

(2009) 06 KL CK 0175

In the High Court Of Kerala

Case No : WP. (Criminal) No. 170 of 2009 (S)

Radha Thankappan

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 04-06-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 173, 2(d), 2(r), 7(2)
Kerala Anti-Social Activities (Prevention) Act, 2007 — Section 2, 2(o), 2(o)(ii), 3, 7(2)
Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 —
Section 24, 25

Citation : (2009) 2 KLJ 594

Hon'ble Judges : R. Basant, J;M.C. Hari Rani, J

Bench : Division Bench

Advocate : K. Sunilkumar, for the Appellant; K.K. Raveendra Nath (A.D.G.P), for the Respondent

Final Decision : Dismissed

Judgement

Basant, J.—Is the expression "report" in the proviso to Section 2(o) of the Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as KAAPA) to take its meaning from the "police report" defined under Sec. 2(r) of the Code of Criminal Procedure? Is insistence on such importation of the definition under the Code to the KAAPA justified? These questions are raised for determination in this writ petition. The petitioner is the mother of the detenu Subhash who has been ordered to be preventively detained u/s 3 of the KAAPA by the 2nd respondent. She prays that a writ of habeas corpus may be issued to produce her son, who was detained u/s 3 of the KAAPA and release him.

2. A brief reference to the sequence of events will be crucially relevant. The detenu was allegedly involved in five crimes, all relating to alleged attempts at depredation of nature by the petitioner. Five such crimes were registered. The offences alleged in those five crimes were allegedly committed on the following dates:

- i) 07/09/2006 ii) 28/09/2006
- iii) 28/02/2007 iv) 02/04/2007 and
- v) 24/10/2008

3. The first four cases were investigated and complaints were filed before the Magistrate by the police. The 5th case was being investigated into. At that stage, it is now revealed that, on 18/12/2008, a report was submitted by the 3rd respondent to the 2nd respondent recommending that the detenu may be ordered to be detained under the KAAPA. That report was received by the 2nd respondent; but order of detention was not passed. The 2nd respondent sent the report back to the 3rd respondent pointing out that readable copies of the documents have to be furnished by the sponsoring authority along with the recommendation. It was also pointed out that it has not been stated specifically whether the conditions of bail have been violated by the detenu. Accordingly, the detaining authority returned the said report dated 31/12/2008 to the sponsoring authority.

4. The returned file was received by the sponsoring authority on 07/02/2009. Instead of submitting a report giving further clarification, the sponsoring authority submitted a fresh report dated 05/03/2009 (Ext.P4) to the detaining authority. It would be apposite straight away to note that in the 5th case, which was pending investigation when the earlier report dated 31/12/2008 was submitted, investigation had been completed and final report/complaint had been filed on 12/11/2008. In Ext.P4 report, this fact was made clear by the 3rd respondent.

5. The detaining authority, the 2nd respondent considered such report dated 5/3/2009 submitted by the 3rd respondent and proceeded to issue Ext.P1 order of detention dated 26/3/2009 u/s 3 of the KAAPA. The detenu was arrested on 28/3/2009 and the detention was approved by the Government by Ext.P2 order dated 04/04/2009. Grounds of detention was communicated to the detenu under Ext.P3 along with the order of detention. It is submitted that the Advisory Board has later recommended continued detention and orders confirming the order of detention have already been issued by the Government.

6. The learned counsel for the petitioner and the learned Additional D.G.P have been heard. In the course of arguments, the learned counsel for the petitioner assails the order of detention and detention of the detenu on the following three specific grounds only;

- i) The detenu does not satisfy the definition of Known Goonda u/s 2(o) of the KAAPA,
- ii) At any rate, it must be held that there was no live link between the alleged prejudicial acts and the order of detention Ext.P1.
- iii) The nature of the contentions taken by the respondents reveal that there has

been crucial breach of the obligation of the detaining authority to furnish copies of all relevant documents under Section, 7(2) of the KAAPA.

