(2013) 10 KL CK 0054

In the High Court Of Kerala

Case No : Writ Petition (Criminal) No. 332 of 2013

Thahira APPELLANT

Vs

State of Kerala and Others RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Citation : (2014) CriLJ 684 : (2013) 4 KHC 511 : (2013) 4 KLJ 677 : (2013) 4 KLT 626

Hon'ble Judges : P.D. Rajan, J;Antony Dominic, J

Bench : Division Bench

Advocate : K.J. Mohammed Anzar, T.B. Gafoor and A.D. Suresh Babu, for the Appellant; T. Asaf Ali, Director General of Prosecution, for the Respondent

Judgement

Antony Dominic, J.—The petitioner is the wife of Shajahan @ Kannan @ Shaji. In this writ petition, she is challenging Ext. P1 order of detention issued u/s 3(2) of the Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as the ''Act'' for short). Briefly stated, facts of the case are that Shajahan, the detenu, was the accused in Crime Nos. 1235/2010, 1273/2010, 1985/2012, 890/2009, 1232/2010, 1236/2010 and 147/2012 of Kottiyam Police Station. Among the above, Crime No. 1237/2010 involves offences under the Indian Penal Code, whereas, rest of the cases involve offences under the Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001. Pointing out the involvement of the detenu in the above cases, the 3rd respondent submitted a report dated 22/12/2012 u/s 3(1) of the Act to the 2nd respondent requesting that the detenu be classified as a ''Known Goonda'' as provided u/s 2(o) of the Act and that to prevent him from continuing his anti-social activities, he be detained u/s 3 of the Act Subsequently, yet another report was made on 03/01/2013. Based on the above reports, the 2nd respondent initiated action and finally issued Ext. P1 order of detention dated 29/01/2013, classifying the detenu as a ''Known Goonda'' u/s 2(o) of the Act and ordering his detention as provided u/s 3(1) of the Act.

2. Accordingly, the detenu was arrested and is under detention since 03/05/2013. On the issuance of the order, the 2nd respondent reported the matter to the Government and the Government approved the order of detention as provided u/s 3(3) of the Act, by order dated 09/05/2013. Subsequently, the matter was referred to the Advisory Board constituted u/s 9 of the Act. Before the Advisory Board, the detenu was represented by a counsel and after affording an opportunity of being heard, the Advisory Board made its report to the Government. Thereafter, the Government issued order dated 16/07/2013 confirming the order of detention as provided u/s 10(4) of the Act. It is in these circumstances, this writ petition is filed challenging Ext. P1 order of detention and the consequential steps taken.

3. We have heard the learned counsel for the petitioner and also the learned Government Pleader appearing for the respondents.

4. The first contention raised by the learned counsel for the petitioner was that there is non-compliance of Section 3(3) of the Act. Section 3(3) of the Act provides that if an order of detention is passed by an officer authorised u/s 3(2) of the Act, he shall forthwith report the fact to the Government and the Director General of Police, together with a copy of the order and supporting records and that no such order shall remain in force for more than 12 days, excluding public holidays, from the date of detention, unless, in the meantime, the order has been approved by the Government or by the Secretary, Home Department, if so authorised by the Government in this regard.

5. The learned counsel contended that insofar as this case is concerned, the 2nd respondent did not report the matter to the Government forthwith and that the report was made by him only on 07/05/2013 and that it was on that basis, the Government issued order dated 09/05/2013 approving Ext. P1 order of detention.

6. As already stated by us, Ext. P1 order of detention was issued on 29/01/2013 and in execution thereof, the detenu was detained on 03/05/2013. It is thereafter that approval u/s 3(3) was accorded by the Government on 09/05/2013. During the hearing, the learned Government Pleader made available letter No. M9-71731/2012 dated 29/01/2013 from the 2nd respondent addressed to the Principal Secretary to Government, Home Department and the Director General of Police, Thiruvananthapuram, reporting about Ext. P1 order of detention and also enclosing the connected records for necessary action. From this communication, it is evident that it was not on 07/05/2013 the matter was reported u/s 3(3) of the Act, instead, such report was made by the 2nd respondent on 29/01/2013, the date on which Ext. P1 order of detention was issued. The fact that the report was made to the Government on 29/01/2013 is also stated in the report of the Advisory Board. In such circumstances, we are unable to persuade ourselves to agree with the learned counsel for the petitioner that there was non-compliance of Section 3(3) of the Act.

