

(2009) 07 KL CK 0008

In the High Court Of Kerala

Case No : Criminal M.C. No"s. 1561 and 2127 of 2007

Vijukumar

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 23-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Foreigners Act, 1946 — Section 14, 2, 3, 3(2), 7
Registration of Foreigners Act, 1939 — Section 3, 5
Registration of Foreigners Rules, 1992 — Rule 14, 14(7), 2

Citation : (2009) 3 KLT 684

Hon'ble Judges : Sasidharan Nambiar, J

Bench : Single Bench

Advocate : R.D. Shenoy, Biju Balakrishnan, P.K. Ravisankar and S. Vinod Bhat,
for the Appellant; V.G. Govindan Nair, Director General of Prosecution and C.K.
Suresh, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

M. Sasidharan Nambiar, J.—Petitioner in CrI.M.C. No. 1561/2007 is the second accused in C.C. No. 1623/2005 on the file of Judicial First Class Magistrate's Court, Varkala, Petitioners in CrI.M.C. No. 2127/2007 are accused 1 and 2 in C.C. No. 13/2007 on the file of Chief Judicial Magistrate's Court, Ernakulam. The petitioners are being tried for the offence under Foreigners Act, 1946. These petitions are filed u/s 482 of Code of Criminal Procedure to quash the proceedings as against the petitioners contending that even if the prosecution case is accepted, no offence as alleged is made out.

2. Prosecution case in C.C.No. 1623/2005 on the file of Judicial First Class Magistrate's Court, Varkala is that, in violation of the law that when accommodation is provided to a foreigner in a hotel or resort, that fact is to be reported to the police by the keeper of the hotel or resort, petitioner/second accused, who is the owner of Eden Garden Resorts, did not furnish Form-C as prescribed and instead kept it at the resort itself and thereby the accused

committed an offence u/s 7 read with Section 14 of Foreigners Act. Prosecution case in C.C. No. 13/2007 on the file of Chief Judicial Magistrate's Court, Ernakulam is that first petitioner/first accused, who is the licensee of Dwaraka Hotel and second petitioner/second accused, its full time Director and third accused, the Receptionist, did not report to the police that two Srilankan citizens resided in Room No. 304 of Dwaraka Hotel from 3.11.2006 till the night of 4.11.2006 and thereby committed offence u/s 7 read with Section 14 of Foreigners Act.

3. Case of the petitioners is that though u/s 7 of Foreigners Act, the hotel keeper of any premises, where, lodging or sleeping accommodation is provided, has an obligation to furnish the information regarding the foreigners accommodated, as prescribed under the Act or the Rules framed thereunder, no Form is prescribed and so petitioners cannot be prosecuted for the failure to report the fact in the prescribed Form, in the absence of a specific case that the fact was not reported. It was pointed out that the case of the prosecution in C.C. No. 1623/2005 is only that Form-C was kept at the resort itself and not that the residence was not reported and in C.C. No. 13/2007, the case is only that the residence of the foreign citizens was not reported in the prescribed Form and not that the fact was not reported at all. It was also contended that prescribed Form-C was provided only under Registration of Foreigners Rules framed under Registrations of Foreigners Act, 1939 and if there is any violation of the said Rule, petitioners could be prosecuted only for the offence u/s 5 of Registration of Foreigners Act and not under the Foreigners Act and hence, the cases are to be quashed.

4. Learned senior counsel appearing for the petitioners in CrI.M.C. No. 2127/2007 and learned Counsel appearing for the petitioner in CrI.M.C. No. 1561/2007 and learned Director General of Prosecutions were heard.

5. Learned Counsel appearing for the petitioners pointed out that though u/s 3 of Foreigners Act Central Government is competent to make provisions in respect of all foreigners regulating or restricting their entry into India or their presence, Foreigners Order, 1948, made u/s 3, does not contain any provision for furnishing a report as provided u/s 7 of the Foreigners Act and no Form is prescribed and definition contained in Section 2(b) shows that "prescribed" means, prescribed by orders made under the Act. It was argued that the obligation provided u/s 7 is only to report as prescribed and in the absence of a prescribed Form, petitioners cannot be prosecuted for failure to report in a particular Form. Learned senior counsel also pointed out that the allegation in the final report in C.C. No. 13/2007 is only that there was failure to report as prescribed and therefore, prosecution of the petitioners in CrI.M.C. No. 2127/2007 is only an abuse of process of the court and in any case, on the materials produced along with the final report, petitioners cannot be convicted u/s 7 read with Section 14 of Foreigners Act. It was also pointed out by learned Counsel appearing for the petitioner in CrI.M.C. No. 1561/2007 that at best, for non compliance of the provisions of the Registration of Foreigners Act, petitioner

is liable to pay penalty as provided u/s 5 and as prosecution is only under the Foreigners Act, the prosecution is bad.