7. We shall now consider these contentions in detail.

8. Contention No. 1: An order of detention u/s 3 can be passed only against a person who is a known goonda or a known rowdy. That is the threshold requirement for any order u/s 3 to be passed against a person. If such Known Goonda or Known Rowdy is likely to commit any anti social activity and his detention is necessary to prevent such activity then and then alone, an order u/s 3 can be passed. It is the case of the respondents that the detenu is a Known Goonda. We extract below the definition of a Known Goonda u/s 2(o) of the KAAPA.

known goonda" means a goonda who had been, for acts done within the previous seven years as calculated from the date of the order imposing any restriction or detention under this Act,-

(i) found guilty, by a competent Court or authority at least once for an offence within the meaning of the term "goonda" as defined in clause (j) of Section 2; or

(ii) found in any investigation or enquiry by a competent police officer, authority or competent Court on complaints initiated by persons other than police officers, in two separate instances not forming part of the same transaction, to have committed any act within the meaning of the term "goonda" as defined in clause (j) of Section 2:

Provided that an offence in respect of which a report was filed by a police officer before a lawful authority consequent to the seizure, in the presence of witnesses, of alcohol, spirit, counterfeit notes, sand, forest produce articles violating copyright, narcotic drugs, psychotropic substances, or currency involved in hawala racketeering may be included for consideration though the report had resulted from an action initiated by a police officer.

9. All the five criminal cases against the petitioner relate to depredation of the environment and punishable inter alia under "The Kerala Protection of River Banks and Regulation of Removal of Sand Act (hereinafter referred to as the Sand Act). The specific contention of the petitioner is that he does not fall under the definition of Known Goonda because he does not satisfy condition No. (i) or condition No. (ii) of Section 2(o). The respondents have no contention that the detenu comes under clause (i). The only question is whether he satisfies clause (ii).

10. Clause (ii) indicates a salutary provision to prevent the possibility of misuse of the powers under the KAAPA. The provisions of Section 3 can be invoked not only against the person who has been found guilty by a competent court or authority; but also against a person who has been found in investigation or enquiry by a competent police officer, authority or court to have committed any stipulated act. If the court has convicted the detenu, one instance is sufficient to

bring the person within the sweep of the definition of a Known Goonda whereas if he has to satisfy clause (ii), he must have been found in such investigation to have committed such acts atleast twice. There is a further safeguard provided that such instance of alleged commission should not have been initiated on complaints by police officers.

11. Rationale of the stipulation appears to be very clear. Conviction by the court need not be insisted. Conclusion of a police officer, authority or court that the person has committed the offence is sufficient. But, then, there was a possibility of police officials misusing such powers. Hence it was stipulated that to come within the sweep of clause (ii), the instances must be not instances of alleged offences initiated by the police officers; but such initiation must be on complaints by non-police officers.

12. Having enacted that stipulation in the interests of prevention of abuse, the legislature realised that an exception will have to be carved out. It was stipulated in the proviso that where proceedings were initiated on the basis of seizure by a police officer having lawful authority in the presence of witnesses of certain articles including sand, such instances would be sufficient to satisfy clause (ii) of Section 2(o) notwithstanding the fact that it was initiated by a police officer.

13. In all the five cases referred to in Ext.P1, crimes have been registered at the instance of and on the basis of reports submitted by police officers who had seized sand from the possession of the petitioner. All the crimes were registered on the basis of F.I.S recorded by such police officers who effected seizure.

14. The learned counsel contends that the proviso will not be applicable and that the action in all the five cases having been initiated on the complaints of police officers, the detenu must be held to be not a Known Goonda under clause (ii).

15. This contention is built on the plank that the police officers, after investigation, launches a prosecution not on the basis of a report u/s 173 Cr.P.C; but on the basis of complaints u/s 25 of the Sand Act. Prosecution is to be launched under the Sand Act as per the stipulations of Section 25 on the basis of a complaint in writing made by an authorised person. We extract Section 25 of the Sand Act below:

25. Cognizance of offences;- No court shall take cognizance of any offence punishable under this Act, except upon a complaint in writing made by a person authorised in this behalf by the Government or the District Collector or a Geologist of the Department of Mining and Geology.

