

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

THURSDAY, THE 17TH DAY OF SEPTEMBER 2015/26TH BHADRA, 1937

WP(Crl.).No. 377 of 2015 (S)

PETITIONER(S):

KUMARAN, AGED 55 YEARS
S/O.KANNAN, THAYYAL HOUSE, NITTUR
KUTTIADY, KOZHIKODE DISTRICT, PIN-673 507

BY ADVS.SRI.K.S.ARUN KUMAR
SMT.M.N.MAYA
SMT.RESMI THOMAS
SRI.M.S.DILEEP

RESPONDENT(S):

1. THE DISTRICT COLLECTOR
AND DISTRICT MAGISTRATE
KOZHIKODE, PIN-673 001
2. THE DISTRICT POLICE SUPERINTENDENT
KOZHIKODE, PIN-673001
- 3.STATE OF KERALA
REPRESENTED BY ADDITIONAL CHIEF SECRETARY
TO GOVERNMENT (HOME & VIGILANCE)
SECRETARIAT, THIRUVANANTHAPURAM. PIN-695 001

R1-R3 BY ADDL.DIRECTOR GENERAL OF PROSECUTION
SRI.TOM JOSE PADINJAREKKARA
R1-R3 BY GOVERNMENT PLEADER SMT.BINDU GOPINATH

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
17-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(Crl.).No. 377 of 2015 (S)

APPENDIX

PETITIONER'S EXHIBITS :

EXT.P1: TRUE COPY OF THE ORDER NO. S2/20473/15 OF DISTRICT COLLECTOR
DT. 18/6/15

EXT.P2: TRUE COPY OF THE REPRESENTATION DT. 27/6/15

EXT.P3: TRUE COPY OF THE GOVT.ORDER DT. 20/8/15

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.A. TO JUDGE

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

W.P.(Crl.) No.377 of 2015 S

Dated this the 17th day of September, 2015

JUDGMENT

K.T.Sankaran, J.

The main question involved in this Writ Petition is whether before passing an order under Section 3(1) of the Kerala Anti-Social Activities (Prevention) Act (hereinafter referred to as 'the KAAPA'), it is necessary that the detaining authority should pass another order declaring that the person concerned is a “known goonda” or “known rowdy”. Certain other points are also raised by the learned counsel for the petitioner which will be dealt with hereunder :

Vikas, the son of the petitioner, was detained in execution of the order of detention dated 18.6.2015 passed by the District Magistrate, Kozhikode. The order was executed on 24.6.2015. The order of detention was confirmed on 20.8.2015 holding

that the detenu was liable to be detained for a period of six months. The order of detention and the continued detention are under challenge in this Writ Petition.

2. The learned counsel for the petitioner submitted that though in Exhibit P1 order of detention there is mention that the detenu satisfies the definition of known rowdy under Section 2(p)(iii) of the KAAPA and that he is a known rowdy, there is no order preceding Exhibit P1 declaring that the detenu is a known rowdy or a known goonda and therefore, Exhibit P1 is liable to be struck down.

3. To comprehend the above contention raised by the petitioner, it is necessary to extract Section 3(1) of the KAAPA.

“3. Power to make orders for detaining Known Goondas and Known Rowdies :- (1) The Government or an officer authorised under sub-section (2), may, if

satisfied on information received from a Police Officer not below the rank of a Superintendent of Police with regard to the activities of any Known Goonda or Known Rowdy, that with a view to prevent such person from committing any anti-social activity within the State of Kerala in any manner, it is necessary so to do, make an order directing that such person be detained.”

4. “Known rowdy” is defined under Section 2(p) and “known goonda” is defined under Section 2(o) of the KAAPA. Likewise, 2(t) defines “rowdy” and 2(j) defines “goonda”. A person can be classified as “known rowdy” under three contingencies mentioned under sub-clauses (i), (ii) and (iii) of clause (p). That is, he was either convicted for an offence under clause (t) of Section 2 or he was found on investigation or enquiry by a competent 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. To attract Section 3(1) of the KAAPA, the Government or an officer authorised must be satisfied that with a view to prevent a known goonda or known rowdy from committing any anti-social activity within the State of Kerala in any manner, it is necessary to make an order directing that such person be detained.

