

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN

&

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

MONDAY, THE 17TH DAY OF AUGUST 2015/26TH SRAVANA, 1937

WP(Crl.).No. 275 of 2015 (S)

PETITIONER:

NIRMALA SOMAN, AGED 58 YEARS
W/O. SOMAN, SOM NIVAS, WARD NO.8
EZHUPUZHA PANCHAYATH, CHERTHALA TALUK, ALAPPUZHA

BY ADV. SRI.K.R.VINOD

RESPONDENTS:

1. STATE OF KERALA
REPRESENTED BY THE SECRETARY, MINISTRY OF HOME DEPT
THIRUVANANTHAPURAM 695001
2. THE ADDL. CHIEF SECRETARY
HOME & VIGILANCE DEPT. GOVT, SECRETARIAT
THIRUVANANTHAPURAM 695001
3. THE DISTRICT COLLECTOR AND DISTRICT MAGISTRATE
ALAPPUZHA DISTRICT, ALAPPUZHA 688001
4. THE SUPERINTENDANT OF POLICE,
ALAPPUZHA 688001
5. THE SUB INSPECTOR OF POLICE
AROR POLICE STATION, ALAPPUZHA 688534
6. THE SUB INSPECTOR OF POLICE
KURUPPUMPADY POLICE STATION, ERNAKULAM 683 545
7. THE SUPERINTENDANT OF POLICE
VIYYUR CENTRAL JAIL, THRISSUR 680 010

R1-R7 BY ADDL.D.G.P., SHRI.TOM JOSE PADINJAREKKARA

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
17-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS

EXHIBIT P1: THE PHOTOCOPY OF THE ORDER OF DETENTION ALONG WITH THE
GROUNDS FOR DETENTION OF THE SON OF THE PETITIONER DATED
5.3.2015 ISSUED BY THE 3RD RESPONDENT.

EXHIBIT P2: THE PHOTOCOPY OF THE MEMO DATED 5.3.2015 ISSUED BY THE 3RD
RESPONDENT DIRECTING THE 4TH RESPONDENT TO EXECUTE ORDER
OF DETENTION

EXHIBIT P3: THE PHOTOCOPY OF THE ORDER OF THE 2ND RESPONDENT HEREIN
GO(RT) NO.980/2015/ HOME DATED 23.4.2015

RESPONDENTS' EXHIBITS : NIL

// TRUE COPY //

PA TO JUDGE

dl.

C.R.

**K.T.SANKARAN &
B.SUDHEENDRA KUMAR, JJ.**

W.P.(Crl.) No.275 of 2015

Dated this the 17th August 2015

JUDGMENT

K.T.Sankaran J.,

Shijeev alias Shee, the son of the petitioner was detained as per the order dated 05.03.2015 passed by the third respondent under Section 3(1) of the Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as 'the KAAPA'). The order of detention was

executed on 13.03.2015. The Advisory Board opined that there are sufficient grounds for detaining Shijeev@Shee. The Government confirmed the order of detention as per order dated 23.04.2015 and held that the period of detention would be six months from the date of detention. The order of detention is under challenge in this Writ Petition.

2. Certain facts are not in dispute. The detenu is involved in five crimes registered at Aroor and Kuruppampadi Police Stations for offences of the nature mentioned in Section 2(t) of the KAAPA. Those crimes were registered in the years 2008, 2009, 2013 and 2014. The detention order was passed on the subjective satisfaction that with a view to prevent the detenu from

committing any anti social activity within the State of Kerala in any manner, it was necessary to make an order directing him to be detained. Proceedings under Section 107 of the Code of Criminal Procedure (for short 'the Cr.P.C.') were taken against the detenu in 2004 and 2011. In the proceedings under Section 107 Cr.P.C. initiated in 2011, the detenu executed a bond. During the period of currency of the bond, the detenu was not involved in any crime. However, after the expiry of the period of the bond, he was involved in three crimes. The last of the crimes was allegedly committed on 8.9.2014. In that case, the final report was filed on 21.1.2015. As mentioned above, the order of detention was issued on 5.3.2015.