(emphasis supplied)

16. The argument of the learned counsel is that prosecution having been initiated on the basis of complaints u/s 24 and not on the basis of reports u/s 173 Cr.P.C, the proviso to Section 2(o)(ii) is not at all applicable to the detenu. We are afraid, this contention cannot be accepted. It would be myopic to blindly import the definitions of "report" and "complaint" in the Cr.P.C while attempting to

interpret the relevant provisions of the KAAPA. The Cr.P.C also does not define "report". But there is of course, definition of a police report in Section 2(r) as follows:

Section 2(r): "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173.

17. The learned counsel for the petitioner contends that unless investigation conducted by a police officer has resulted in a police report u/s 2(r) of the Cr.P.C, the proviso to Section 2(o)(ii) of the KAAPA cannot apply,

18. We note, at first, that there is no stipulation anywhere in the KAAPA that the definitions in the Cr.P.C have to be followed if there is no definition. It is hence impermissible for this court to assume that the report referred to in proviso to Section 2(o)(ii) must be understood as a "police report" defined u/s 2(r) Cr.P.C. Going by the purpose which Section 2(o)(ii) and its proviso have to achieve, it is unnecessary to assume that report referred to in the proviso must take its meaning from Section 2(r) of the Cr.P.C. The purpose, to us, appears to be very clear. If there is a conviction, one instance of conviction is necessary under clause (i) of 2(o) of the KAAPA. Even if there is no conviction and the police investigation has resulted in the launching of a prosecution, that would be sufficient, provided there are atleast two such instances. Such instances cannot include instances of complaints initiated by police officers lest police officers may misuse their powers. This embargo does not apply where proceedings are initiated on the basis of seizures effected by police officers in exercise of their lawful authority in the presence of witnesses if specified articles (sand included) are recovered.

19. We feel no doubt on the question that the definitions in the Cr.P.C cannot be blindly imported while understanding the concept of a Known Goonda in Section 2(o). That is again evident from the body of Section 2(o)(ii) which shows that proceedings initiated on the basis of complaints have to be reckoned. The expression complaint there, cannot be understood to have the meaning assigned to that expression in Section 2(d) of Cr.P.C. If that be the case, it will have to be assumed that only complaints filed before Magistrates and referred u/s 156(3) Cr.P.C to the police for investigation can be reckoned as complaints for the purpose of Section 2(o)(ii). That evidently is not the legislative intention and this is clear as daylight.

20. We are, in these circumstances/ unable to accept the contention that the detenu does not fall within the sweep of the proviso to Section 2(o)(ii). Consequently, the contention that he is not a Known Goonda to satisfy the threshold requirement of Section 3 cannot also be accepted. The first contention therefore fails.

21. It is contended that there is no live link between the alleged prejudicial acts and the order of detention dated 26/3/2009. The last of such alleged prejudicial acts had taken place on 24/10/2008 and the order of detention is issued 5

months thereafter. The live link between the alleged prejudicial act and the order of detention is thus broken and snapped, argues counsel. It is contended that the order of detention must be held to be bad as the subjective satisfaction allegedly entertained by the detaining authority must be held to be not valid or proper in the absence of a live link between the acts complained of and the order of detention.

22. We note that the alleged offences were committed on the dates referred above and the last of such acts was committed on 24/10/2008. That case was investigated and the final report was filed on 12/11/2008. The sponsoring authority had submitted the proposal for detention on 31/12/2008. The same was returned for the reason essentially that readable copies were not furnished. A fresh report Ext.P4 was submitted on 05/03/2009, in that, the fact that investigation into the crime dated 24/10/2008 had culminated and a final report/complaint dated 12/11/2008 had been filed was also incorporated.

