

(2005) 09 KL CK 0044

In the High Court Of Kerala

Case No : Writ Petition (Criminal) No. 90 of 2005

Nissa Hassan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 23-09-2005

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 3(3), 5A, 8, 8(3)
Constitution of India, 1950 — Article 22, 226

Citation : (2005) 4 ILR (Ker) 163 : (2005) 4 KLT 783

Hon'ble Judges : M.N. Krishnan, J;M. Ramachandran, J

Bench : Division Bench

Advocate : B. Raman Pillai, George Philip, R. Anil, Raju Radhakrishnan, Anil K. Mohammed and Delvin Jacob Mathew, for the Appellant; John Varghese, Assistant Solicitor General and Lal George, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

M. Ramachandran, J.—Mr. AH Hassan, Pavathethu Vadakkethil, Puliyoor Vanchi North, Thazhava P.O., Karunagappally, Kollam District has been directed to be detained and kept in custody in the Central Prison, Thiruvananthapuram by order of the Additional Chief Secretary & Principal Secretary to Government, issued on behalf of the Government of Kerala, in exercise of powers conferred on him by Section 3(1) (ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA Act). Ext.P-1 dated 10-1-2005 is the order of detention, which is presently challenged at the hands of his wife Nissa Hassan. Along with Ext.P-1 order, the grounds of detention supplied to the detenu has been produced and separately marked as Ext.P-2. The petitioner has also challenged Ext.P-5 dated 26-3-2005, whereunder the Government had confirmed the detention, in exercise of powers u/s 8(f) of the COFEPOSA Act, directing that the detention shall continue for a period of one year from 24-1-2005. The petitioner has also produced Ext. P-4 memorandum

dated 24-2-2005 issued by the Government of India informing the detenu that the Central Government has rejected the representation, whereby he had requested for review of the order of detention. The challenge is against Exts. P-1 and P-5.

2. Learned counsel for the petitioner highlighted principally three points, in support of the submission that the orders were vitiated. According to him, the attention of this Court has to be focused on the reasonableness, even if the order is one passed under the COFEPOSA Act. Referring to the Judgment of this Court, reported in *Lekha Nandakumar Vs. Government of India*, , and other decided cases, it is pointed out that there was unexplained delay in passing the orders and this itself was a circumstance justifying interference.

3. The second point of submission was that the rejection of representation without adequate care and application of mind, in the manner as above, in effect denied the benefit of a constitutional mandate as available to the detenu. Support had been attempted to be drawn from the decision reported in *Raziya v. Government of Kerala* 2004 (1) KLT 836 (SC). The delay in considering the representation, which was alleged to be there in the present case, also was a factor which could have come to the assistance of the petitioner for compelling release of her husband. Advertence was made to the judgment in *Ahamed Nassar v. State of Tamil Nadu* 1999 SCC (Cri.) 1469, which dealt with a case in similar situation.

4. The third ground, on which reliance was placed, is concerning the procedural lapses. It is pointed out that as of right the detained person was entitled to have access to all the incriminating materials, on which the proposal was to be rested. Counsel points out that three such documents, which would have thrown serious doubts about the veracity of the materials, on which the decision was rested had been kept back from him. Substantially, the contention as above is based on the decision of the Supreme Court reported in *A. Sowkath All v. Union of India* 2000 SCC (Cri.) 1304. Sustenance was drawn from observations made in an earlier decision, viz., *Ahamed Nassar's* case (cited supra). Freedom and liberty to a citizen had been guaranteed, and personal liberty should have been preserved and any attempt to interfere with such rights could have been subjected to great scrutiny. Reliance had been placed on a decision reported in *Kamleshkumar Ishwardas Patel v. Union of India* 1995 SCC (Cri.) 643.

5. Therefore, according to the counsel, this was a case where the Court has to exercise its extraordinary jurisdiction to ensure that the detenu was to be released forthwith, as the detention ab initio was illegal and arbitrary.

6. The arguments and suggestions, as above, had been controverted by Sri Lal George, Special Government Pleader appearing on behalf of the State of Kerala as well as Sri John Varghese, Assistant Solicitor General, appearing on behalf of the Central Government.