6. Learned Director General of Prosecutions submitted that there is allegation in Annexure-A final report in Crl.M.C. No. 2127/2007 that petitioners, in violation of the law, did not report the residence of Srilankan citizens in Dwaraka Hotel and therefore, ingredients of an offence u/s 7 read with Section 14 of Foreigners Act is made out and if that be so, the case cannot be quashed and at best, petitioners" could seek an order of discharge from the concerned Magistrate. Learned Director General of Prosecutions also pointed out that in Annexure-2 final report in Crl.M.C. No. 1561/2007, there is a specific allegation that in violation of the provisions, residence of the foreigners was not reported and that the accused kept Form-C at the resort itself and when, there are sufficient allegations that accused did not report the residence of foreigners in their resort as provided u/s 7 and it is punishable u/s 14, the cases cannot be quashed. It was also pointed out that in exercise of the powers u/s 3 of Foreigners Act, Foreigners (Report to Police) Order, 1971 was made, which provides that every householder or other person shall report to the officer in charge of the nearest police station about the arrival or presence in his household or in any premises occupied by him or under his control, of any, foreigner, if he knows or has reason to believe that he is a foreigner and there is violation of the said order and hence, an offence u/s 7, which is punishable u/s 14 of Foreigners Act, is made out and therefore, the case cannot be quashed.

7. As is clear from the Statement of Objects and Reasons, the Foreigners Act, 1946 was enacted, as Registration of Foreigners Act, 1939 has been found to be ineffective and inadequate. Section 3 provides for making either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or for their departure. Section 7 prescribes an obligation on the hotel keeper. Section 7(1) reads:

It shall be the duty of the keeper of any premises whether furnished or unfurnished where lodging or sleeping accommodation is provided for reward, to submit to such person and in such manner such information in respect of foreigners accommodated in such premises, as may be prescribed.

Explanation.- The information referred to in this sub-section may relate to all or any of the foreigners accommodated at such premises and may be required to be submitted periodically or at any specific time or occasion.

Section 14 of Foreigners Act is the penal provision. It reads:

14. Penalty for contravention of provisions of the Act, etc.- Whoever-

a) remains in any area in India for a period exceeding the period for which the visa was issued to him;

(b) does any act in violation of the conditions of the valid visa issued to him for

his entry and stay in India or any part thereunder;

(c) contravenes the provisions of this Act or any other made thereunder or any direction given in pursuance of this Act or such order for which no specific punishment is provided under this Act, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if he has entered into a bond in pursuance of Clause (f) of Sub-section (2) of Section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting Court why such penalty should not be paid by him.

8. The Statement of Objects and Reasons of Registration of Foreigners Act, 1939 show that it was enacted as Government of India should, at all times, have complete information as to the number and whereabouts of foreigners in the country, not only for national defence, but also for replying the enquiries as to the whereabouts of foreigners received from their relatives. Section 3 of the said Act provides for making Rules. The Registration of Foreigners Rules, 1992 is made u/s 3 of that Act.

9. Hotel keeper is not defined in the Foreigners Act, 1946 or in the Foreigners Order, 1948, made in exercise of the powers, conferred u/s 3 of Foreigners Act. The Act and the Order do not contain a provision regarding particulars to be furnished as provided u/s 7 of Foreigners Act. It also does not prescribe any specified form u/s 7. What is provided under Sub-section (1) of Section 7 is only an obligation "to submit to such person and in such manner such information in respect of foreigners accommodated in such premises as may be prescribed." u/s 2(b), "prescribed" is defined as prescribed by orders made under the said Act. Foreigners Order, 1948 does not provide any guideline to fix the identity of "such person" to whom the report is to be submitted as provided u/s 7. It also does not show the "manner" in which the report is to be submitted. Though the Foreigners (Report to Police) Order, 1971 was made by the Central Government u/s 3 of Foreigners Act, 1946 and the said order provides that every householder shall report to the nearest Police Officer regarding the arrival of a foreigner, it also does not prescribe "the manner" in which the information is to be furnished. When the Act provides for furnishing report in respect of foreigners accommodated in such manner as prescribed and when the Foreigners Order is made in exercise of the powers u/s 3, details of the form and the person to whom it is to be furnished and the manner in which it is to be furnished, should have been specified in the Order so made, to avoid any confusion at a later stage. It is seen that Foreigners Order, 1971 was made and published on 14.12.1971, in exercise of the powers conferred u/s 3 of Foreigners Act. Rule 2 thereunder reads:

Every householder or other person shall report to the officer-in-charge of the nearest police station about the arrival or presence in his household or in any premises occupied by him or under his control of any foreigner, if knows, or has reason to believe that he is a foreigner.

