

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 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA, 1937

WP(C).No. 33816 of 2015 (B)

PETITIONER(S) :

SAINUL ABIDEEN
S/O. MUHAMED KUNHI, ATHINBAL HOUSE,
AJANOR VILLAGE, HOSDURG TALUK, KASARGOD DISTRICT.

BY ADV. SRI.RAJIT

RESPONDENT(S) :

1. STATE OF KERALA
REP. BY SECRETARY, MINISTRY OF HOME AFFAIR,
SECRETARIAT, THIRUVANANTHAPURAM.
2. THE DISTRICT MAGISTRATE AND DISTRICT COLLECTOR,
KASARGOD.
3. THE DISTRICT SUPERINTENDENT OF POLICE,
KASARGOD.
4. SUB INSPECTOR OF POLICE,
HOSDURG POLICE STATION, KANHAGAD,
KASARGOD DISTRICT.
5. SUB INSPECTOR OF POLICE,
BEKAL POLICE STATION, KASARGOD DISTRICT.

R1-R5 BY ADDL.DIRECTOR GENERAL OF PROSECUTION
SRI. K.I. ABDUL RASHEED
BY GOVERNMENT PLEADER SRI.ABDUL KAREEM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 16-12-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS

- EXT.P1: TRUE COPY OF THE FIR REGISTERED BY THE 4TH
RESPONDENT IN CRIME 783/2014.
- EXT.P2: TRUE COPY OF THE PRELIMINARY ORDER DTD. 21-1-2015
IN MC NO. 40/2015 OF THE 2ND RESPONDENT.
- EXT.P3: TRUE COPY OF THE FIR IN CRIME NO. 119/2014.
- EXT.P4: TRUE COPY OF THE AFFIDAVIT FILED BY THE DEFACTO
COMPLAINT IN CRL. MC NO. 5222/2015 BEFORE THIS
HON'BLE COURT.
- EXT.P5: TRUE COPY OF THE ORDER DTD. 11-8-2015 IN CRL.MC.
NO. 5222/2015.
- EXT.P6: TRUE COPY OF THE FIR REGISTERED BY THE HOSDURG
POLICE IN CRIME NO. 711/2014.
- EXT.P7: TRUE COPY OF THE STATEMENT FILED BY THE SUB
INSPECTOR OF POLICE IN CRL. MC NO.64\334/2015.
- EXT.P8: TRUE COPY OF THE REPRESENTATION FILED BY THE
PETITIONER BEFORE THE 1ST RESPONDENT.
- EXT.P9: TRUE COPY OF THE ABOVE LETTER BEARING
NO. 63910/S.S.A1/15/HOME DTD. 20-8-2015.

RESPONDENT(S) ' EXHIBITS : NIL.

//TRUE COPY//

P.A. TO JUDGE

bp

K.T.SANKARAN & RAJAVIJAYARAGHAVAN V, JJ.

W.P.(C).No.33816 of 2015

Dated this the 16th day of December, 2015

J U D G M E N T

K.T.SANKARAN, J.

Coming to know that an order of detention under Section 3(1) of the Kerala Anti-Social Activities (Prevention) Act (hereinafter referred to as 'KAAPA') has been passed against the petitioner, he has filed this Writ Petition challenging Ext.P9 communication issued to his mother stating that proceedings have been initiated for detention of the petitioner, and also for issuance of a declaration that the proceedings proposed to be initiated against the petitioner under the provisions of the KAAPA are illegal.

2. The original records were made available by the learned Public Prosecutor on our direction. It is seen from the records that an order dated 23.07.2015 has been issued

by the District Magistrate, Kasaragod under Section 3(1) of the KAAPA against the petitioner. The order of detention shows that the petitioner is involved in 6 cases, 4 of which were registered at Hosdurg police station and 2 of which were registered at Bekal police station in Kasaragod District. The order of detention shows that the petitioner is classified as a 'known rowdy'.

3. The learned counsel for the petitioner submitted that Crime No.783/2014 was registered against the petitioner at the Hosdurg police station, under Section 107 of the Code of Criminal Procedure, in which, reference is made to Crime Nos.119/2014 and 711/2014. The petitioner challenged the proceedings under Section 107, in CrI.M.C.No.6334/2015 before this Court, in which the Sub Inspector of Police filed Ext.P7 statement. In Ext.P7, there is mention of an order of detention dated 23.07.2015 having been issued, classifying the petitioner as a 'known rowdy'. It is submitted that Crime No.119/2014 was quashed by this

Court in Crl.M.C.No.5222/2015 (Ext.P5). Ext.P9 challenged in this Writ Petition is a letter dated 20.08.2015 issued by the Under Secretary to the Government for the Additional Chief Secretary, Ministry of Home Affairs, to the mother of the petitioner rejecting her representation to re-consider the order issued against the petitioner under the KAAPA.