7. With reference to the details, Sri Lal George submits that there were adequate

reasons which prompted action to be taken under the COFEPOSA Act against Sri Ali Hassan, and certain other persons, who were found as engaged in the crime of smuggling, abetting etc. There was practically no delay in taking follow up steps, once the matter had come to the notice of the respondents. A criticism would have been sustainable in this regard, when there was unexplained delay, suggesting that the authorities were sleeping over the matter. It was not at all the case here. The detention order had been issued taking notice of the abundant materials that had been collected by interrogation, and other steps, and the allegation that there was non-application of mind was a bald proposition. It was a case where Government was conscious that they were dealing with civil liberties of a person and all precautionary measures have been taken so as to ensure that the detenu was supplied with all relevant materials and nothing had been withheld, so as to cause him prejudice. Reference had been made to a number of decisions, including Kamlabai (Smt) Vs. Commissioner of Police, Nagpur and Others, , wherein it had been held that short delay was liable to be ignored while an order of detention was passed. The aspect of delay as a vitiating circumstance, according to him, had been explained by the Supreme Court in the decision reported in Sri Ram Skukrya Mhatre Vs. R.D. Tyagi and Others, . The principles laid down were never applicable to the present situation, as procedures had been strictly followed. To the same position, the learned Special Government Pleader had relied on the decision of the Supreme Court in Sitthi Zuraina Begum Vs. Union of India (UOI) and Others, as well as Radhakrishnan Prabhakaran Vs. The State of Tamil Nadu and Others, . According to the Government Pleader, the materials obtained, as far as those which were relevant and which had been relied on, had been made available to the detenu. The documents, which had originated after the detention order, naturally could not have been taken notice of. They too did not contribute to any doubt that the decision arrived at was faulty or arbitrary. The competent authority, u/s 8 of the COFEPOSA Act, also had arrived at a decision as coming from the materials that were placed before the Government and after giving opportunity for hearing, a subjective decision had been arrived at as envisaged by the Act.

8. The objective standards to be adopted while considering such issues, according to him, had been succinctly laid down by the Supreme Court in two decisions, where it had been indicated that presence of probative materials do justify orders to be passed ordering a detention, in public interest. This Court could not have, in this jurisdiction, sat in judgment over the efficiency or adequacy of the materials and for the proposition as above. Mr. Lal George had referred to the decisions in Smt. Phulwari Jagdambaprasad Pathak Vs. Shri R.H. Mendonca and Others, and Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another, covering these aspects. He had also made available the files containing the materials, which had prompted the Government to take a decision leading to Ext. P-1.

9. Almost identical contentions had been raised by Mr. John Varghese. There was no technical defect in the orders passed by the Central Government and he

points out that Ext. P-4 has not been subjected to specific challenge. Referring to Presidential Orders dated 16-1-2002, as from the notification published by the Ministry of Home Affairs dated 16-2-2002 (S.O. 211(E)), it is pointed out that Rules of business regarding the manner in which executive orders were to be issued in the name of the President had been laid down, and the present orders satisfy the parameters so enforced. The State Government as also the competent authority had examined the matters in extenso, and any technical arguments, therefore, were not sustainable.

10. In the background of the submissions made as above, we may examine as to whether there has been an indiscretion at the hands of the State Government in issuing Ext.P-1 or Ext.P-5 and whether this is a case where, in exercise of powers under Article 226, interference is required.

11. The statute authorises for detention of certain persons and simultaneously ensures that the executive does not misuse the powers, as the orders are likely to interfere with the civil liberties guaranteed by the Constitution of India. When the State is satisfied with respect to any person that with a view to prevent him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to prevent him from smuggling goods, abetting the smuggling of goods, transporting, selling or keeping smuggled goods etc., he could be placed under preventive detention. As a safeguard, if such detention is made by the State Government, a report requires to be forwarded to the Central Government. u/s 3(3) of the COFEPOSA Act, for the purposes of Clause (5) of Article 22 of the Constitution, the person, who has been detained, should be given as soon as may be after the detention, the grounds on which such order is passed. It is to be communicated forthwith. Section 8 refers to the necessity for consideration of the issue by the Advisory Board and by Sub-section (f), the Government is expected to re-examine the matter and can confirm or continue the detention as it thinks fit on the basis of the report of the Advisory Board.

12. The decisions referred to by the appearing counsel indicate that every possible facet of the issue had come to the notice of the Court from time to time for minute examination. The parameters to be followed are no more uncertain. Undue delay in issuing detention orders at times had been found fault with, as obviously the casual connection is thereby snapped. The essentiality of a detention become obliterated by passage of time. Likewise, the execution of the order of detention also has to be expeditious and the time-lag in all cases has to be duly taken notice of when the issue is placed before Court. This again is to see whether the efficacy of such orders is as claimed by the Authorities. Another aspect is as to the requirement for supply of full details and materials; and the decisions of the Supreme Court go to the extent that the detaining authorities are not ordinarily sitting in judgment as to whether a particular document is necessary to be made available to the detenu or not. The right of a person, who is detained, as a preventive measure has to be jealously preserved and the opportunity of representation on whatever materials, that might be relevant,

from the point of view of the detenu, should not be kept back.

