

(2011) 09 KL CK 0017

In the High Court Of Kerala

Case No : Writ Petition (Criminal) No. 192 of 2011

Saliyal Beevi

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 30-09-2011

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3

Constitution of India, 1950 — Article 22(5), 226

Citation : (2012) CriLJ 3872 : (2011) 4 KLJ 566

Hon'ble Judges : Thottathil B. Radhakrishnan, J;K. Surendra Mohan, J

Bench : Division Bench

Advocate : D. Peethambaran, for the Appellant; P.K. Babu (GP), P. Parameswaran Nair (ASG) and Govindu P. Renuka Devi (CGC), for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—Ibrahim, Murugan, Abu Gani and Kareem Sathik Basha detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, for short, "COFEPOSA Act" are the beneficiaries of these writ petitions filed seeking issuance of writs, directions or orders in the nature of habeas corpus on the ground that the orders for their detention and their continued detention in terms of those orders are in violation of Article 22(5) of the Constitution and the different provisions of COFEPOSA Act. The detention orders are also sought to be quashed. Adv. S. Palanikumar appearing on behalf of the petitioners in these cases, Adv. Govindu P. Renuka, the Central Government Counsel appearing for Union of India which is the second respondent and Adv. P.K. Babu, the Senior Government Pleader appearing for the State of Kerala and the Superintendent of the Central Prison, Thiruvananthapuram, who are respondents 1 and 3 in these writ petitions, submitted that these matters could be heard together in view of the fact that the contentions on facts and in law are fundamentally similar in these cases and because the grounds of detention are based on the same sequence of alleged

transactions, treated as the foundation for the detention orders. Hence, we proceed accordingly.

2. In support of the writ petitions, the arguments were as to non-application of mind while passing the detention order and while considering the representation, delay in passing the detention and also inconsidering the representation; documents relied on and asked for were not furnished and that the show cause notice and reply were neither placed before the Advisory Board nor considered. Reference was made by the learned counsel for the petitioners to the different decisions of the Hon'ble supreme Court of India in *Aslam Ahmed Zahire Ahmed Shaik v. Union of India*, 1989 SCC (Cri.)554, *Rajammal v. State of Tamil Nadu*, 1999 AIR SCW 139, *Yumnang Mangibabu Singh Vs. State of Manipur and Others*, and *Adishwar Jain v. Union of India*, (2007) 1 SCC(Cri) 464, the decision of the Madras High court in *Mohiadeen Sahib, P.M.S. v. State of Tamil Nadu*, (2006) 1 MLJ 131 and the decisions of this Court in WP(Crl.) No. 230 of 2008 and *Lekha Nandakumar Vs. Government of India*, .

3. Per contra, learned Central Government Counsel and the learned Government Pleader for the State Government argued that the grounds raised are unfounded and the action taken is in conformity with the provisions of the Cofeposa Act and having regard to grounds on which the detention order has been issued and enforced and mere is no reason to take it that there was no subjective satisfaction as to the existence of grounds for such detention in terms of the provisions of law. The learned Senior Government Pleader referred to the decisions of the Apex Court in *N.K. Bapna Vs. Union of India (UOI) and Others*, , *Smt. Hawabi Sayed Arif Sayed Hanif Vs. L. Hmingliana and others*, , *Haradhan Saha Vs. The State of West Bengal and Others*, , *State of Tamil Nadu and Another Vs. Abdullah Kadher Batcha and Another*, , *Union of India and Others Vs. Arvind Shergill and Another*, , *Mukesh Tikaji Bora Vs. Union of India (UOI) and Others*, , *Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr*, , *Ahamed Nassar Vs. The State of Tamil Nadu and Others*, , *Madhya Pradesh Housing Board Vs. Mohd. Shafi and Others*, and *Nishi Kanta Mondal Vs. State of West Bengal*, . The learned Central Government Counsel relied on the decisions of the Apex court in *Sitthi Zuraina Begum Vs. Union of India (UOI) and Others*, , *Union of India (UOI) and Another Vs. Harish Kumar*, , *A.C. Razia v. Government of Kerala*, AIR 2004 SC 2504 and *Haradhan Saha Vs. The State of West Bengal and Others*, .