3. Adv. Shri. K.R. Vinod, the learned counsel for the

petitioner submitted that paragraph No.2 of the order of detention would show that after the sponsoring authority submitted the report, the third respondent returned the file on the ground that the last crime was committed on 6.12.2013, that is, one year before and therefore, it was necessary to file a final report in the crime allegedly committed on 8.9.2014 after completing the investigation. Thereafter, the investigation was completed in the crime registered on 8.9.2014 and a final report was filed. Thereafter, the Sponsoring Authority submitted its report to the District Magistrate on 28.2.2015. The District Magistrate (third respondent) passed the order of detention on the basis of that report dated 28.02.2015. The learned counsel for the petitioner submitted that the District

Magistrate was satisfied that there was unexplainable delay and that was why he issued a direction to the Police to complete the investigation in the latest crime and to submit a final report. It is submitted that such a procedure adopted by the District Magistrate itself would show that the order was passed deliberately and not on the basis of impartial subjective satisfaction arrived at by the Detaining Authority.

4. Shri.Tom Jose Padinjarekkara, the learned Additional Director General of Prosecution submitted that the District Magistrate returned the file with a direction to the Police to submit a final report only on the ground that there were conflicting decisions on the question of the interpretation of Clause (iii) of Section 2(p) of the KAAPA.

Two Division Benches of this Court took the view that the wording of Clause (iii) of Section 2(p) of the KAAPA would indicate that it is not necessary to submit a final report in a case in order to take into account that particular case for the purpose of passing the order of detention and that it would be sufficient, if on investigation or enquiry by a competent Police Officer or other authority, it is found that the person concerned has committed any offence. Another Division Bench took the view that only after the final report is filed in a particular case, that case could be counted for the objective satisfaction under Sub Clause (iii) of Clause (p) of Section (2) of the KAAPA. It is submitted that in view of the conflict, the question was referred to a Full Bench and it is pending consideration. It is submitted

that in these circumstances, the detaining authority could not be faulted for issuing a direction to the Police to complete the investigation and to file a final report in the latest crime dated 8.9.2014.

5. In view of the different views taken by the High Court with respect to the interpretation of sub clause (iii) of Clause (p) of Section 2 of the KAAPA, we are of the view that the detaining authority was justified in directing the Police to file the final report before deciding to pass an order under Section 3 of the KAAPA against the detenu. It cannot be termed as vindictive or deliberate or as a devise adopted by the District Magistrate to see that the detenu is detained. The action taken by the District Magistrate was in consonance with the normal office procedure and in the

light of the conflicting views taken by this court in the three decisions mentioned above. We reject the contention put forward by the learned counsel for the petitioner in this regard.

6. The learned counsel for the petitioner submitted that it is proved in this case that during the currency of the period of the bond executed by the detenu in the proceedings initiated against him under Section 107 Cr.P.C., he did not commit any crime. That means normal proceedings under the Cr.P.C. would have been sufficient to deter the detenu from indulging in criminal activities. This fact was not noticed by the detaining authority and the order of detention was issued mechanically on the ground that after the period of the currency of the bond in

the proceedings under Section 107 Cr.P.C., the detenu was involved in three criminal incidents. The learned Additional Director General of Prosecution submitted that the submission made by the learned counsel for the petitioner has no force as the detaining authority was satisfied that the proceedings under Section 107 Cr.P.C. had not deterred the detenu from indulging in any criminal activities.

7. Proceedings under Section 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 purpose and

object of an order of detention under Section 3 of the KAAPA is different from the purpose and object of an order under Section 107 Cr.P.C. A Division Bench of this Court (in which Justice K.T.Sankaran was a party) in **Thejas v. Inspector General of Police** [2015(3) KLT 1] held that the proceedings under Section 107 Cr.P.C. is of a lesser magnitude when compared to preventive detention order under the laws of preventive detention. Simply because proceedings were initiated against the person under Section 107 Cr.P.C., it cannot be said that an order of preventive detention cannot be passed against him.