7. The learned counsel for the petitioner then contended that vital documents

were not furnished to the detenu. This contention was raised referring to Ext. P1 order of detention, which refers to reports dated 22/12/2012 and 08/01/2013 made by the sponsoring authority. The learned counsel further contended that among the two reports, report dated 08/01/2013 was not furnished to the detenu and that therefore, his right to make representation, availing of the constitutional right under Article 22(5) of the Constitution of India, stood violated. In support of this contention, the learned counsel for the petitioner placed considerable reliance on the Division Bench judgment of this Court in Sulaiman P.A. Vs. Additional Chief Secretary to Govt. and Others, which has been referred to in the subsequent judgments in Ranjini Vs. State of Kerala and Others and Sujitha v. State of Kerala 2012 KHC 2222 : 2012 (1) KLT SN 133.

8. It is true that report dated 08/01/2013 is referred to in Ext. P1 and this report was also not furnished to the detenu. However, the question to be considered is whether this was a crucial document and what is the consequence of the failure to supply the same to the detenu. In this context, it is relevant to refer to the principles laid down by the Apex Court in State of Tamil Nadu and Another Vs. Abdullah Kadher Batcha and Another, where, in paragraphs 7 and 8, it has been held thus:

7. The Court has a duty to see whether the non supply of any document is in any way prejudicial to the case of the detenu. The High Court has not examined as to how the non-supply of the documents called for had any effect on the detenu and/or whether non-supply was prejudicial to the detenu. Merely because copies of some documents have been supplied they cannot by any stretch of imagination be called as relied upon documents.

8. While examining whether non-supply of a document would prejudice a detenu the Court has to examine whether the detenu would be deprived of making an effective representation in the absence of a document Primarily, the copies which form the ground for detention are to be supplied and non-supply thereof would prejudice to the detenu. But documents which are merely referred to for the purpose of narration of facts in that sense cannot be termed to be documents without the supply of which the detenu is prejudiced.

The aforesaid principles laid down by the Apex Court would show that while appreciating the contention such as the one raised by the learned counsel for the petitioner, this Court is bound to examine whether, as a result of the failure to supply the document in question, the detenu was deprived of his right to make an effective representation impugning his detention. Further, the Court has also made a distinction between documents which form the ground for detention, which are to be supplied and the documents which are merely referred to in the order of detention for the purpose of narration of facts. The Court has also held that what is required to be supplied to the detenu are the documents which form the ground for detention and not the documents which are merely referred to in the order of detention.

9. Insofar as this case is concerned, reading of Ext. P1 order shows that in the beginning of that order, while explaining the manner in which the proceedings were initiated, reference has been made to the report dated 08/01/2013 and the order does not make any further reference to that report or to the contents thereof. In other words, the report dated 08/01/2013 is only a document, which is referred to by the detaining authority while narrating the facts and this document does not form the ground for detention. Therefore, report dated 08/01/2013 is not a document which ought to have been supplied to the detenu and failure to supply the document is inconsequential.

10. Even apart from this, another factual question is whether the failure to supply the report dated 08/01/2013 has deprived the detenu his right to make an effective representation against the order of detention. The files produced by the learned Government Pleader show that impugning the order of detention, when the matter was heard by the Advisory Board, the detenu was represented by a counsel and that both the detenu and the counsel made representations to the Advisory Board. Further, from the files, we also notice that Ext. P21 representation was also made by the detenu''s wife and that it was rejected by the Government vide Ext. P22 order issued on 17/05/2013. In these representations, although various grievances were raised against the order of detention, nobody has raised any complaint regarding the non-supply of the report dated 08/01/2013 or that it affected the detenu''s right to represent in the matter. Further the fact that the detenu, his wife and his counsel made separate representations on their own, itself, demonstrates that non-supply of the report dated 08/01/2013 has not deprived the detenu or his representatives the opportunity of making an effective representation against the detention.

11. Further, the report dated 08/01/2013 and its enclosure, which were made available to us, show that this report was made in response to letter dated 02/01/2013 from the 2nd respondent and what is furnished by this report is the crime numbers, offences and rank of the detenu, the date of bail, bail details, whether the detenu is in judicial custody, the present status of the case and such other details. The non-furnishing of these details contained in the statement enclosed to the report dated 08/01/2013 could not have, at any rate, prejudiced the right of the detenu to make his representation against the order of detention.

