

(2004) 12 KL CK 0013

In the High Court Of Kerala

Case No : Writ Petition (Criminal) No. 200 of 2004

Rejeena

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 03-12-2004

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 3(1), 8
Customs Act, 1962 — Section 108

Citation : (2005) CriLJ 1882 : (2005) 1 ILR (Ker) 81

Hon'ble Judges : Sasidharan Nambiar, J; M. Ramachandran, J

Bench : Division Bench

Advocate : B. Raman Pillai, George Philip, R. Anil, Raju Radhakrishnan, Anil K. Mohammed and Delvin Jacob Mathews, for the Appellant; Lal George, Spl. Govt. Pleader for Respondents 1 and 3 and John. Varghese, SCGSC for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

M. Ramachandran, J.—Order passed by the Government of Kerala, dated 19-4-2001, whereby Shri. S.S. Nassar (Husband of the petitioner herein) had been directed to be detained and kept in custody in the Central Prison, Thiruvananthapuram, is under challenge. Such an order had been issued by the Government entering a satisfaction that the said person was to be prevented from smuggling goods, abetting the smuggling of goods, and engaging in transporting or concealing or keeping smuggled goods. Such powers were exercised purportedly u/s 3(1)(i), 3(1)(ii) and 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short COFEPOSA Act).

2. It is submitted that the order suffers from want of jurisdiction, improper application of mind and procedural delay. Though passed on 19-4-2001, its enforcement had been delayed for years and Sri Nassar had been apprehended only on 14-7-2004. The delayed implementation was not attributable to any of

his conduct and did not also support the provisions of the COFEPOSA Act. With reference to authorities of the judgment of the Supreme Court, it is prayed that the impugned orders are to be set aside and the detenu released.

3. Counter-affidavits have been filed by the Additional Chief Secretary and Principal Secretary (Home and Vigilance), Government of Kerala as well as the Deputy Secretary, Ministry of Finance, Department of Revenue, New Delhi, on behalf of the second respondent -- Union of India. They have stoutly opposed the claims, as have been raised.

4. The grounds of detention of the detenu had been enumerated in Ext. P2, which was served on him. Supporting documents (numbering 124) also have been served on him. It appears that one Mammu had been apprehended by the Officers of the Directorate of Revenue Intelligence in the Trivandrum International Airport at about 9.00 a.m. on 24-12-2000 with foreign currency (equivalent to Indian Rs. 73,85,423.20) concealed in his baggage. The said Mammu had given a statement, while subjected to questioning, u/s 108 of the Customs Act, and he had inter alia referred to the name of Sri Nassar, who had been awaiting in a Hotel at Trivandrum on the day. It is stated that Nassar had been subjected to interrogation on the day and he had also given a statement primarily indicating his complicity in the violation under the Customs Act. It has come out that proceedings had been registered as OR/ DRI/TVM/2000 before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam. Sri Nassar had been let on bail. Proceedings before the Economic Offences Court are yet to be concluded.

5. The circumstances as above had been arrayed in Exts. P1 and P2. However, as referred to earlier, he had been arrested, in implementation of the said order, only in July, 2004. It is stated that an application for revocation of the order, as envisaged by Section 8 of the COFEPOSA Act, had been presented before the Advisory Board. After hearing the parties, the Board had authorised detention and the petitioner has been informed by Ext. P8 letter dated 28-9-2004 that the representation has been examined in detail and thereafter the Government has considered the case afresh, but had thought of confirming the order u/s 8(f) of the Act and the detention shall continue for a period of one year from 14-7-2004. In the meanwhile, by separate proceedings, the Central Government had also advised him that the Government had considered his representations and regretted that the same was not being entertained. The detention order and the Memorandum rejecting the representation issued by the Central Government dated 10-9-2004 are under challenge.

6. The learned counsel for the petitioner made submissions as following :

- (i) The detention order (Ext. P1) has been passed with inordinate delay.
- (ii) The order has been passed by an incompetent authority and without application of mind.

(iii) There is substantial delay not only in passing of the order, but also thereafter in executing it, which has not been appropriately explained. The order does not subserve the purpose envisaged by the Act.