As the Order came into force at once as provided therein, every householder or other person, who provide such accommodation, shall report to the officer in charge of the nearest police station, the arrival or presence in his household or in any premises occupied by him or under his control, of any foreigner, if he knows, or has reason to believe that he is a foreigner. But, in the absence of a prescribed Form made under the Foreigners Act, 1946 or the Foreigners Order, 1948 or 1971, a hotel keeper of any premises, where, lodging or sleeping accommodation is provided for reward cannot be prosecuted for the reason that information is not furnished in a prescribed manner. True, under the Order, 1971, he is bound to submit a report, though not in the prescribed Form, to the officer in charge of the nearest police station about the arrival or presence in his household or in any premises occupied by him or under his control of any foreigner, if he knows, or has reason to believe that he is a foreigner. If not furnished, he is liable for punishment as provided u/s 7 read with Section 14 of Foreigners Act.

10. As distinct from the Foreigners Act and Foreigners Order, Registration of Foreigners Rules, 1992, under Rule 14, prescribes the manner in which a keeper of the hotel has to furnish the necessary particulars. It reads:

14. Report to be made to and by hotel keepers.- (1) Every keeper of a hotel shall require every visitor to the hotel to furnish the particulars necessary for recording, and sign, on his arrival at the hotel, his name and nationality in a register maintained for the purpose in Form F and, if any such visitor is a foreigner shall further require him;

(a) on his arrival at such a hotel to furnish the other particulars specified in Items 4 to 10 of the said register; and

(b) at the time of his departure from such a hotel to furnish the particulars necessary for recording in the said register, the date and time of his departure and the address to which he is proceeding.

(2) The register prescribed by sub-rule (1) shall at all time be made available for inspection, on the demand of any Registration Officer, any magistrate or any police officer not below the rank of head constable.

(3) Every visitor to any hotel shall, on being required so to do by the keeper of the hotel, furnish the particulars necessary for recording, and sign, his name and nationality, in the register referred to in Sub-rule (1), and if such visitor is a foreigner, shall also,-

(a) on his arrival at such a hotel furnish the other particulars specified in Items 4 to 10 of the said register; and

(b) at the time of his departure from such hotel, furnish the particulars necessary for recording, in the said register, the date and, time of his departure and the address to which he is proceeding.

(4) Every particulars, other than the signature of the keeper of a hotel or a visitor, which is required by this rule to be recorded in the said register shall be recorded by the keeper of the hotel and in the English language, if he is so able, or otherwise, in an Indian language.

(5) If a visitor does not understand the English language, it shall be duty of the keeper of the hotel, if so requested to explain to the visitor the requirements, of this rule and Form F.

(6) The keeper of the hotel shall, as soon as may be but not more than twenty-four hours, after the arrival of any foreigner, transmit a copy of Form C, duly completed from the particulars furnished by such a foreigner, to the Registration Officer.

(7) For the purpose of this rule,-

(a) "hotel" includes any boarding-house, club, dak-bungalow, rest house, paying guest house, sarai or other premises of like nature;

(b) "keeper of a hotel" means the person having the management of a hotel and includes any person authorised by him, and competent to perform the duties of the keeper of the hotel under this rule;

(c) "sign" includes, in respect of a visitor who is unable to write, the making of a thumb impression or other mark by means of which he is accustomed to attest a document; and

(d) "visitor" means a person for whom accommodation is provided at a hotel.

(8) Copies of Form C may be obtained, on application from any Registration Officer.

11. When a person, who is not a citizen of India, who is the foreigner as defined under the Foreigners Act, 1946 and Registration of Foreigners Act, 1939, is accommodated in a hotel or resort, a report as provided u/s 7 of the Foreigners Act is to be furnished and if not it is punishable u/s 14(c) of the Act. But, the obligation under the Section and consequent culpability is only on the keeper of the premises. If we go by dictionary meaning, keeper could only be some one in charge of the hotel or resort. If an attendant or manager is appointed in charge of the hotel or resort, then the owner or owners will not be the keeper and it so, it is the person in charge of the resort or hotel, who is obliged under the Section to furnish the information provided u/s 7 of the Act. If so, the owner of the resort or hotel cannot be prosecuted for the offence u/s 14(c) of the Act.

