

(2013) 04 KL CK 0019

In the High Court Of Kerala

Case No : Writ Petition (C) No. 29820 of 2012

Rajesh Babu @ Unni

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 03-04-2013

Acts Referred:

Citation : (2013) CriLJ 4982 : (2013) 4 KHC 320 : (2013) 4 KLT 147

Hon'ble Judges : M.L. Joseph Francis, J;K.T. Sankaran, J

Bench : Division Bench

Advocate : C. Rajendran, for the Appellant; T. Asaf Ali, Director General of Prosecution, for the Respondent

Judgement

K.T. Sankaran, J.—The present Writ Petition is the third Writ Petition filed by the petitioner even before he was detained under the Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as "KAAPA"). The petitioner filed W.P. (C) No. 6778 of 2012 for a declaration that he cannot be treated as a "known depredator" on the basis of the cases registered against him by the police and for the issue of a writ of mandamus, direction or order directing the District Collector, Kollam not to pass any detention order against the petitioner. The said Writ Petition was disposed of by Ext. P16 judgment dated 04/04/2012. The Division Bench held that the reliefs sought for by the petitioner could not be granted. However, the Division Bench observed that the detaining authority would apply its mind to the facts and circumstances pointed out by the petitioner including revocation of the order of detention issued earlier and subsequent developments, before passing any order of detention. Earlier, as per the order dated 26/03/2011 issued u/s 3 of KAAPA, the petitioner was detained. However, the Advisory Board opined that there was no sufficient cause for the detention of the petitioner. Accordingly, the Government issued Ext. P10 order of revocation dated 03/06/2011. Thereafter, it was proposed to issue another order of detention against the petitioner and at that juncture, the petitioner filed W.P. (C) No. 6778 of 2012 referred to above.

2. After the disposal of W.P. (C) No. 6778 of 2012 and before issuing another order of detention, the petitioner filed W.P. (C) No. 10487 of 2012 for the following reliefs:

(i) Issue a writ of mandamus, direction or order directing respondents 5 to 8 not to arrest the petitioner on the basis of any detention order passed by 4th respondent under the provisions of Kerala Anti Social Activities (Prevention) Act, 2007.

(ii) Call for the records pertaining to the last detention order passed by the 4th respondent against the petitioner and quash the same.

(iii) Declare that petitioner cannot be treated as a "known goonda" or "known rowdy" as defined in Kerala Anti Social Activities (Prevention) Act, 2007 on the basis of all or any of the cases so far registered against the petitioner by the police.

(iv) to grant any other appropriate relief considering the nature and circumstances of the case.

3. W.P. (C) No. 10487 of 2012 was dismissed as per Ext. P18 judgment dated 06/06/2012 holding that the petitioner did not make out sufficient grounds for challenging the order of detention at the pre-execution stage as held in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, and Union of India (UOI) and Others Vs. Atam Parkash and Another, judgment was challenged by the petitioner before the Honourable Supreme Court in SLP No. 22440 of 2012, but the SLP was dismissed as per Ext. P20 order dated 17/07/2012.

4. The order of detention has not been executed so far. The petitioner filed the present Writ Petition to quash Ext. P1 order of detention dated 16/04/2012 and for the issue of a writ of mandamus commanding respondents 3 to 8 not to arrest and detain the petitioner in prison pursuant to Ext. P1 order of detention. The petitioner has also sought for a declaration that he is not liable to be classified as "known goonda" and detained under KAAPA. Though the petitioner sought for a declaration that the period of seven years fixed in clauses (o) and (p) of Section 2 of KAAPA (for taking into account acts done during the said period) is ultra vires the Constitution, that contention was not pressed by the petitioner at this stage.

5. The petitioner states that he obtained copies of the order of detention and the grounds of detention on an application made under the Right to Information Act. The learned counsel submitted that there is proof to show that sufficient charges were paid for getting the copies and probably the seal was omitted to be affixed on Exts. P1 and P2. Though there is no seal on Exts. P1 and P2 that they were issued under the Right to Information Act, we accept the submission made by the learned counsel for the petitioner that Exts. P1 and P2 were issued under the Right to Information Act.