4. The learned counsel for the petitioner further submitted that proceedings under Chapter VIII of the Code of Criminal Procedure were initiated against the petitioner and a warrant was also issued against him. The petitioner was however, not arrested, in spite of the fact that he was arrested and released on bail in a crime registered at Hosdurg police station. Instead of producing the petitioner before the Sub Divisional Magistrate before whom proceedings under Section 107 of the Code of Criminal Procedure proceedings under Chapter VIII of Code of Criminal Procedure were initiated, proceedings under the KAAPA have been initiated and an order under Section 3(1)

was passed against the petitioner on 23.07.2015. It is submitted that the petitioner was arrested on 23.06.2015 in Crime No.711/2014 of Hosdurg police station and though he was remanded to judicial custody, he was released on bail on 14.07.2015. It is submitted that the order of detention was passed thereafter on 23.07.2015. The learned counsel also submitted that the detaining authority also should have taken note of the fact that CrI.M.C.No.5222/2015 was allowed on 11.08.2015 and the proceedings in Crime No.119/2014 (which was pending as C.C.No.1302/2014 on the file of the Judicial First Class Magistrate Court-I, Hosdurg) were quashed.

5. The learned Public Prosecutor submitted that the petitioner could not be arrested as he was absconding and proceedings under Section 6 of the KAAPA have been initiated against him, a declaration was issued and it was duly notified. Still the petitioner did not surrender and he is absconding. The learned Public Prosecutor submitted that

as the petitioner is absconding and evading the process of law, he is not entitled to maintain a Writ Petition challenging the order of preventive detention at its pre- execution stage.

6. In **Vijayamma Vs. State of Kerala [2014 (4) KLT 563]**, a Division Bench of this Court held that the mere quashing of a charge, except on a 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. The Division Bench held thus:

"7. Therefore, eventhough a criminal trial case would not go through its further due process in the aforementioned procedure of termination of prosecution before conclusion of trial and verdict, materials would sufficiently be available even in 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."

7. In **Thejas Vs. Inspector General of Police [2015 (3) KLT 1]**, a Division Bench of this Court dealt with the contention as to whether initiation of proceedings under

Section 107 of the Code of Criminal Procedure would bar initiation of proceedings under the KAAPA and held as follows:

"18. Proceedings under S.107 Cr.P.C. would be initiated when an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility. The person concerned would be required to execute a bond for keeping the peace as provided under S.107 Cr.P.C. The purpose and object of an order of detention under S.3 or an order of externment under S.15 is different from the object and purpose of an order under S.107 Cr.P.C. Under the KAAPA, the thrust is on the prevention of anti-social activities, while that under S.107 Cr.P.C. is to keep peace and tranquility and to avoid breach of peace or disturbance of public tranquility. If a person indulges in anti-social activities, that may sometimes result in breach of peace or disturbance of public tranquility. At the same time, breach of peace or disturbance of public tranquility need not necessarily be a result when a person indulges in anti-social activities as defined under the KAAPA. Anti-social activity is defined under the KAAPA as follows:

"2. Definitions.-- In this Act, unless the context otherwise requires,--

(a) "anti-social activity" means acting in such manner as to cause or likely to cause, directly or indirectly, any feeling of insecurity, danger or fear among the general public or any section thereof, or any danger to the safety of individuals, safety of public, public health or the ecological system or any loss or damage to public exchequer or to any public or private property or indulges in any activities referred in clauses (c), (e), (g), (h), (i), (1), (m), (n), (q) and (s) of this section;"

19. The Constitution Bench of the Supreme Court in

Haradhan Saha v. The State of West Bengal & Ors. ((1975) 3 SCC 198) held that merely because a detenu is liable to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Maintenance of Internal Security Act, 1971. Initiation of proceedings under S.107 Cr.P.C. is of a lesser magnitude when compared to preventive detention under the preventive detention laws. An order of externment also is qualitatively different from a proceeding under S.107 Cr.P.C. Simply because proceedings are initiated against a person under S.107 Cr.P.C., it cannot be said that a proceeding under the preventive detention laws either for preventive detention or for externment cannot be resorted to. The decisions of the Supreme Court and that of the High Court with respect to an order of preventive detention in which proceedings are also taken against the detenu under S.107 Cr.P.C. may not be strictly applicable to an order of externment under S.15 of the KAAPA."