7. We may examine the contentions as above with reference to the stand taken by the Central and State Governments. The incident about which the proceedings traceable to Ext. P1 occurred on 24-12-2000. It is stated that Sri. Nassar had been apprehended on the same day and in about a month he had been let out on bail. According to the petitioner, he was leading a quiet life thereafter. Although Section 3 of the COFEPOSA Act confers power on the Government to detain persons with a view of preventing them from smuggling goods, abetting the smuggling of goods etc., the allegation is that procedural safeguards, which are implicitly to be observed, have not been taken notice of while passing the impugned orders.

8. We may advert to the jurisdictional error, which the petitioner points out, vitiates the order. The argument advanced appears to be that it has been passed by an Officer without competent jurisdiction and also without application of mind. Counsel submits that the Principal Secretary, Home Department is not a notified authority and the order does not appear to have been passed by the Government as well. Three Authorities are empowered to pass orders u/s 3 of the COFEPOSA Act. It can be by the Central Government, or by the State Government. An Officer of the Central Government specially empowered for the purpose of Section 3 or an Officer of the State Government also specially empowered for the purpose of the Section could be conferred with such power. The Principal Secretary has not been specifically empowered. The counsel submits that the counter-affidavit filed by the State would indicate that the Home Secretary alone had occasion to see the files and after perusing the documents, he alone had come to a subjective satisfaction and thereupon the order dated 19-4-2001 is issued, (see paragraph 7 of the counter-affidavit dated 29-10-2004).

9. However, this plea is stoutly denied by the Senior Government Pleader Sri Lal George. According to him, as far as the State is concerned, no officer has been specifically authorised under the section and the jurisdiction is solely vesting in the Government. According to him, it was the Government who had passed the order and it had been issued under the authority of the Governor, as envisaged by Rules of business.

10. Reference had been made by the learned Government Pleader to a decision of a Division Bench of this Court in Ammini Jose Vs. Government of Kerala, . The Court had dealt with the Rules of Business of the Government and had occasion to hold that what is contemplated is not subjective satisfaction of the officer, but that of the Government. Though the Government was to pass orders, it could have acted only through the officers. He thus submits that the satisfaction, referred to in the counter-affidavit, was to elucidate and explain the process through which the files had undergone. The decision, though under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act,

was dealing with a provision similarly worded like the COFEPOSA Act.

11. Heavy reliance had been placed therein on the decision of the Supreme Court in *Samsher Singh Vs. State of Punjab and Another*, . From a perusal of the order, it is seen that the Government had applied its mind, as envisaged by the section, and also as warranted by the "Rules of Business", as explained by judicial pronouncements. We are definite that there is no jurisdictional error in the orders presently under attack.

12. The next submission was with reference to the delay as between Ext. P1 and the alleged incident and impropriety thereof. Counsel had invited our attention to the three months" duration, which was, according to him, extraordinary and the Central Government also had failed to explain the position. Advertence had been made to the decisions reported in *Amina Unno Vs. Joint Secretary to Government of India, Ministry of Finance, Department of Revenue and Others*, as well as *Narendra Punjabhai Shah v. Union of India* 2001 SCC (Cri) 1579. Of course, he had made advertence to other decisions also, which explained the law, where the delay possibly had the effect of vitiating the transactions. But there should have been unexplained delay, and if so, detenu alone was entitled to the benefit.

13. Learned Government Pleader explains that there was no undue delay, as has been alleged. Sri John Varghese, Senior Central Government Standing Counsel addressed us with reference to the counter-affidavit filed by the Department and the learned Government Pleader also referred to the position of law, as explained in the abovesaid judgments. Counsel also relied on a decision of the Supreme Court in *M. Ahamedkutty Vs. Union of India (UOI) and Another*, . The above decision appears to be a complete answer to the contentions raised. It was nowhere a case of sleeping over on the issue by the authorities. The delay had been explained. Advertence has to be made to as many as 124 documents and the petitioner had not, in any case, suffered a prejudice, since he had been already enlarged on bail. Mr. Lal George submitted that the Government had contemplated to take action only after a thorough examination of the attending circumstances and the satisfaction was entered into only after some elaborate processing.

14. We find that even though there was about 3 months" delay in issuing the order, such delay has been explained satisfactorily, and interference on this count also may not be proper.