12. In such circumstances, following the Apex Court judgment in Abdullah Kadher''s case (supra), we conclude that the aforesaid contention of the learned counsel for the petitioner does not merit acceptance.

13. The learned counsel for the petitioner then contended that the delay in execution of Ext. P1 order is unexplained and inordinate and that as a result thereof, the live link between the cause for detention and the order of detention is lost. It is true that in this case, although the order of detention was issued on 29/01/2013, the detenu was arrested and detained only on 03/05/2013.

14. We are conscious of the fact that in a case of preventive detention, if there is

inordinate and unexplained delay, either in passing the order or in executing the order, the detention will be rendered illegal and unconstitutional. In other words, the detention order can be rendered illegal and unconstitutional, provided the delay in passing the order or in executing the order is found to be inordinate and unexplained. Therefore, this aspect of the matter is to be explained by the respondents and the question to be considered is whether that explanation is satisfactory.

15. Insofar as this case is concerned, a counter-affidavit has been filed by the 3rd respondent and in paragraph 12, it has been stated thus:

........It is also submitted that the District Magistrate, Kollam issued detention order No. M9-71731/KAAPA/2012, 29/01/2013 and the same was forwarded to the Sub Inspector of Police, Kottiyam for execution. Knowing about the detention order the detenu evading from the arrest by locating near the bank of the Ithikara river and the kadavu, due to this, the movement of the police can be easily detected by the detenu and his henchman. The detenu was evading arrest when police attempted to arrest him by escaping through the river. Many attempts were made earlier by the police to apprehend the detenu. Special squad was formed for tracing and arresting the detenu. Frequent and discreet enquiries were made near the home and places which were frequented by the detenu. Informers were arranged to give tip off regarding the presence of the detenu. Informers were arranged to give tip off regarding the presence of the detenu. Police made all sincere efforts to arrest him. Whenever the Police tried to arrest him, he evade the arrest by escaping to the Ithikara river and mean while, on 03/05/2013 at evening Sub Inspector of Police, Kottiyam got reliable information that the detenu was in Kottiyam Jn. Police part rushed to the spot and arrested the detenu at 18.00 hrs on the same day. Since the detenu was present in and near the area, the Section 6 of KAA(P)A was not initiated against the detenu.

16. There is no affidavit in reply to the counter-affidavit filed. If that be so, going by the explanation thus offered by the 3rd respondent, we are inclined to think that the delay, if any, has been satisfactorily explained. Further, the non-initiation of the steps u/s 6 of the Act also stands explained in the counter-affidavit. It is true that the petitioner relied on Exts. P7, P27, P28 and P29 orders passed by the Judicial First Class Magistrate-II, Kollam, discharging the accused from those cases. It is also true that the detenu has been discharged in the cases mentioned in those orders, but, however, these orders do not show that the detenu was physically present in court on those days. In any case, since the delay has been satisfactorily explained before us, we are inclined to accept the explanation and held that the order of detention is not vitiated on the ground of its alleged delayed execution.

17. The learned counsel for the petitioner then contended that the offences against him are not grave enough justifying the order of preventive detention. He also contended that the detaining authority has proceeded as though the detenu

is the only accused involved in the crimes relied on against him. It may be true that the detenu is not the sole accused in the crimes, which are relied on against him. However, insofar as Ext. P1 order of detention is concerned, the proceedings were only against the detenu and it was therefore that, in spite of the presence of the other accused, the detaining authority has made reference only against the detenu. Therefore, the fact that the other accused are also involved in the criminal cases relied on by the detaining authority, does not in any manner invalidate the order of detention issued against the detenu in this case.

18. Insofar as the contention that the offences are not grave enough to initiate proceedings under the Act is concerned, we must first of all say that Section 2(j) of the Act defines ''goonda'' and it includes ''depredator of environment''. The expression ''depredator of environment'' is defined u/s 2(g) of the Act and the offences, which are charged against the detenu, are squarely covered by this definition. The depredation of environment is a penal offence and is certainly grave one and therefore, we are not prepared to accept the contention of the petitioner that the offences are not grave enough justifying an order of preventive detention. In the result, we do not find any substance in any of the contentions raised by the petitioner.

Therefore, the writ petition will stand dismissed.