23. The law is clear that where there is a gap of time between the last alleged prejudicial act and the order of detention, the detaining authority has to consider whether it amounts to snapping of the live link between the prejudicial act and the order of detention. In the instant case, the gap of time is from 24/10/2008 and 26/3/2009. Though the last alleged criminal act was on 24/10/2008, the complaint after investigation was filed only on 12/11/ 2008. The question is not about number of days of gap between the two. The question is whether the live link between the prejudicial acts and the order of detention is snapped or not In the instant case, we find that the petitioner has been allegedly indulging in such prejudicial acts for a long period of time. The last of the acts occurred on 24/10/2008. Investigation was completed and the final report/complaint about the last of the prejudicial acts was filed on 12/11/2008. It is thereafter that the sponsoring authority recommended preventive detention by the report dated 31/12/2008 which was returned for the reason that readable copies were not made available. It was thereafter that Ext.P4 report dated 5/3/2009 was submitted to the detaining authority by the sponsoring authority. Before us, the decisions in Adishwar Jain Vs. Union of India (UOI) and Another, and Lekha Nandakumar Vs. Government of India, have all been cited. The question is not as to what view any other court has taken on the significance of any particular number of days of delay in any given case. The crucial question is whether this court is satisfied that the detaining authority, when the order of detention was passed, must have noted that there was no live link between the prejudicial acts and the order of detention, in the facts and circumstances of this case, we are unable to agree that there is any snapping of the live link between the alleged prejudicial acts and the order of detention.

24. The learned counsel for the petitioner contends that for the reason that the report was filed on 5/3/2009 also, it must be held that the live link is broken. The last act was on 24/10/2008. That again is reason enough to conclude that there has been snapping of the live link between the prejudicial act and the proposal of

the sponsoring authority, contends Counsel. For the same reasons which we have referred to earlier, that contention cannot also be accepted. The second contention also fails.

25. The learned counsel for the petitioner then contends that, at any rate, the 3rd contention referred above is liable to be accepted. That contention was not specifically raised in the writ petition; but the learned counsel contends that this contention is available from the counter affidavits filed by the respondents. The crux of the contention is that the report of the sponsoring authority dated 5/3/2009 or the order of detention passed by the detaining authority on 26/3/2009 do not significantly refer to the earlier recommendation of the sponsoring authority dated 31/12/2008. That has not been referred to at all. When copies of relevant documents were furnished to the detenu u/s 7(2), this earlier report dated 31/12/2008 has also not been produced, it is contended.

26. The learned Additional D.G.P contends that the earlier report of the sponsoring authority cannot at all be reckoned as a crucial or vital document of which copy is liable to be furnished u/s 7(2). The learned Additional D.G.P points out that the earlier report dated 31/12/2008 was irrelevant while considering the proposal for detention in Ext.P4 and while passing the order of detention Ext.PI on 26/3/2009. The learned Additional D.G.P places reliance on the decisions in *State of U.P v. Shakeel Ahmed IJT 1995 (8)S.C561]* and *Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, .* To us, it appears that, it is not necessary to advert to precedents in any greater detail. The crucial question is whether the earlier proposal for detention is such a vital document that the non-furnishing of it can be reckoned as a crucial infraction of the obligation to furnish copies u/s 7(2). The report dated 5/3/2009 - Ext.P4 is virtually a verbatim repetition of the earlier report dated 5/3/2009 subject to the crucial additional information that in the 5th crime, the investigation had been completed and the prosecution had been launched. All the information available in the report dated 31/12/2008 are repeated in the report dated 5/3/2009 (Ext.P4). There is no information which is there in the report dated 31/12/2008 which is not there in Ext, P4. Additional information is available about the 5th crime referred to in both the reports.

27. The fact that there was an earlier proposal or that it was returned for non-furnishing of readable copy is, to our mind, not at all relevant while considering the purpose for which there is an obligation to furnish copies u/s 7 (2). In order to make effective representations against the order of detention also, the omission to mention details about the earlier report dated 31/12/2008 is not of any vital significance. We are, in these circumstances, satisfied that the innocuous omission to refer to the earlier report dated 31/12/2008 in Ext.P4 (sponsoring authorities report) or Ext.PI, the order of detention by the detaining authority is not of any crucial significance while considering the validity of the order of detention. That innocuous omission cannot justify a contention that the order of detention deserves to be invalidated for that purpose. The third

contention must also, in these circumstances, fail. No other contentions are raised. We are, in these circumstances, satisfied that this writ petition only deserves to be dismissed.

In the result, this writ petition is dismissed.