13. Essentially these are the areas where attention of the Court has to be specifically to be concentrated. However, the Courts have always noticed that on flimsy reasons detention orders are not to be interfered with. It is not any violation that is relevant, but a shortfall, which reasonably can be assessed as going to the root of the matter. A prejudice, real and substantial, should be there, since what is being carried out is not a routine administrative action, but a deterrent step for preserving the security and even sovereignty of the nation and its economy. Reference was made by the Government Pleader, in this regard, to the decision of the Supreme Court in *Kamarunnissa and Others Vs. Union of India and another*, , as an answer to the contentions urged by the petitioner. It appears to be that the question is as to whether a person has been rendered handicapped, taking simultaneous notice of the national interest as the paramount objective, which requires to be given the highest priority. (See the decisions in *Abdul Sattar Abdul Kadar Shaikh Vs. Union of India (UOI) and Others*, , and *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, . Government Pleader had also referred to the presence of Section 5A of the COFEPOSA Act, which had been introduced by an amendment during 1975, incorporating a principle of severability of the grounds of detention. According to him, this was indicative of the anxiety of the Parliament to ensure that a person is not let off for technical reasons, thereby jeopardizing the interest of nation and the effort of the Administration to see that enforcement proceedings are not made a mockery.

14. Now we may advert to the facts of the case as well. On 29-9-2004 one Sukumaran Rajeev, who had come for clearance of unaccompanied baggage, at the Customs Counter of the Air Cargo Complex, Trivandrum, was behaving in a suspicious manner. The interrogations evidenced that he was only a name-lender and though was the holder of the Passport, which had been used for import of certain goods, had been obliging third parties. On verification of his baggage, which was declared as household items, it had been found that Local Cells, worth Rs. 12,23,790 (the approximate market price of which was estimated to Rs. 30 lakhs), were found as warranting confiscation. It came to be noticed that he has been drawn into the transactions at the instance of persons, including Sri Ali Hassan, the husband of the petitioner. The involvement was confirmed by interrogation of the persons concerned and the allegation was that Sri Ali Hassan had collected the Passport from Rajeev, which duly had been handed over to third persons for the illicit purpose of import of Articles by a procedure not permitted by law. It was not a solitary incident they came to know, and steps were taken after a detailed investigation to ensure that such offences could be prevented by snapping the connection by a process of detention.

15. We do not think that the delay in passing the detention order or disposal of the representation were so unreasonable, taking notice of the efforts that had been taken by the Department to collect materials about his involvement and

involvement of third parties. But as the point had been highlighted by the petitioner, it could be examined with reference to the authorities cited. It is submitted that twenty eight days delay was declared as unreasonable by the Supreme Court in Rama Dhondur Borade Vs. V.K. Saraf, Commissioner of Police and Others, . Likewise delay in considering the representation was commented upon by the Apex Court in Ahamed Nassar v. State of Tamil Nadu (1999 SCC (Cri.) 1469. Counsel also had relied on Lekha Nandakumar Vs. Government of India, , in this context.

16. The principles which lead to the proposition are clear. As succinctly laid down in Lekha Nandakumar's case, the objective of detention is to prevent illegal activities and it is not intended as a punitive measure. On the facts, the Division Bench held that delay of 2 1/2 years was sufficient enough to snap the nexus, requiring a preventive detention. In Ahamed Nassar's case, it is Held in categorical terms that delay in considering the application is not to be tested by any fixed number of days. At times a few days' delay may be fatal, but if circumstances are explained, longer time could be accepted as reasonable. Suggestion from the detenu that services of a special messenger was called for, did not at all find acceptance, as what was required was expeditious disposal alone.

17. There can be delay in passing of detention orders by the competent authority, in serving the orders so passed, as also delay in disposing of the representation submitted to the Government. As pointed out by the counsel, delay in any of these stages, would vitiate the orders. But delay, if not substantial, or if satisfactorily explained, need not result in advantage to the detainee. We need only advert to the observations made by the Supreme Court in Radhakrishnan Prabhakaran Vs. The State of Tamil Nadu and Others, , and Sri Ram Skukrya Mhatre Vs. R.D. Tyagi and Others, , for this conclusion. In the present case, a representation is seen to have been made against the detention on 10-2-2005. It is disposed of on 26-2-2005. Taking notice of the intervening holidays, and the satisfactory explanation submitted through the counter-affidavit, we are not prepared to hold that the files were kept in hibernation. Further, the decision reported in Rama Dhondur Borade Vs. V.K. Saraf, Commissioner of Police and Others, , was not a case of detention coming under the COFEPOSA Act. There the allegation was that a person had armed himself and was found to be a public menace, and had been detained in exercise of powers under the National Security Act. In scope and purport, although cases of detention, we have to notice that there is subtle differentiation required to be followed while considering the impact of the situation. The arguments of the petitioner, therefore, have to be rejected.