12. Section 3 of Registration of Foreigners Act empowers the Central Government to make Rules after previous publication by notification in the Official Gazette for requiring any foreigner entering or being present in India to report his presence to a prescribed authority within such time and in such manner and with such particulars as prescribed. Registration of Foreigners Rules, 1992 published in Official Gazette dated 19th March, 1992 in exercise of the powers conferred u/s

3, under Rule 14 provides for furnishing report to be made by hotel keeper. Sub-rule (7) defines keeper of a hotel. Form-C provided in Rule 14 contains the details of the hotel, name of the foreign visitor, his nationality, details of passport, address in India, date of arrival in India and proposed duration of stay in India, etc. Failure to furnish Form-C as provided under Rule 14 would attract an offence punishable u/s 5 of Registration of Foreigners Act, 1939. Section 5 reads:

5. Penalties.- Any person who contravenes, or attempts to contravene or fails to comply with, any provision of any rule made under this Act shall be punished, if a foreigner, with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both, or if not a foreigner, with fine which may extend to five hundred rupees.

Contravention of the relevant Rules as provided under the Registration of Foreigners Rules, 1992, would attract the offence provided u/s 5 of the Registration of Foreigners Act.

13. It is, thus, clear that when the contravention is that of the Foreigners (Report to Police) Order, 1971 or the Foreigners Order, 1948 and thereby the Foreigners Act, prosecution could only be u/s 7 read with Section 14 of the Foreigners Act. On the other hand, if the contravention is of the provisions of Registration of Foreigners Act or Registration of Foreigners Rules, prosecution could only be u/s 5 of the Registration of Foreigners Act. Prosecution in such a case cannot be u/s 7 or 14 of the Foreigners Act.

14. Evidently, the Investigating Officers in these cases were under the impression that information to be furnished u/s 7 of Foreigners Act and the report to be filed under Rule 14 of Registration of Foreigners Rules are the same. That could only be the reason why in Annexure-2 final report in CrI.M.C. No. 1561/2007, it is alleged that in violation of the Rules, Form-C was not forwarded and instead, it was kept at the resort itself and thereby alleged commission of the offences under Sections 7 and 14 of the Foreigners Act. Similarly, that could only be the reason why in Annexure-A final report in CrI.M.C. No. 2127/2007, it is alleged that report was not furnished in the prescribed Form, when neither Section 7 nor the Rules prescribe any Form. Even if petitioners did not furnish a report as provided under Rule 14 of Registration of Foreigners Rules, they cannot be prosecuted u/s 7 read with Section 14 of Foreigners Act. Therefore, prosecution of the petitioners under the Foreigners Act, on these allegations, is only an abuse of process of the court.

15. When the final report and materials produced along with the final report establish that there is no material to prove commission of an offence, continuation of the proceedings will serve no fruitful purpose, as ultimately, even if petitioners are to be tried, they cannot be convicted for the offence. In order to convict the petitioners, there should be a specific case that petitioners did not report the residence of the foreign citizens in their resort or hotel, in violation of

the provisions contained in Section 7 of Foreigners Act. If that be so, there should be a specific allegation that in spite of the provision that every householder shall report to the officer in charge of the nearest police station about the arrival or presence of foreigners in their household or premises, petitioners did not report the matter to the officer in charge of the nearest police station. When there is no such case and no investigation was conducted in nearest police station to find out whether such report/information was received from the hotel or resort of the petitioners or records were verified in the resort or hotel to find out whether such information provided u/s 7 of the Act was furnished or not, even if petitioners are to be tried, they cannot be convicted. In, such circumstances, interest of justice warrants that prosecution as against the petitioners are to be quashed.

16. Before parting with the case, it is necessary to remind the Central Government of the necessity to make an effective order or rule, in exercise of the powers u/s 3 of Foreigners Act to enforce Section 7 of the Act. When the infiltration of extra territorial terrorists is in the increase and security of the nation and the public are in danger, Government cannot be a silent spectator and instead have to make use of all the relevant provisions in the statute to prevent any such threat. Proper and effective enforcement of the provisions of Section 7 of the Foreigners Act would definitely aid the police and the enforcement authorities to trace out the stay and movement of such foreign nationals within India. It is for the Government to make necessary Rules prescribing the details of the information to be furnished u/s 7 and take effective steps for the proper security of this great nation.

Petitions are allowed. C.C. No. 1623/2005 on the file of Judicial First Class Magistrate's Court, Varkala and C.C. No. 13/2007 on the file of Chief Judicial Magistrate's Court, Ernakulam as against the petitioners are quashed.