IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

WEDNESDAY, THE 2ND DAY OF SEPTEMBER 2015/11TH BHADRA, 1937

WP(C).No. 23855 of 2015 (F)

PETITIONER:

LANKESH, AGED 31 YEARS
S/O PUSHPARAJAN, LANKESH BHAVAN,
KATTUMBURAM P.O., VADAMON MURI,
ANCHAL VILLAGE, PUNALUR TALUK
KOLLAM.

BY ADVS. SRI.R.SURAJ KUMAR
SRI.SUNIL J.CHAKKALACKAL
SMT.V.BEENA
SMT.V.DEEPA

RESPONDENTS:

1. STATE OF KERALA
   REPRESENTED BY THE SECRETARY TO GOVERNMENT OF KERALA
   DEPARTMENT OF HOME AFFAIRS, GOVERNMENT SECRETARIAT
   THIRUVANANTHAPURAM, PIN:695 001.

2. THE DISTRICT COLLECTOR AND DISTRICT MAGISTRATE
   KOLLAM, PIN:691 001.

3. THE DISTRICT POLICE CHIEF
   KOLLAM, PIN:691 001.

4. THE SUB INSPECTOR OF POLICE
   ANCHAL, KOLLAM DISTRICT - 691 001.

R1 -R 4 BY ADDL.DIRECTOR GENERAL OF PROSECUTION
SRI.K.I.ABDUL RASHEED

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 2.9.2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 23855 of 2015 (F)

APPENDIX

PETITIONER'S EXHIBITS

EXHIBIT P1: TRUE COPY OF THE REPLY DATD 25.8.2014.

EXHIBIT P2: TRUE COPY OF THE JUDGMENT OF THIS COURT DATED 20.12.2013 IN CRL.M.C.NO.6514/2013, QUASHING FINAL REPORT AND ALL FURTHER PROCEEDINGS IN CRIME NO.449/2009 OF ANCHAL POLICE STATION (C.C.NO.1841/2010 ON THE FILE OF THE JUDICIAL FIRST CLASS MAGISTRATE-I, PUNALUR).

EXHIBIT P3: TRUE COPY OF THE JUDGMENT OF THIS COURT DATED 28.6.2013 IN CRL.M.C.NO.2655/2013 QUASHING FINAL REPORT AND ALL FURTHER PROCEEDINGS IN CRIME NO.310/2011 (S.T.NO.1619/2011 ON THE FILE OF THE JUDICIAL FIRST CLASS MAGISTRATE-I, PUNALUR).

EXHIBIT P4: TRUE COPY OF THE JUDGMENT OF THIS COURT DATED 29.7.2013 IN CRL. M.C.NO.3151/2013 QUASHING FINAL REPORT AND ALL FURTHER PROCEEDINGS IN CRIME NO.435/2012 OF ANCHAL POLICE STATION (C.C.NO.472/2012 ON THE FILE OF THE JUDICIAL FIRST CLASS MAGISTRATE-I, PUNALUR).

EXHIBIT P5: TRUE COPY OF THE JUDGMENT DATED 30.4.2013 IN S.C.NO.324/009 AND S.C.NO.1601/2010 ON THE FILE OF THE COURT OF THE ADDITIONAL DISTRICT AND SESSIONS JUDGE (ADHOC II), KOLLAM.

EXHIBIT P6: TRUE COPY OF THE FIR DATED 28.6.2013 IN THE CRIME NO.1099/2013 OF ANCHAL POLICE STATION, KOLLAM DISTRICT.

EXHIBIT P7: TRUE COPY OF THE REPRESENTATION ADDRESSED TO THE IST RESPONDENT DATED 13.8.2014.

EXHIBIT P8: TRUE COPY OF THE REPRESENTATION ADDRESSED TO THE SECOND RESPONDENT DATED 13.8.2014.

RESPONDENTS' EXHIBITS: NIL

//TRUE COPY//

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K.T.SANKARAN &
RAJA VIJAYARAGHAVAN V., JJ.

W.P.(C) No.23855 of 2015 (F)

Dated this the 2nd day of September, 2015

<u>JUDGMENT</u>

<u>K.T.Sankaran, J</u>.