5. The learned counsel submitted that since Section 3(1) speaks of the subjective satisfaction of the detaining authority with respect to the activities of a known goonda or known rowdy, it means that there must be an order declaring the person concerned to be a known goonda or known rowdy before arriving at the subjective satisfaction spoken to in Section 3(1). In other words, according to the learned counsel, there must be a separate proceeding by which the person

concerned must be held to be a known goonda or known rowdy and only thereafter, the Government or the officer authorised can exercise their power under Section 3(1) of the KAAPA.

6. Going by the scheme of the KAAPA, an order of detention under Section 3(1) shall be passed when the detaining authority arrives at the subjective satisfaction as mentioned in Section 3(1) of the Act. The action to be taken under Section 3(1) is peremptory and not after a long drawn adjudication. It is aimed at preventing the person concerned from indulging in anti-social activities. The definition of 'antisocial activity' in Section 2(a) indicates that the said activity affects the safety of individuals, safety of public etc. An order of preventive detention under Section 3(1) of the KAAPA is intended to prevent the person concerned from committing any anti-social activity. It cannot be assumed that the authority exercising the

power under Section 3(1) should make a declaration that the person concerned is a known goonda or known rowdy. If such an interpretation is taken, that would defeat the very purpose of preventive detention under the KAAPA. It is sufficient for the detaining authority to arrive at the satisfaction that the person concerned is either a known goonda or known rowdy and that an order of preventive detention should be issued to prevent him from committing any anti-social activity. The KAAPA itself makes a distinction between an order of detention under Section 3(1) and an order of restraint/externment under Section 15(1) of the KAAPA. An order under Section 15(1) can be passed only after issuing a notice to the person concerned and after affording an opportunity of being heard to him. Only after such hearing, the authority can pass an order restraining the person concerned from entering into any particular area. This is quite distinct and different from an order of detention under

Section 3(1). Before issuing an order of detention under Section 15(1), there is no question of issuing any notice to the person concerned. The other preventive detention laws like COFEPOSA Act also do not provide for such an opportunity or such an adjudication before passing an order of detention. We are not inclined to accept the contention put forward by the learned counsel for the petitioner in this regard.

7. The learned counsel for the petitioner submitted that there is delay in passing the order of detention which is not explained by the detaining authority. The last prejudicial activity referred to in the order of detention was on 5.3.2015. The order of detention was passed on 18.6.2015. It is submitted that the delay of more than three months would snap the live-link between the prejudicial activity and the order of detention. In ground 'H' in the Writ Petition, the petitioner

has taken a specific ground that the delay would vitiate the order of detention.

8. In paragraph 13 of the counter affidavit filed by the first respondent, the delay is sought to be explained as follows :-

“Last prejudicial activity committed by Vikas in Kuttiady PS Cr.132/15 under Sections 323, 324 and 308 read with 34 IPC was on 5.3.2015. On 9.3.2015, Vikas was surrendered before the JFCM Court, Nadapuram and the Hon'ble Court sent him to judicial custody till 19.3.2015. After conducting proper investigation and proving his involvement in the case, charge sheet against Vikas was submitted before the JFCM Court, Nadapuram on 20.3.2015. Preliminary report with connected records for initiating action under Section 3(1) of KAAPA 2007 with the recommendations of Inspector of Police Kuttiady and DySP, Nadapuram was forwarded to District Police Chief, Kozhikode Rural on 11.4.2015. On getting this report, District Police Chief, Kozhikode Rural evaluated the report and conducted confidential enquiry about the

activities of Vikas through District Special Branch staff and after satisfying, District Police Chief, Kozhikode Rural submitted report before the District Collector & District Magistrate, Kozhikode to initiate action under Section 3 of KAAPA against Vikas on 21.4.2015. After evaluating the report and observing all formalities, District Collector & District Magistrate, Kozhikode, issued detention order on 18.6.2015. Inspector of Police, Kuttiady detained Vikas on 24.6.2015. Hence, there is no inordinate delay occurred as alleged in the petition.”