18. As a vitiating circumstance for the detention, petitioner had stressed on the circumstance that certain documents had originated in the meanwhile and although they had been served on the detenu on subsequent dates (being statement dated 7-1-2005, 17-2-2005 and 10-3-2005), the principles of natural justice, as explained by the Supreme Court, stood violated. However, as pointed

out by the Government Pleader, it has come by authentic records that these statements could not be relied on for good reasons as even the earliest of them had come to the notice of the competent authority after the detention orders were finalized. The petitioner had very forcefully made reference to Sowkath All's case (cited supra), since the detaining authority had ignored the confessional statements and when it was found that there was a retraction statement from the co-detenu, the intrinsic value of the credibility of the statement automatically had to come down. Reference is invited to the circumstance that the Supreme Court was considering almost a case of similar nature and the statement dated 7-1-2005, which came before the Sponsoring Authority, substantially should have altered the position to his advantage. However, we have to notice that the absolute proposition as submitted by the petitioner is not gatherable from the judgment. The unexplained gap before the detention, according to the Supreme Court, was the important circumstance. The relevance of the retraction statement had come as highly relevant in the above context. We may also take notice of the general principles that have been laid down by the Supreme Court in *J. Abdul Hakeem v. State of Tamil Nadu and Ors.* 2005 (5) Supreme 785. The attempt of the Court should not be to cause puncture holes. With approval, the Supreme Court had quoted the observations in the decision reported in *Kamarunnissa and Others Vs. Union of India* and another, namely that the right of the detenu is to get an opportunity to make an effective representation. But a rider was always there that non-supply of each and every document is not a ground for setting aside the detention order. It is for the detenu to establish that the non-supply of copies of documents has impaired the right of the detenu to make an effective and purposeful representation.

19. As could be seen from Ext. P-2, the predominant circumstance highlighted in the order of detention is the admission made by Sri Ali Hassan on 30-9-2004 that he had been collecting passports of passengers coming from abroad and giving them to agents in Trivandrum for Rs. 2000 out of which Rs. 1000 or more would be given to the passport holder. Sri Ali Hassan was aware that using the passports, goods would be imported and he had done twice such work. He had also admitted that he had received the passport from Sri Sukurnaran Rajeev on a promise of Rs. 1100 and it was using that passport, goods were sent in the name of the said person, which are under seizure. He had also admitted that he had offered to co-operate with Sri Sukurnaran Rajeev in the course of clearance of goods and he had also admitted that the piece of paper received from Sri Sukumaran Rajeev was given by him and the direction contained in it was meant for Sri Shamnad to give money to Sri Sukumaran Rajeev and the paper contained his own telephone number.

20. The petitioner could not highlight a case that Sri Ali Hassan had retracted from the above stand. When the detention order was particularly made reference to the active role played by the detenu, the non-supply of some other documents could not have had any impact on the sustainability of the detention order. In *Abdul Hakeem*, 's case (cited supra), the Court had also made particular

reference to the observations made by the Court in Radhakrishnan Prabhakaran's case (cited supra), which was to the following effect:

"We make it clear that there is no legal requirement that a copy of every document mentioned in the order shall invariably be supplied to the detenu. What is important is that copies of only such of those documents as have been relied on by the detaining authority for reaching the satisfaction that preventive detention of the detenu is necessary shall be supplied to him."

As reiterated by the Court, the crux of the matter lies in whether the detenu's right to make a representation against the order of detention is hampered by non-supply of the particular document.

21. Follow up orders, passed by the Government, in exercise of the powers u/s 8(3) of the COFEPOSA Act, according to us, satisfies the requirement of the section. Circumstances had not been presented before us so as to show that there was any mal-exercise of power or that the case was sufficiently strong enough for this Court to hold that the detention order was unreasonable or illegal.

22. In the aforesaid view, we are not impressed by the submissions of the learned Counsel for the petitioner that exercise of powers under Article 226 of the Constitution is required. The Writ Petition is dismissed.