6. Going by Ext. P2 grounds of detention, it is seen that the petitioner was involved in Crime Nos. 798 of 2010 and 1063 of 2010 of Paravoor Police Station and Crime Nos. 1579 of 2010 and 1839 of 2011 of Chathannur Police Station. These crimes were registered under Sections 20 and 21 of the Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 (hereinafter referred to as "the Sand Act"). It is also seen from a perusal of Exts. P2 and P9 (the grounds of detention in support of the earlier order of detention) that Crime No. 1839 of 2011 was registered subsequent to Ext. P10 revocation order dated 03/06/2011 and that crime is also taken as a ground for passing Ext. P1 order of detention dated 16/04/2012. The three crimes mentioned in the present order of detention dated 16/04/2012 were included in Ext. P8 order of detention dated 26/03/2011, which was subsequently revoked as per revocation order dated 03/06/2012.

7. Sri. C. Rajendran, the learned counsel for the petitioner, raised the following points: (1) Though cases were registered under the Sand Act, there is no provision in the Sand Act for seizure of sand and, therefore, the proviso to sub-clause (ii) of clause (o) of Section 2 of KAAPA will not apply. In order to attract the said proviso, seizure of sand is mandatory. When seizure of sand is not provided under the Sand Act, it cannot be said that the sand was seized legally or as permitted by law. If so, an order of preventive detention cannot be passed against the petitioner by invoking the proviso to sub-clause (ii) of clause (o) of Section 2 of KAAPA. (2) Removal of sand from the river banks by an individual is not an offence under the Sand Act. Therefore, the order of detention under KAAPA on the ground that the petitioner violated the provisions of the Sand Act is illegal. (3) The first order of detention issued against the petitioner (Ext. P8 dated 26/03/2011) was revoked as per Ext. P10 order dated 03/06/2011. The present order of detention was passed taking into account those grounds which were relied on to pass Ext. P8 order, which is quite illegal. The ground on which the earlier order of detention was passed cannot be made a ground for passing the present order of detention, the earlier order having been revoked by the Government u/s 10(4) of KAAPA. He relied on the decision of this Court in *Praseetha Vs. State of Kerala and Others*

8. The learned Director General of Prosecution submitted that the contentions put forward by the learned counsel for the petitioner are unsustainable. The learned Director General of Prosecution contended that copies of Ext. P1 order of detention and Ext. P2 grounds of detention could not be validly issued under the Right to Information Act. Many of the grounds raised in the Writ Petition are grounds which could probably be raised at the post execution stage of the order of detention and not at its pre-execution stage. He also submitted that the decision of the Supreme Court in *Alka Subhash Gadia's* case still holds good and the dismissal of the earlier Writ Petition (W.P. (C) No. 10487 of 2012) filed by the petitioner would operate as a bar to the maintainability of the present Writ Petition, as the principles of *res judicata* would apply to the writ proceedings as well.

9. After the arguments were heard in detail, Sri. C. Rajendran, the learned counsel appearing for the petitioner, submitted that the third point raised by him is not pressed at this stage and that the right of the petitioner to raise the same at the appropriate stage may be reserved. It is made clear that in this judgment we are not dealing with the third point raised by the learned counsel appearing for the petitioner. All those points which could be raised at appropriate stage are left open.

10. For appreciating the contentions raised by the learned counsel for the petitioner, it is necessary to refer to the relevant provisions in the KAAPA. Clauses (a), (g), (j) and (o) of Section 2 of KAAPA are extracted below:

2. Definitions.--In this Act, unless the context otherwise requires,--

(a) "anti-social activity" means acting in such manner as to cause or likely to cause, directly or indirectly, any feeling of insecurity, danger or fear among the general public or any section thereof, or any danger to the safety of individuals, safety of public, public health or the ecological system or any loss or damage to public exchequer or to any public or private property or indulges in any activities referred in clauses (c), (e), (g), (h), (i), (l), (m), (n), (q) and (s) of this section;

xxx xxx xxxx

(g) "depredator of environment" means a person who, by any direct act by which he derives pecuniary or commercial benefit, commits an offence under any law relating to protection of environment or rivers or under any law relating to sand mining from any place or under any law relating to quarrying or mining, or who commits or abets the commission of offences punishable under any law relating to conservation of forests or wildlife.

xxxx xxxx xxxx

(j) "goonda" means a person who indulges in any anti-social activity or promotes or abets any illegal activity which are harmful for the maintenance of the public order directly or indirectly and includes a bootlegger, a counterfeiter, a depredator of environment, a digital data and copy right pirate, a drug offender, an hawala racketeer, an hired ruffian, rowdy, an immoral traffic offender, a loan shark or a property grabber;

xxxx xxxx xxxx

(o) "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.