9. It is seen from the counter affidavit that a final report was filed in respect of the last prejudicial activity on 20.3.2015. Till 19.3.2015, the detenu was in jail as an under trial prisoner. The recommendation was made by the Inspector of Police on 11.4.2015. A report was made by the District Police Chief to the District Collector on 21.4.2015. Considering the report and other materials, the order of detention was passed on 18.6.2015. On going through the

counter affidavit filed by the first respondent, we are satisfied that the delay in passing the order of detention has been satisfactorily explained. It cannot be said that the live-link between the prejudicial activity and the order of detention was snapped or that the order of detention has become stale on the date on which it was passed.

10. The learned counsel for the petitioner cited the decisions in **Jimesh Jose v. State of Kerala (2013(1) KLT 447)**, **Abidha Beevi v. State of Kerala (2013(1) KLT 286)** and **T.A.Abdul Rahman v. State of Kerala and others (AIR 1990 Supreme Court 225)**.

11. In **Jimesh Jose v. State of Kerala (2013 (1) KLT 447)**, there was a delay of 4½ months in passing the order of detention. It was held in paragraph 13 of the judgment that no

explanation was given for the delay either in Exhibit P1 detention order or in the counter affidavits filed by respondents 1 and 2. On that ground, it was held that the delay would vitiate the order of detention. In **Abidha Beevi v. State of Kerala (2013(1) KLT 286)** also, there was unexplained delay of 4½ months and the counter affidavits did not contain any explanation for the delay. Referring to **T.A.Abdul Rahman v. State of Kerala and others (AIR 1990 Supreme Court 225)**, the learned counsel stressed on the second part of paragraph 11 of the judgment. For the sake of convenience, we would extract the whole of paragraph 11 of the judgment which reads as follows :

“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 casual connection has been broken in the circumstances of each case.”

12. In **Licil Antony v. State of Kerala and another (2014(11) SCC 326)**, the prejudicial activity was on 17.11.2012 and the order of detention was passed on 6.5.2013. After referring to various decisions of the Supreme Court, it was held

in Licil Antony's case thus :

“9.While dealing with the question of delay in making an order of detention, the court is required to be circumspect and has to take a pragmatic view. No hard-and-fast formula is possible to be laid or has been laid in this regard. However, one thing is clear that in case of delay, that has to be satisfactorily explained. After all, the purpose of preventive detention is to take immediate steps for preventing the detenu from indulging in prejudicial activity. If there is undue and long delay between the prejudicial activity and making of the order of detention and the delay has not been explained, the order of detention becomes vulnerable. Delay in issuing the order of detention, if not satisfactorily explained, itself is a ground to quash the order of detention. No rule with precision has been formulated in this regard. The test of proximity is not a rigid or a mechanical test. In case of undue and long delay the court has to investigate whether the link has been broken in the circumstances of each case.

18.Even in a case of undue or long

delay between the prejudicial activity and the passing of detention order, if the same is satisfactorily explained and a tenable and reasonable explanation is offered, the order of detention is not vitiated.”

13. The learned Additional Director General of Prosecution submitted that the delay has been satisfactorily explained in the case and there is no unexplained delay which would vitiate the order of detention. He also relied on the decision of the Supreme Court in **Abdul Salam alias Thiyyan v. Union of India and others (AIR 1990 Supreme Court 1446)**. In Abdul Salam's case, the prejudicial activity was detected on 17.9.1987 and the order of detention was passed on 21.5.1988. Rejecting the contention that there was unexplained delay in passing the order of detention, the Supreme Court held thus :

“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 *Hemalata 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. The aforesaid decisions of the Supreme Court would fortify our conclusion that in the facts and circumstances, there

is no unexplained delay in passing the order of detention in the present case.