8. That the detenu did not commit any offence during the currency of the period of the bond executed by him in the proceedings initiated under Section 107 Cr.P.C., is not a

ground to hold that thereafter also proceedings should be continued to be taken against him under Section 107 Cr.P.C. and that an order under Section (3) of the KAAPA cannot be passed by the detaining authority. The test to be applied is whether, after initiation of proceedings against the detenu under Section 107 Cr.P.C., he has improved or whether his activities ceased to be detrimental to the society at large. If he was inclined to continue to indulge in anti social activities, the detaining authority cannot be faulted for initiating proceedings under Section 3 of the KAAPA.

9. A Constitution Bench of the Supreme Court in **Haradhan Saha and others v. State of West Bengal** [1975 (3) SCC 198] held that merely because a detenu is

liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of Cr.P.C., would not by itself debar the Government from taking action for his detention under the Maintenance of Internal Security Act, 1971. The ultimate object of issuing an order of detention under the KAAPA is to prevent the person concerned from committing any anti social activity within the State of Kerala. When it is seen that the detenu continued to indulge in anti social activities in spite of taking recourse to the normal laws, nothing prevents the detaining authority from making an order of detention under Section 3 of the KAAPA. It is not the law that always recourse should be taken to Chapter VIII of

Cr.P.C. instead of initiating proceedings under Section 3 of the KAAPA. Circumstances may arise where the detaining authority may find that risk could not be taken in the matter of the activities of certain persons. It cannot be held that there is complete bar of taking action against a person under the KAAPA only on the ground that he had proved to be a good person by not indulging in any crime during the period in which the bond was executed. Such an interpretation cannot be taken going by the scheme of the KAAPA and the various decisions rendered by the Court.

10. The learned counsel for the petitioner submitted that the last prejudicial activity against the petitioner was on 8.9.2014. The detention order was issued on 5.3.2015. There is long and unexplainable delay in passing the order

of detention and therefore, the live link between the prejudicial activity and the order of detention is snapped.

The learned counsel relied on the decisions of this Court in

Jimesh Jose v. State of Kerala [2013(1) KHC 49] and

Abida Beevi v. State of Kerala [2013(1) KHC 308]. The

learned Additional Director General of Prosecution

submitted that the final report in respect of the crime

registered on 8.9.2014 was filed on 21.1.2015. The

District Police Chief, Alappuzha submitted a further report

to the authorised Officer on 28.02.2015 and without any

delay the order of detention was passed on 05.03.2015.

The order of detention was executed on 13.03.2015. In

paragraph 12 of the counter affidavit filed on behalf of

respondents 1 and 2, apart from stating the above facts it is

stated thus:

“It is clear that the matter has been considered and processed with expedition by all the authorities concerned and only the least required time has been taken. As elucidated in para 2 of Exhibit P1 detention order, the delay in this regard has been satisfactorily explained. The time taken for the issuance of the order may therefore be considered as reasonable. The live and proximate link between the last prejudicial activity and the issuance of the order has been kept intact at all the stages of the process. The averment to the contrary is incorrect.”

11. The learned Additional Director General of Prosecution also cited the decisions of the Supreme Court in **T.A. Abdul Rahman v. State of Kerala** (AIR 1990 SC 225), **Abdul Salam alias Thiyyan v. Union of India** (1990 SC 1446) and **Subramanian v. State of Tamil Nadu** [2012

(4) SCC 699].

12. In **Jimesh Jose v. State of Kerala** (2013(1) KHC 49), after holding that “mere delay in passing the detention order after the last prejudicial activity alone is not a sufficient ground for vitiating the order of detention provided the delay is satisfactorily explained by the authorities concerned”, the Division Bench held that when the maximum period for which a person can be detained is determined to be six months, a delay of four months in passing the detention order after the last anti social activity can only be considered as an inordinate delay. It was also found that no explanation was given for the delay either in the detention order or in the counter affidavit filed by respondent Nos.1 and 2 and therefore, it would vitiate the

detention order. A similar view was taken by the same Division Bench in **Abida Beevi v. State of Kerala** (2013 (1) KHC 308). In **T.A. Abdul Rahman v. State of Kerala** (AIR 1990 SC 225), the Supreme Court considered the question of delay in passing the order of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short 'the COFEPOSA Act') and held thus:

“7.....There is no denying the fact that the impugned order has been passed after lapse of 11 months from the date of seizure of the eleven gold biscuits from the back courtyard of the house of the detenu. As repeatedly pointed out by this Court that there is no hard and fast rule that merely because there is a time lag between the offending acts and the date of order of detention, the causal link must be taken to

be snapped and the satisfaction reached by the detaining authority should be regarded as unreal, but it all depends upon the facts and circumstances of each case and the nature of the explanation offered by the detaining authority for the delay that had occurred in passing the order. There is a catena of decisions on this point, but we feel that it is not necessary to recapitulate all those decisions except a salient few.

