tourist, would not lead to a presumption that he was involved in smuggling activities or was likely to indulge in such activities in future. The detenu was the Managing Director of a public limited company at the relevant point of time and there was no allegation against him that he was involved in any other anti social activities. In the above facts and circumstances, the apex court had set aside the order of detention in that case.

12. Having considered the materials available on record and also the scope and ambit of the definition of "anti social activity" read along with the definition of "known rowdy" under the Act, this Court had, in the earlier round of litigation, held that the order of detention was issued against petitioner's husband after due application of mind. Therefore, we are afraid that the petitioner cannot gain any support from the above decisions cited before us.

13. The last question to be considered is whether the present writ petition is barred by the principles of *resjudicata*. As has been noticed already, the earlier writ petition filed by the petitioner impugning the order of detention was dismissed by the Division Bench under Ext.P4 judgment dated January 21, 2009. Admittedly, the said judgment has become final in as much as it was not challenged before the apex court. It is true, in the present writ petition the petitioner has also sought to impugn Ext.PS order issued by the Government confirming the order of preventive detention in the light of the opinion furnished by the Advisory Board. But still, as mentioned by us earlier, the attempt of the petitioner in this writ petition is obviously to reagitate the validity and correctness of the order of detention. The grounds which were raised by the petitioner in the earlier writ petition have yet again been raised before us though from a different angle and couched in different terminologies. The core essence of the contentions raised in the earlier writ petition and in the present one, is fundamentally the same. All those contentions were considered in the earlier judgment itself.

14. Thus the issue boils down to the question whether, in the above facts and circumstances, the present writ petition is maintainable or not. It is true that the bar of *resjudicata* or principles analogous thereto would not apply to a writ of habeas corpus where the prayer is for setting a detenu at liberty. In *Srikant Vs. District Magistrate, Bijapur and Others*, their Lordships of the Supreme Court had

occasion to consider the applicability of the principles of resjudicata in the matter relating to writ of habeas corpus. In *Nazul Ali Molla v. State of W.B.*, 1969 (3) SCC 698 the question that came up for consideration before the apex court was whether a petition for issue of a writ of habeas corpus could be filed under Article 32 of the Constitution of India before the apex court after the disposal of a writ petition for the same relief filed before the High Court under Article 226, The said question was answered in the affirmative following the decision in *Bhagubhai Dullabhabhai Bhandari Vs. The District Magistrate, Thana and Others*, , In *T.P. Moideen Koya Vs. Government of Kerala and Others*, , also the apex court had considered the bar of resjudicata in the matter of writ of habeas corpus. After referring to the above and several other decisions, the apex court in *Moideen Koya's* case (supra) observed thus:

11. The principle which can be culled out from these authorities is that the bar of res judicata or constructive res judicata would apply even to a petition under Article 32 of the Constitution where a similar petition seeking the same relief has been filed under Article 226 of the Constitution before the High Court and the decision rendered against the petitioner therein has not been challenged by filing an appeal in the Supreme Court and has been allowed to become final. However, this principle, namely, the bar of res judicata or principles analogous thereto would not apply to a writ of habeas corpus where the petitioner prays for setting him at liberty. If a person under detention files a writ of habeas corpus under Article 226 of the Constitution before the High Court and the writ petition is dismissed (whether by a detailed order after considering the case on merits or by a non-speaking order) and the said decision is not challenged by preferring a SLP under Article 136 of the Constitution and is allowed to become final, it would still be open to him to file an independent petition under Article 32 of the Constitution seeking a writ of habeas corpus.

15. The apex further observed thus:

It is well settled that a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by law. It is in the interest of public at large the finality should attach to binding decisions pronounced by a court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation.

16. The apex court in *Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others*, had observed thus:

The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive resjudicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.

17. The apex court in Srikant's case after extracting the above observation had this to say:

Whether any new ground has been taken, has to be decided by the court dealing with the application and no hard-and-fast rule can be laid down in that regard. But one thing is clear, it is the substance and not the form which is relevant. If some surgical changes are made with the context, substance and essence remaining the same, it cannot be said that challenge is on new or fresh grounds.

18. In view of the above settled position, we have no hesitation to hold that the present writ petition is not maintainable in the eye of law. In the cases that came up before the apex court the question raised was whether bar of resjudicata would apply if a petition for writ of habeas corpus was filed under Article 32 of the Constitution of India after the dismissal of the writ petition for the same relief under Article 226 by the High Court, without challenging the said order in appeal. The factual position in the case on hand is entirely different. Petitioner has adopted an ingenious method by filing a fresh writ petition urging the same grounds though couched in different terminologies. The fact remains that the earlier decision (Ext.P4) rendered by the Division Bench was not challenged before the apex court.

19. Curiously, the present writ petition was not initially filed praying for issue of a writ of habeas corpus. The prayer was to quash Ext.P1 to P3 and P5. But later, LA. No. 4152/2009 was filed seeking to amend the writ petition by incorporating the prayer for issue of a writ of habeas corpus as well. But, significantly in the present writ petition no specific ground has been raised challenging Ext.P5 order issued by the Government confirming the order of detention. The attempt apparently is to re-agitate the issue which has been settled already in the light of Ext.P4 judgment.

20. We have carefully perused the grounds raised by the petitioner in the writ petition and considered the submissions made by the learned Senior Counsel at the Bar. We have also gone through the earlier judgment rendered by this Court in W.P.(C) No. 455/2008, After elaborately considering the order and grounds for detention, the Division Bench had held that in the facts and circumstances of the case, the order issued by the detaining authority was eminently justified. The challenge now raised is not on "new or fresh grounds".

There is no merit in any of the contentions raised by the petitioner. The writ petition fails and it is accordingly dismissed. But in the peculiar facts and circumstances, there will be no order as to costs.