4. The orders of detention issued on 26.2.2011 were executed on 10.3.2011. The representations of the detenues were forwarded by the jail authorities and the Central and State Governments made independent orders. While there is some conflict between the dates of the representations as mentioned by the petitioners and the jail authorities, it is shown that on 30.3.2011, representations were received and the order of the State Government was issued on 8.4.2011. While it is argued in support of the writ petitions that there is inordinate and unexplained delay in considering the representations and even in cases where the delay is of

a short duration, if the same is left unexplained, that would be fatal to continue the detention. It needs to be noted that excluding the postal delay of 16.4.2011 to 21.4.2011 and for three subsequent holidays, i.e., 22nd, 23rd and 24th of April 2011, there is no delay left unexplained and there is nothing on record to indicate that the concerned authorities had left the files without consideration. Due consideration in terms of the law laid by the Apex Court in relation to Article 22(5) and the concept of delay in considering their presentation and also passing the confirmation orders stand to advise that on the facts of the case in hand, there is no delay which could be treated as inuring to the benefit of the detainees, to release them by holding that the detention has turned out to be unlawful or unauthorized on account of any such delay. The issue of delay, therefore, does not merit acceptance on the facts of the case in hand.

5. The premise on which the detention orders were issued is that the detainees were intercepted by the authorities on 30.9.2010 from the Cochin International Air Port, Nedumbassery. Kareem Sathik Basha was the passenger and the declaration made as to the luggage was found to be deficient. Enquiries revealed that electronic goods of foreign origin, valued more than Rs. 1.35 crores, were being smuggled in violation of the provisions of law. On the basis of different statements and materials, it was found necessary to make the detention orders in terms of the COFEPOSA Act. Going by the nature of the transaction and the grounds of detention served by the authorities on the detainees along with the detention order, Kareem Sathik Basha was the passenger who brought in the goods by illegal import and Murugan and Abu Gani had lifted him and goods in a vehicle and Ibrahimis reckoned as the abettor.

6. The learned counsel for the petitioners took objection to the learned Government Pleader's stand making repeated reference to the facts made mention of in the grounds of detention and also to the submissions by the learned Central Government Counsel focusing on the grounds of detention which tend to indicate that the detainees are demonstrated to be involved in smuggling activities on a regular basis and it is not a case of solitary instance.

7. Though it is well settled that the judicial review process would not include the exercise of any appellate jurisdiction by considering all the grounds of detention order and the sustainability of the decision arrived at by the statutory authorities in exercise of their power under the legislation in question, it having been found that there is no ground to hold that there is any delay in the matter, the plea as to whether there is non-application of mind by the statutory authorities could be answered only after referring to the basic facts.

8. The provision in Section 3 of COFEPOSA Act empowering the making of an order directing preventive detention, has to be appreciated and effectuated in terms of the object of that enactment which is reflected in its preamble. The law laid by the Apex court in *Ahamed Nassar Vs. The State of Tamil Nadu and Others*, , points out, among other things, that in interpreting statutes, it has to be borne in mind that it is well settled that whenever there are two possible

interpretations of a statute, the one that subserves the objective of an enactment is to be accepted. This principle applies with equal force intesting the credibility of the acts of a statutory functionary performing its statutory obligations which includes the requirement to act promptly to ensure not to further lengthen the detenue's detention through their casual conduct, neglect, lethargy etc. The Apex Court in the said judgment clearly noted that COFEPOSA Act was brought in for the conservation and augmentation of foreign exchange and prevention of smuggling activities and the said legislation became necessary as there were large scale violations of foreign exchange regulations and increase in the smuggling activities affecting the national economy. The Apex Court stated that, in other words, the said legislation was brought in for prevention of smuggling activities, by detaining such persons. We looked into this aspect of the matter to advise ourselves that when the question of non-application of mind is being projected, the answer to that cannot be given without looking at the quality of the allegations on facts, since the object sought to be achieved by the legislation is to prevent activities which are detrimental to national interest, including national economy and security of the State, it cannot be disputed that in the scales of societal justice with community and State interests reach a point of bargain, that ought to gain pre-eminence to individual rights, though liberty issues are equally important and pulsates in the bossom of the Constitution. In so balancing, the primordial interests are those which the Nation can ill-afford to ignore on the premise of individual personal liberty issues.