.....
.....

11. The conspectus of the above decisions can be summarised thus : The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or

mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the Court has to investigate whether the causal connection has been broken in the circumstances of each case.”

13. In **Abdul Salam alias Thiyyan v. Union of India** (AIR 1990 SC 1446), dealing with the question of delay in passing the order of detention under the COFEPOSA Act, the Supreme Court held :

“14. That apart, we are unable to agree with the learned counsel that because of this

delay the necessary nexus got severed and that the grounds have become stale and illusory. In appreciating such a contention, the Court also has to bear in mind the nature of the prejudicial activities indulged by the detenu and the likelihood of his repeating the same. It is this potentiality in him that has to be taken into consideration and if the detaining authority is satisfied on the available material then on mere delay as long as it is not highly unreasonable and undue the Court should not normally strike down the detention on that ground. In *Hemlata Kantilal Shah v. State of Maharashtra*, (1981) 4 SCC 647 : (AIR 1982 SC 8) it is held that delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person. For these reasons we are of the view that in this case the delay by itself does not invalidate the detention but even otherwise it has been reasonably explained.”

14. Subramanian v. State of Tamil Nadu (2012 (4)

SCC 699) was a case coming under the prevention of dangerous activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Slum-Grabbers and Video Pirates Act, 1982 (Tamil Nadu).

In that case the detaining authority was satisfied that the detenu was habitually committing crimes and also acting in a manner prejudicial to the maintenance of public order and as such he was a 'goonda' as contemplated under Section 2(f) of the Tamil Nadu Act 14 of 1982. The detaining authority found that there was compelling necessity to detain the person concerned in order to prevent him from indulging in such activities in future which are prejudicial to the maintenance of public order. The detaining authority took note of the earlier instances

commencing from 2008 and 2010 and passed an order on 21.07.2011. The last prejudicial activity was also in 2011.

A contention was put forward by the detenu that the subjective satisfaction reached by the detaining authority was vitiated. Answering in the negative, the Supreme Court held thus:

“14. It is well settled that the court does not interfere with the subjective satisfaction reached by the Detaining Authority except in exceptional and extremely limited grounds. The court cannot substitute its own opinion for that of the Detaining Authority when the grounds of detention are precise, pertinent, proximate and relevant, that sufficiency of grounds is not for the Court but for the Detaining Authority for the formation of subjective satisfaction that the detention of a person with a view to preventing him from acting in any manner prejudicial to public order is required and that such satisfaction is

subjective and not objective. The object of the law of preventive detention is not punitive but only preventive and further that the action of the executive in detaining a person being only precautionary, normally, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct in an exhaustive manner. The satisfaction of the Detaining Authority, therefore, is considered to be of primary importance with certain latitude in the exercise of its discretion.”

15. An order under Section 3 of the COFEPOSA Act can be passed based on a single prejudicial activity, provided the detaining authority arrives at the subjective satisfaction that with a view to preventing the person concerned from acting in any manner prejudicial to conservation or augmentation of foreign exchange or with

a view to preventing him from indulging in any of the categories of activities mentioned therein, it is necessary to make an order directing that such person be detained. The Supreme Court in various decisions considered the aspect of delay in passing the order of detention, the delay occasioned from the date of passing the order of detention and the date of executing the order of detention etc., and formulated several principles.