15. The further submission was about the expediency of getting the detenu under custody, at a time when there was nothing to indicate that he was to be apprehended in connection with anti-social activities, which came within the purview of Section 3 of the COFEPOSA Act. If at all there were allegations of activities pertained to December 2000, the lapse of time had practically led to a situation where detention might have been only a ritual. Mr. Anil, counsel appearing for the petitioner, submits that the detenu was leading a normal life at Ernakulam and he had not went underground, so as to avoid service of the order

or for avoiding detention. According to him, the observations made by the Supreme Court in *Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another*, was applicable to the facts of this case, since the link for putting a person behind the bars with the allegations had automatically snapped. Reference was made also to a decision of the Supreme Court in *Abdul Salam alias Thiyyan Vs. Union of India and others*, , in support of the argument.

16. The issue, therefore, is whether there was unexplained delay in executing the order for making the detention only a formality, or is such detention in furtherance of the anxiety that is spoken to by the statute, Mr. Lal George submits that the matter has to be viewed not from a technical angle and a person should not have got a benefit because of his own default. Orders had been passed in connection with the incident on 24-12-2000. In respect of other persons, it had been possible for the Government to get them arrested pursuant to the orders passed. However, Sri Nassar had made himself scarce. With reference to the records available with him, it is pointed out that there was constant surveillance and even the informants had failed to throw light as about the whereabouts of Sri Nassar. It was not due to any default on the part of the Government that the apprehension was delayed. He also had made advertence to Ext. R1(a), which was a notification published in Kerala Gazette, Extraordinary dated 20-5-2002, whereunder the Government had directed Sri S.S. Nassar to appear before the Commissioner of Police, Kochi City for execution of the order passed against him. Reference is also made to the Explanatory Note pointing out that the Government felt that he was concealing himself so as to avoid execution of the order. The learned Government Pleader had also adverted to the letter dated 21-6-2002 (Ext. R1(b)) addressed to the Chief Judicial Magistrate, Ernakulam requiring affixture of proclamation, so as to effectively convey the information to the person concerned. It is also pointed out that the Chief Judicial Magistrate finding that Sri Nassar had violated the conditions of the bail granted to him, had issued non-bailable warrant, for his arrest, as could be seen from Ext. R1(c) dated 9-7-2002. Therefore, there was deliberate avoidance and he could not have contended that the delay defeated the purpose of the detention. According to the Government Pleader, the position has been explained from time to time and the observations in the decision of the Supreme Court in *Union of India and Others Vs. Arvind Shergill and Another*, and the recent decision of the Supreme Court in *A.C. Razia Vs. Government of Kerala and Others*, are complete answer for the allegations that have been placed on this count.

17. We had also considered the issue independently. The plea of the petitioner that the detenu was available in open is a self-supporting statement. It cannot be that he was unaware of the notification of the affixture. He has also not effectively explained the circumstances in which a non-bailable warrant came to be issued by the Chief Judicial Magistrate. The only reason that the authorities could not reach him cannot, therefore, be claimed as an advantageous position for petitioner's husband. The delay in execution, we feel, has been satisfactorily explained and it is too premature to hold that the nexus between his complicity

and the economic offence alleged are feeble. We feel that for years together his whereabouts were unknown, and the apprehension about his activities even now are well founded.

18. Above all, we also find that the issue had been considered by a statutory Board u/s 8 of the COFEPOSA Act and the Government had acted on its recommendation. Although these proceedings are in recognition of a Constitutional right of a citizen, that he had opportunity to place his submissions also is one of the factors, which are to be taken notice, and in any case not wholly irrelevant.

19. The last submission of Mr. Anil was about the prejudice that had been caused to the detenu because of non-supply of documents called for. He submits that effective opportunity had been denied for him to make submissions, as vitally required documents were not made available to him, though the relevance of some of the documents was not denied. The claims are in respect of the proceedings of the Reserve Bank vis-a-vis a claim staked by Mr. Mammu, regarding the parentage of foreign exchange. The other materials, according to the petitioner, were to highlight the possible bias that the Revenue Officers had been harbouring against him as he had acted as an informer obliging only a few persons in the Department and this had resulted in grudge among others.

20. However, the allegations are too vague and it has not been possible for the petitioner to establish that the materials would have turned the tables against the Government, in any manner whatsoever. Apart from the documents relied on, we do not feel that they had an added duty to supply to him all the materials which he fancied might be relevant to get extricated from the custody. It has to be noticed that the observations of the Supreme Court in Madan Lal Anand Vs. Union of India and others, will be an answer to the case of the detenu in this region.

The writ petition is without merit. There has not been any arbitrariness or unreasonableness in issuing Ext. P1 order or executing the same. It is, therefore, dismissed. Parties are to suffer their respective costs.