Explanation.--An instance of an offence involving a person, which satisfies the conditions specified in the definition of known rowdy referred to in clause (p) of Section 2 can also be taken into consideration as an instance, along with other cases, for deciding whether the person is a known goonda or not.

11. Section 3 of KAAPA empowers the Government or an authorised officer to make an order of detention with a view to prevent any "known goonda" or "known rowdy" from committing any anti social activity within the State of Kerala in any manner, on being satisfied that such an order of detention is required. Any activity under clause (g) would come within the meaning of anti-social activity. Committing an offence under any law relating to protection of environment or rivers or under any law relating to sand mining is covered by the definition of "depredator of environment". The term "goonda" as defined in Section 2(j) includes a person who indulges in any anti-social activity or a person who is a depredator of environment. To enable the Government or the officer authorised to issue an order of detention u/s 3 of KAAPA, there must be subjective satisfaction that an order of detention is required for preventing a "known goonda" or a "known rowdy" from committing any anti-social activity within the State of Kerala in any manner. To be termed as a "known goonda", any of the conditions under clause (o) of Section 2 of KAAPA must be satisfied. In the present case, the petitioner was not found guilty by any competent Court as contemplated under sub-clause (i) of clause (o) of Section 2 of KAAPA. However, the petitioner is termed as a "known goonda", by invoking sub-clause (ii) thereof. To attract sub-clause (ii), the case should have been initiated by persons other than police officers. However, in view of the proviso to sub-clause (ii), action initiated by a police officer can also be taken into account for the purpose of considering a person as "known goonda" under sub-clause (ii) of clause (o) of Section 2 of KAAPA, if the conditions mentioned in the proviso are satisfied. To invoke the proviso to sub-clause (ii) of clause (o), there must be seizure, in the presence of witnesses, of any of the items mentioned in the proviso. One of the items of seizure required under the proviso is sand. The contention of the petitioner is that the authority under the Sand Act has no jurisdiction to seize sand and they can only seize the vehicle in which sand was removed or attempted to be removed. It is submitted that seizure of vehicle alone would not be a sufficient ground to invoke the proviso to sub-clause (ii) of clause (o) of

Section 2 of KAAPA. The argument of the learned counsel for the petitioner, though appears to be attractive, is not liable to be accepted for the following reasons: The Sand Act was enacted to protect river banks and river beds from large scale dredging of river sand and to protect their biophysical environment system and regulate the removal of river sand and for matters connected therewith and incidental thereto. Various regulatory measures are provided in the Sand Act for regulating indiscriminate removal of sand from the rivers in the State of Kerala. Section 20 of the Sand Act provides for penalty for contravention of the Act which provides for imprisonment for a term which may extend to two years or with fine which may extend to Rs. 25,000/- or with both. Section 22 of the Sand Act provides that nothing in the Act shall prevent any person from being prosecuted under any other law for the time being in force for any act or omission made punishable under the Sand Act.

12. Section 23 of the Sand Act and Rules 27 and 28 of the Kerala Protection of River Banks and Regulation of Removal of Sand Rules, 2002 (hereinafter referred to as the Sand Rules") are relevant in this context and they are extracted below:

23. Confiscation of vehicles.--Whoever transports sand without complying with the provisions of this Act shall be liable to be punished and the vehicle used for the transportation is liable for confiscation by the Police or Revenue Officials.

Explanation.--The term "vehicle" for the purpose of this section includes "country boat" and raft

Rule 27. Procedure for confiscation of vehicles.--(1) The Police or Revenue officials shall seize the vehicle used for transporting sand in violation of the provisions of the Act and these Rules.

(2) In the case of seizure of vehicle under sub-section (1); a mahazar shall be prepared in the presence of two witnesses regarding the vehicle and one copy of the same shall be given to the person possessing the vehicle at the time of seizure and one copy to the District Collector.

(3) The vehicle may be returned if the owner of the vehicle or the possessor remits an amount towards River Management Fund equal to the price fixed by the District Collector with fine within seven days of seizure.