16. We are of the view that the decisions of the Supreme Court touching upon the cases under the COFEPOSA Act as such may not be applicable to cases coming under the KAAPA, since the ingredients to be satisfied to consider a person as a known goonda or a known rowdy are different from the activities which are

referred to in Section 3 of the COFEPOSA Act. In order to satisfy the definition of known rowdy under Clause (p) of Section 2 of the KAAPA, any of the following 3 contingencies should occur, namely:

(i) made guilty, by a competent Court at least once for an offence of the nature under item (i) of clause (t) of Section 2 or any offence notified as such under the said clause; or

(ii) made guilty, by a competent Court at least twice for any offence of the nature mentioned under item (ii) of clause (t) of Section 2 or any offence notified as such under the said clause; or

(iii) found, on investigation or enquiry by a competent police officer or other authority, on complaints initiated by persons other than police officers, in three separate instances not forming part of the same

transaction to have committed any offence mentioned in clause (t) of Section 2.

17. The aforesaid ingredients mentioned in the preceding paragraph could be with reference to acts done by him within the previous seven years as calculated from the date of the order of detention. That means, if a person is found guilty in a case covered by sub clause (i) of clause (t) of Section 2 of the KAAPA, an order of detention could be passed, say for example, even after five years of the date of commission of the offending act but when he was convicted. Likewise, Sub clauses (ii) and (iii) of Clause (p) of Section 2 of the KAAPA also could be invoked with respect to incidents which occurred during the period of previous seven years as calculated from the

date of the order of detention. In other words, the prejudicial activity is not confined to an activity which occurred within the close proximity of the order of detention. But it could be during the period of seven years as calculated from the date of order of detention. However, in the case of sub clause (iii), it could be said that there must be reasonable proximity between the last prejudicial activity and the order of detention. The subjective satisfaction must be arrived at by the detaining authority that with a view to prevent the known goonda or known rowdy from committing any anti social activity within the State of Kerala, it is necessary to make an order directing such person to be detained. Put it differently, the continued activities of the person concerned during a period of seven

years could be taken note of to arrive at the subjective satisfaction by the detaining authority. This is quite different from the subjective satisfaction to be arrived at by the detaining authority under the COFEPOSA Act. It is true that the court could consider whether the detaining authority was alive of the facts necessitating the detention of the person concerned. In the facts and circumstances of the case, the delay as such is not a ground to snap the live link between the prejudicial activity and the detention order. As held by the Supreme Court in **Subramanian v. State of Tamil Nadu** (2012(4) SCC 699) the court will not interfere with the subjective satisfaction reached by the detaining authority except in exceptional and extremely limited grounds.

18. The COFEPOSA Act and the KAAPA would be applicable in different situations. The former is intended for the purpose of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith, whereas in the case of the latter, it is intended to provide for the effective prevention and control of certain types of anti social activities in the State of Kerala. The definition of anti social activity as defined in section 2(a) of the KAAPA makes the position clear that it means the 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 etc. The impact of the activities which attract the the KAAPA is a direct impact on the citizens, whereas, the activities which are sought to be dealt with by the COFEPOSA Act may have impact on the economy of the nation. The peace and harmony in the society would be lost if persons indiscriminately involve in anti social activities, which are sought to be prevented under the KAAPA. The legislature in its wisdom thought it fit to take into account the prejudicial activities of the person concerned for a period of seven years under the KAAPA.

19. The learned counsel for the petitioner submitted that even after the final report was filed in the crime

registered in respect of the last prejudicial activity, more than one month elapsed before issuing the order of detention and this delay also would vitiate the order of detention. We are of the view that the delay has been satisfactorily explained in Paragraph 12 of the counter affidavit filed by respondent Nos. 1 and 2, as mentioned above. On the aspect of the delay from 21.01.2015 to 05.03.2015 also, there is sufficient and satisfactory explanation.

20. In the present case, we are satisfied that the respondents have satisfactorily explained the delay in passing the order of detention. Therefore, we hold that the live link between the prejudicial activity and the order of detention has not been snapped.

For the aforesaid reasons, we do not find any ground to grant the reliefs prayed for in the Writ Petition.

Writ Petition is, accordingly dismissed.

**Sd/
K.T.SANKARAN,
JUDGE**

**Sd/
B.SUDHEENDRA KUMAR,
JUDGE**

dl