The petitioner has approached this Court by way of this Writ Petition to declare that he is not liable to be proceeded under the Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as 'KAAPA'). It is stated in the Writ Petition that the second respondent has issued an order under Section 3(1) of the KAAPA and that the petitioner apprehends arrest in execution of the order of detention. It is stated in paragraph 2 of the Writ Petition that Crime Nos.57/2008, 449/2009, 310/2011 and 435/2012 were registered at Anchal Police Station against the petitioner. In respect of Crime No.57/2008, the case was pending before the Court of Sessions, Kollam as S.C.No.324 of 2009 and S.C.No.1601 of 2010. The petitioner relies on Ext.P5 judgment in those Sessions Cases, whereby accused Nos.2 and 3 were acquitted. The petitioner was absconding and, therefore, the case against him was split up. In so far as Crime Nos.449/2009, 310/2011 and 435/2012 are concerned, the cases were settled by the petitioner and the respective defacto complainants and, accordingly, the FIR/final report in those cases were quashed by this Court exercising jurisdiction under Section 482 of the Code of Criminal Procedure, as per Exts.P2, P3 and P4 judgments.

2. In **Vijayamma** v. **State of Kerala** **[2014 (4) KLT 563]**, a Division Bench of this Court held that the mere quashing of a charge except on the ground that no offence is disclosed, would not result in purging the accused of the allegations against him and the facts and factors which constitute the ingredients of the offence charged against him. In *Vijayamma's case*, the order of detention under the KAAPA was challenged at its pre-execution stage, as in this case. The Division Bench held thus:

> "5. We think that it is not inappropriate for us to sound a word of caution, here and now. If a person is shown to be repeatedly indulging in different offences and if the prosecutions are, ultimately, permitted to be terminated by the procedure noticed above, we are afraid that we may pave way to an unholy, irregular,

improper, illegal, oppressive, submissible and unconstitutional *modus operandi* by those who would be committing such acts or activities, subverting and deflecting the course of justice. We say this because, this Court is not oblivious to the fact that witnesses could be influenced by economic might; by political clout; by muscle power and by threat to life and limb of one or more and their dear and near ones, apart from valuable property of any or all of them.

6. In the aforesaid inescapable scenario of societal existence, this Court cannot be persuaded to hold that such orders as are noted above, which terminate prosecutions in exercise of authority under S.482 of the Code, should be permitted to be pressed into service to torpedo any proposal for preventive detention order in cases which really fall under its cover to the satisfaction of the competent authority and which would withstand the test on judicial scrutiny as to statutory sustainability and appropriateness, apart from constitutionality.

7. We may also say that when a prosecution gets terminated by the modes, procedures or processes noted above, that does not go to immediately discharge a person from the conclusions arrived at by the

investigating officer leading to that prosecution. That finding by the competent police officer, on inquiry or on investigation would still be a material available in the domain of police and executive. Such material would, therefore, be available for the purpose of S.2(p)(iii) of KAAPA. We say this, more particularly, because the fact of the matter remains that the mere quashing of a charge, except on a ground by holding that no offence is disclosed, would not result in purging the accused of the allegations against him and the facts and factors which constitute the ingredients of the offence charged against him. This is in contradistinction to the situation that an offence with which a person is charged may not be looked into, if in the ultimate trial, he is not found guilty of the charge. Therefore, eventhough a criminal trial case would not go through its further due process in the aforenoted procedure of termination of prosecution before conclusion of trial and verdict, materials would sufficiently be available even n such cases, for the detaining authority or the sponsoring authority to act and consider such facts and materials for the purpose of formulating an opinion, as may be necessary, in relation to preventive detention laws."

3. In **Additional Secretary to the Government of India and others** v. **Smt.Alka Subhash Gadia and another** **[1992 Supp(1)**

SCC 496], the Supreme Court held that the order for preventive detention can be challenged at its pre-execution stage only if certain conditions are satisfied. It was held thus:

> "30. ..... The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz, where the courts are prima facie satisfied (*i*) that the impugned order is not passed under the Act under which it is purported to have been passed, *(ii)* that it is sought to be executed against a wrong person, *(iii)* that it is passed for a wrong purpose, (*iv*) that it is passed on vague, extraneous and irrelevant grounds or (*v*) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question."