Rule 28. Sale of the vehicle seized.--(1) The District Collector shall consider every objection submitted within seven days of seizure of any vehicle under Rule 27 and the decision of District Collector thereon shall be final.

(2) In the case of sale of the vehicle under sub-section (1), if the fine and amount under sub-section (3) of Section 27 of these rules has not been remitted, the District Collector shall sell the vehicle by auction.

(3) The amount received from auction under sub-section (2) shall be credited to the River Management Fund after deducting the expenditure of auction.

13. Though the Sand Act and Rules provide for confiscation of vehicles involved

in transportation of sand, there is no provision as such in the Act or Rules to seize sand which was transported illegally. Seizure of sand and not the vehicle in which it was loaded is the condition requisite under the proviso to sub-clause (ii) of clause (o) of Section 2 of KAAPA. KAAPA was enacted for the effective prevention and control of certain kind of antisocial activities in the State of Kerala. "Anti-social activity" as defined in KAAPA includes the commission of an offence under any law relating to protection of environment or rivers or under any law relating to sand mining. A person can be termed as "goonda" if he indulges in any anti-social activity which includes a depredator of environment. If we were to accept the contention of the learned counsel for the petitioner, even if a person consistently indulges in illegal sand mining and even if all the vehicles involved in such incidents are seized, such a person cannot be detained under KAAPA only on the ground that there is no provision in the Sand Act or Rules to seize sand. If such an interpretation is accepted it would defeat the very purpose of the Sand Act as well as KAAPA. Section 23 of the Sand Act empowers the Police and Revenue Officials to seize the vehicle used for transportation of sand. What should they do with the sand? Should they release sand to the depredator of environment? No sensible person can think that if a person indulges in illegal sand mining, that sand should be released to the sand miner and only the vehicle in which it was transported could be seized. A meaningful interpretation of Section 23 of the Sand Act would lead to the inference that confiscation of the vehicle includes confiscation of sand loaded in it. Any other interpretation would defeat the very purpose of the Sand Act. The High Court has no jurisdiction to issue a direction to enact a law or to amend a law or to incorporate a section or rule in the Act or Rules. But, it is in the exclusive domain of the Court to interpret the law and that too in a meaningful and purposive manner. By making such a meaningful and purposive interpretation, we have no hesitation to hold that Section 23 of the Sand Act and Rules 27 and 28 of the Sand Rules empower the authorities mentioned in Section 23 to seize the sand which was transported and not only the vehicle which was used for such transportation. If so, such seizure would constitute a ground to invoke the proviso to sub-clause (ii) of clause (o) of Section 2 of KAAPA. Accordingly, we reject the contention put forward by the learned counsel for the petitioner.

14. Equally unsustainable is the contention raised by the learned counsel for the petitioner that removal of sand by an individual from the river bed is not illegal and it does not constitute an offence under the Sand Act. Section 9 of the Sand Act provides that the District Expert Committee shall have the powers enumerated therein. Clauses (a), (b), (c) and (e) are relevant and they read as follows:

9. Power and Functions of the District Expert Committee.--x x x x

(a) to identify the Kadavu or river bank in a district in which sand removal may be permitted;

(b) to fix the total quantity of sand that can be removed from a Kadavu or river

bank giving due regard to the guidelines of expert agencies like the Centre for Earth Science Studies and Centre for Water Resources Development and Management;

(c) to control the transportation of sand from a Kadavu or river bank to another area;

(d) xxxx xxxx xxxx

(e) to ensure the protection of river banks and keep them free from encroachment;

xxxx xxxx xxxx

15. Section 11(d) of the Sand Act empowers the Kadavu Committee to recommend to the District Expert Committee about the necessity to ban sand removal during any season of the year. Section 12 of the Sand Act provides for general conditions for the sand removal operations in a Kadavu. u/s 23 of the Sand Act, whoever transports sand without complying with the provisions of the Sand Act shall be liable to be punished. Section 20 of the Sand Act provides for punishment of a person who contravenes any of the provisions of the Act or the rules made thereunder. Rules 27, 28 and 29 are also the provisions relating to seizure and confiscation of vehicle and the conditions to be observed in sand mining etc. The specific stipulation in Section 20 of the Sand Act that whoever contravenes any of the provisions of the Sand Act or Rules shall be punished would indicate that removal of sand by an individual from a river bed contrary to the provisions of the Sand Act and Rules would be illegal and punishable. Accordingly, we reject the contention raised by the learned counsel for the petitioner.