9. In this view of the matter, while we recognize the argument on behalf of the petitioners that this Court, while considering the writ petitions against the preventive detention, would not adjudicate on the merits of issues relating to the fundamental allegations, we have, necessarily, to point out that the quality of allegations made is nothing but the disclosure of a continued threat, in a designed manner, affecting the national economy by importing into India, electronic goods of foreign origin and thereby debasing the national economy and Indian market, thereby seriously and adversely affecting the security of the Nation. In the judicial review process, these assertions of the Union and State, cannot be ignored. The larger national interest, which is the reflection of the core rights, including fundamental rights of every citizen, in the collective and societal domain, in conformity with Rule of Law has to be held with priority over liberty issues raised by individuals against whom there is material with the Executive Government to reasonably suspect indulgence in anti-national activities. If liberty of individual is shown to have been restricted only in larger societal and national interests, there is no deprivation of liberty or violation of Rule of Law and the Constitution, including due procedure interms of the prescriptions of the laws. The pristine principle of liberty of the individual applies on case to case basis, on facts, calling for cautious exercise of the discretionary jurisdiction under Article 226 of the Constitution. The judicial discretion in cases where issuance of writ of habeas corpus is sought for in relation to persons who have allegedly violated laws made to protect and preserve national interest ought to be exercised

ensuring a fine balance between the liberty of the individual and the need to verdict such liberty in national interest. When the free movement of a particular citizen or group of citizens is shown to be against the interest of the Nation and citizenry, on preventive detention of such persons, no doctrine of liberty is breached in terms of the constitution of India. The wholesomeness of the society as India is the primordial norm.

10. For one thing, the nexus between the operations in the State of Tamil Nadu, including from Chennai and the attempt of the Revenue Enforcement Agency to curb such activities at that end is specifically stated. The change of base for illegal activities, including planned smuggling by collective effort of different persons are assemblies of unlawful nature of the gravest order and the police power of the State should necessarily have the reach to make preventive orders in contemplation or in anticipation of such activities. This duty of prevention, in exercise of the police power of the State, cannot be excluded or forgotten while meat-mincing the procedural process on the file of the Executive in search of grounds to release the persons who are shown to have been involved in illegal activities falling within the purview of the COFEPOSA Act. Exclusion of their preventive detention has been shown by the union and the state to be such as it would endanger and adversely affect the national economy and critically affect the security of the State, which are of utmost importance, while it is not for the Court to assess on the basis of the materials, when the stand of the executive statutory authority is that a particular situation has happened or is likely to happen and that there are reasons and grounds to hold for itself that such eventuality is seen, the judicial bounds ought to prioritize the national interest, including the preservation of national economy and security of the State, as the prime concern, without, in any manner, creating any room for sustainable allegation of violation of the liberty of the individual citizens. This means that a meaningful balance has to be struck between the plea of the detainees that there is no application of mind and the defence of the State to the writ petitions that the materials, including statements available with them, clearly disclose, on subjective satisfaction, the requirement to pass the detention order/orders.

11. Remember, there is no allegation in these writ petitions of personal bias, individual prejudice, nepotism etc. The plea of the petitioners surrounds only on allegations of violation of norms on the basis of the statutes and their interpretation by the Courts, including the Hon'ble Supreme Court of India. Nor is there even an averment that the detainees were personally known to the intercepting, recommending and confirming authorities.

12. Looking at the facts of the cases in hand as reflected in the grounds of detention and the manner in which the authorities have applied their mind to arrive at the decision as to whether the detention order ought to be passed or not and also on the ground whether the representations of the detainees were eligible for acceptance, we see that barring certain superficial errors on facts and grammar, the basis of the detention order and also the orders rejecting the

representations cannot be faulted. The plea that the order rejecting the representation was not issued by the authority which made it and has not been explicit in independent grounds and that they do not reflect subjective consideration of the grounds of objections raised by the detenues, do not stand, we have perused the files. They clearly show that the entire materials went through due process of executive function and proper file notings were placed ultimately to the competent authority, it is not required of Central Government to express decision through a detailed order as if it is answering a lis. For the foregoing reasons, we do not find any merit in these writ petitions.

In the result, these writ petitions are dismissed.