4. Later, a three Judge Bench of the Supreme Court in **<u>Subhash Popatlal Dave</u>** v. **<u>Union of India and another</u>** **[(2012) 7**

SCC 533], held that the grounds for challenging an order of preventive detention at its pre-execution stage cannot be confined to the five grounds mentioned in *Alka Subhash Gadia's case*. The case was finally heard by the said Bench in the decision reported in **Subhash Popatlal Dave** v. **Union of India and another** **[(2014) 1 SCC 280]** and held thus:

> "46. Therefore, I am of the opinion that those who have evaded the process of law shall not be heard by this Court to say that their fundamental rights are in jeopardy. At least, in all those cases, where proceedings such as the one contemplated under Section 7 of the COFEPOSA Act were initiated consequent upon absconding of the proposed detenu, the challenge to the detention orders on the live nexus theory is impermissible. Permitting such an argument would amount to enabling the law-breaker to take advantage of his own conduct which is contrary to law.
>
> 47. Even in those cases where action such as the one contemplated under Section 7 of the COFEPOSA Act is not initiated, the same may not be the only consideration for holding the order of preventive detention illegal. This Court in *Shafiq Ahmad v. District*

Magistrate, Meerut [(1989) 4 SCC 556] held so and the principle was followed subsequently in *M. Ahamedkutty v. Union of India and Anr. [(1990) 2 SCC 1],* wherein this Court opined that in such cases, the surrounding circumstances must be examined. In both *Shafiq Ahmad* and *Ahamedkutty's* cases (supra), these questions were examined after the execution of the detention order. Permitting an absconder to raise such questions at the pre-execution stage, I am afraid, would render the jurisdiction of this Court a heaven for characters of doubtful respect for law.

48. This Court in *Alka Subhash Gadia* (supra), emphatically asserted that "it is not correct to say that the courts have no power to entertain grievances against detention order prior to its execution". This Court also took note of the fact that such an inquiry had indeed been undertaken by the courts in a very limited number of cases and in circumstances glaringly untenable at the pre-execution stage.

"14. In *Shafiq Ahmad v. District Magistrate, Meerut,* (1989) 4 SCC 556 relied on by appellant, it has been clearly held that what amounts to unreasonable delay depends on facts and circumstances of each case. Where reason for the delay was stated to be abscondence of the detenu, mere failure on the part of the authorities to take action under Section 7 of the National Security Act by itself was not sufficient to vitiate the order in view of the fact that the police force remained extremely busy in tackling the serious law and order problem. However, it was not accepted as a proper explanation for the delay in arresting the detenu. In that case the alleged incidents were on April 2/3/9, 1988. The detention order was passed on April 15, 1988 and the detenu was arrested on October 2, 1988. The submission was that there was inordinate delay in arresting the petitioner pursuant to the order and that it indicated that the order was not based on a bona fide and genuine belief that the action or conduct of the petitioner were such that the same were prejudicial to the maintenance of public order. Sabyasachi Mukharji, J., as my Lord the Chief Justice then was, observed that whether there was unreasonable delay or not would depend upon the facts and circumstances of a particular situation and if in a situation the person concerned was not available and could not be served, then the mere fact that the action under Section 7 of the Act had not been taken, would not be a ground for holding that the detention order was bad. Failure to take action even if there was no scope for action under Section 7 of the COFEPOSA Act, would not by itself be decisive or determinative of the question whether there was undue delay in serving the order of detention."

"30. ..... Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to the execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so."

49. The question whether the five circumstances specified in *Alka Subhash Gadia case* (supra) are exhaustive of the grounds on which a pre-execution scrutiny of the legality of preventive detention order can be undertaken was considered by us earlier in the instant case. We held that the grounds are not

exhaustive. But that does not persuade me to hold that such a scrutiny ought to be undertaken with reference to the cases of those who evaded the process of law."

5. It is seen that the Sessions Case which was disposed of as per Ext.P5 judgment was with respect to Crime No.57 of 2008 in which the petitioner was absconding, the petitioner was involved in three other crimes in 2009, 2011 and 2012 but still he did not appear before Court. That itself is an indication that he was absconding and, at the same time, he was indulging in criminal activities.

We do not think that this is a fit case where the power under Article 226 of the Constitution could be exercised in favour of the petitioner to quash the order of detention at its pre-execution stage. The Writ Petition is bereft of bona fides and it is, accordingly, dismissed.

K.T.SANKARAN
Judge

RAJA VIJAYARAGHAVAN. V.
Judge

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