16. The Writ Petition filed by the petitioner challenging the order of detention at the pre-execution stage was dismissed by us in W.P. (C) No. 10487 of 2012. We held that none of the grounds mentioned in Alka Subhash Gadia's case was made out by the petitioner. Though the judgment in W.P. (C) No. 10487 of 2012 was challenged before the Supreme Court, no special leave was granted by the Supreme Court. The learned Director General of Prosecution pointed out that though the Supreme Court in Subhash Popatlal Dave Vs. Union of India (UOI) and Another, held that the right of a detenu to challenge the order of detention at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in Alka Subhash Gadia's case requires further examination, the cases were not subsequently heard and disposed of by the Supreme Court. It is contended that therefore the rules set out in Alka Subhash Gadia's case should be applied at present. Since the matter is pending before the Honourable the Supreme Court, we are of the view that it would not be proper for this Court to deal with that aspect.

17. The petitioner challenged the order of detention at the pre-execution stage. That challenge did not succeed. He has challenged it again on some other

grounds. The petitioner states that he did not get copies of the order of detention and the grounds of detention at the time of filing the earlier Writ Petition and as he got it now he could challenge again the order of detention. It is well settled that general principles of res judicata would apply to proceedings under Article 226 as well. (See - Ayichutty Vs. State of Kerala and The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, In the present case, the constitutionality of any provision of law is not under challenge since the petitioner did not press relief No. V in the Writ Petition. If so, the petitioner is barred by the principles of res judicata from raising the same contentions and praying for the same reliefs which were rejected earlier. The contention of the petitioner that since he got copies of the order of detention and the grounds of detention only later, he could challenge the same even before the execution in spite of the fact that his earlier Writ Petition was dismissed by this Court, is also not liable to be accepted. The petitioner would be barred by the principles of constructive res judicata in that regard.

18. In Subhash Popatlal Dave Vs. Union of India (UOI) and Another, the Supreme Court considered the question whether the Right to Information Act applies in the case of preventive detention matters and held thus:

38. Not much discourse is required with regard to the primacy of the provisions of the Constitution vis-a-vis the enactments of the Legislature. It is also not necessary to emphasise the fact that the provisions of the Constitution will prevail over any enactment of the Legislature, which itself is a creature of the Constitution. Since clause (5) of Article 22 provides that the grounds for detention are to be served on a detenu after his detention, the provisions of Section 3 of the RTI Act, 2005, cannot be applied to cases relating to preventive detention at the pre-execution stage. In other words, Section 3 of the RTI Act has to give way to the provisions of clause (5) of Article 22 of the Constitution. Even the provisions relating to production of an arrested or detained person, contained in clauses (1) and (2) of Article 22 of the Constitution, have in their application been excluded in respect of a person detained under any preventive detention law.

39. We, therefore, agree with the learned ASG, Mr. P.P. Malhotra, that notwithstanding the provisions of the RTI Act, 2005, the State is not under any obligation to provide the grounds of detention to a detenu prior to his arrest and detention, notwithstanding the fact that in the cases of Choith Nanikram Harchandani and Suresh D. Hotwani and Another, referred to hereinabove, the grounds of detention had been provided to the detenu under the RTI Act, 2005, at the pre-execution stage. The procedure followed under the RTI Act, in respect of the said writ petitions cannot and should not be treated as a precedent in regard to Mr. Rohatgi's contention that under the RTI Act, 2005, a detenu was entitled, in assertion of his human rights, to receive the grounds under which he was to be detained, even before his detention, at the pre execution stage.

19. We have noticed that in many cases copies of confidential records relating to

preventive detention are issued under the Right to Information Act and those documents are relied on for the purpose of challenging detention at the pre-execution stage. The Supreme Court has in clear terms held in Subhash Popatlal Dave's case that RTI Act would not apply to such cases. For the aforesaid reasons, we dismiss the Writ Petition.

A copy of this judgment shall be forwarded to the Chief Secretary to the Government for information and appropriate action, if any, in respect of the interpretation made by us with respect to Sand Act and Rules and also the non-applicability of the Right to Information Act with respect to matters connected with preventive detention.