15. Lastly, the learned counsel for the petitioner submitted that the detenu is undergoing detention since 24.6.2015 and taking into account the facts and circumstances and the nature of the cases in which he is alleged to be involved, it would be just and proper to hold that the period undergone by him would be sufficient for the purpose. In other words, the contention raised by the petitioner is that the High Court exercising the jurisdiction under Article 226 of the Constitution of India would be entitled to reduce the period of detention fixed by the Government while passing the order of confirmation under sub-section (4) of Section 10 read with Section 12 of the KAAPA. A similar contention raised by the detenus in a case under the COFEPOSA Act was rejected by a

Division Bench of this Court in Leema Sebastian and Rasheeda v. State of Kerala and others (W.P.(Crl) Nos.115 and 5276 of 2015) (in which Justice K.T.Sankaran was a party) wherein it was held thus :

“The scheme of the COFEPOSA Act shows that the Court has no authority to revoke an order of detention. The Court can exercise its jurisdiction under Article 226 of the Constitution of India to hold that the order of detention is illegal on various grounds, namely, that the detaining authority did not apply its mind to the relevant factors while arriving at the subjective satisfaction, that the relevant materials were not placed before the detaining authority, that there is no live-link between the prejudicial activity and the order of detention and that the live-link has been snapped, etc. etc. The Court can also hold that the continued detention of the detenu is illegal in certain circumstances, for eg., when the representation of the detenu is not considered expeditiously. However, the High Court does not have the jurisdiction to limit the duration of the detention while disposing of a writ petition challenging the validity of the order of detention or challenging the continued detention under the COFEPOSA Act. Therefore, we reject the submission made by the learned counsel for the petitioner in W.P.(C) No.5276 of 2015 in this regard.”

16. The scheme of the KAAPA is also similar in many respects as in the case of COFEPOSA Act. Before passing an order of detention under Section 3(1), the Government or the officer authorised need not issue notice to any party or hear him. The order of detention can be straight away executed and the person concerned can be detained. The procedure on arrest of the person concerned is provided in Section 7 of the KAAPA. The order of detention shall be read out to the person concerned by the officer arresting him and a copy of the order shall be supplied to him. The grounds of detention along with the copies of relevant documents shall be furnished to the detenu as soon as possible and in any case within five days of the detention. The detenu would have a right to make a representation to the Government as well as before the Advisory Board against his detention. The Superintendent of Jail where the person is detained is bound to afford reasonable

opportunity to the detenu to consult a lawyer and provide reasonable assistance to him in making a representation against the detention order. The Government shall, within the time provided under Section 9 refer the matter to the Advisory Board. Based on the opinion and report of the Advisory Board, the Government is either bound to revoke the order of the detention or is entitled to confirm the order of detention, depending upon the nature of the report. There is no provision in the KAAPA which justifies the intervention of the court in the matter of fixing the period of detention under Section 3(1). That the court has no jurisdiction to alter the period of detention under Section 3(1) is also clear from the grant of such power to the Advisory Board under Section 15(2) of the KAAPA. In the case of externment under Section 15(1), the person concerned has a right to make a representation before the Advisory Board and the Advisory Board can annul, amend

or confirm the order either in part or in full. It was held by a Division Bench of this Court that this power which the Advisory Board possesses, can be exercised by the court while disposing of a Writ Petition challenging the order under Section 15(1) as well. Such a power cannot be exercised by the court in the case of an order of detention under Section 3(1). We reject the contention raised by the learned counsel for the petitioner in this regard.

For the aforesaid reasons, we do not find any ground to hold that the order of detention or the continued detention is vitiated. The Writ Petition is accordingly dismissed.

**K.T.SANKARAN
JUDGE**

**RAJA VIJAYARAGHAVAN.V.
JUDGE**

“**Section 15(1)**” occurring in line 2 at page 7 (paragraph 6) of the judgment dated 17.9.2015 in W.P.(CrI.) No.377/2015(S) is corrected and substituted as “**Section 3(1)**”, vide order dated 9/11/2015 in W.P.(CrI.) No.377/2015(S).

Sd/-
Registrar (Judicial)