8. The Division Bench in **Thejas Vs. Inspector General of Police [2015 (3) KLT 1]** relied on the decision of the Constitution Bench of the Supreme Court in **Haradhan Saha v. The State of West Bengal & Ors. [(1975) 3 SCC 198]**. In the light of the decisions in **Haradhan Saha v. The State of West Bengal & Ors. [(1975) 3 SCC 198]** as well as in **Thejas Vs. Inspector General of Police [2015 (3) KLT 1]**, the contention of the petitioner that proceedings under Chapter VIII of the Code

of Criminal Procedure having been initiated against the petitioner, it was improper for the District Magistrate who have passed an order under Section 3(1) of the KAAPA, is unsustainable.

9. The contention of the petitioner that though he was arrested on 23.06.2015 in Crime No.711/2014 and remanded to judicial custody till 14.07.2015, he was not produced before the Sub Divisional Magistrate where proceedings under Chapter VIII of the Code of Criminal Procedure were pending and it would show that the authorities were not very keen on getting the presence of the petitioner before the Sub Divisional Magistrate and thereafter it was not permissible to initiate proceedings under KAAPA against the petitioner, is without any substance. The order under Section 3(1) of the KAAPA was passed on 23.07.2015. In spite of the fact that a notification was issued under Section 6 of the KAAPA, the petitioner did not surrender and he cannot be heard to say

that the proceedings under Section 107 would have been enough to deter him from indulging in the alleged activities.

10. In **Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another [(1992) Supp. (1) SCC 496]**, the Supreme Court held on what grounds an order of preventive detention could be challenged at its pre-execution stage. The correctness of the decision in **Alka Subhash's Case** (supra) was challenged before the Supreme Court in **Subhash Popatlal Dave Vs. Union of India and Another [(2012) 7 SCC 533]** wherein it was held that a challenge against an order of preventive detention could be made on grounds other than mentioned in **Alka Subhash Gadia's Case** (supra). The case of Subhash Popatlal Dave was finally disposed of by the Supreme Court in **[(2014) 1 Supreme Court Cases 280]** wherein it was held (*majority view*) thus:

"43. If a preventive detention order is to be quashed or declared illegal merely on the ground that the

order remained unexecuted for a long period without examining the reasons for such non-execution, I am afraid that the legislative intention contained in the provisions such as Section 7(1)(b) of the COFEPOSA Act would be rendered wholly nugatory. Parliament declared by such provision that an (recalcitrant) individual against whom an order of preventive detention is issued is under legal obligation to appear before the notified authority once a notification contemplated under Section 7(1)(b) of the COFEPOSA Act is issued. We have already noticed that failure to appear without a reasonable excuse would be an offence and render the defaulter liable for a punishment of imprisonment. Holding that the preventive detention orders are themselves rendered illegal, on the basis of the live nexus theory (which, in my opinion, is valid only for examining the legality of the order vis-a-vis the date on which the order is passed) would not only exonerate the person from the preventive detention order but also result in granting impunity to such person from the subsequent offence committed by him under the provisions such as Section 7(1)(b) of the COFEPOSA Act.

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 held so and the principle was followed subsequently in M. Ahamedkutty v. Union of India, wherein this Court opined that in such cases, the surrounding circumstances must be examined. In both Shafiq Ahmad and Ahmedkutty cases, 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.

49. The question whether the five circumstances specified in Alka Subhash Gadia case 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."

11. The contention of the petitioner that the proceedings in Crime No.119/2014 (C.C.No.1302/2014 on the file of the Judicial First Class Magistrate Court-I, Hosdurg) were quashed in Crl.M.C.No.5222/2015 is not a ground to challenge the order of preventive detention dated 23.07.2015 for the simple reason that the order of detention was passed much prior the disposal of Crl.M.C.No. 5222/2015. On perusal of Ext.P5 order in Crl.M.C.No. 5222/2015, it would be clear that the proceedings were quashed not on the ground that no offence is made out but on the ground that the case was settled between the parties. In the light of the decision of this Court in

Vijayamma Vs. State of Kerala [2014 (4) KLT 563], the contention raised by the petitioner in this regard is unsustainable.

In the light of the settled principles of law mentioned above, we do not find any ground to grant the relief prayed for in the Writ Petition. The Writ Petition is, accordingly, dismissed.

Sd/-
K.T.SANKARAN,
JUDGE.

Sd/-
RAJA VIJAYARAGHAVAN V,
JUDGE.

Bb

[True copy]

P.A to Judge