

Petitioner Vs. Respondent

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SooperKanoon Citation : sooperkanoon.com/1181280

Court : Kerala

Decided On : Apr-12-2016

Judge : Thottathil B. Radhakrishnan & The Honourable Mrs. Justice Anu Sivaraman

Appeal No. : W.P.(C) Nos. 14978, 14993, 15004, 15008 of 2016 & DBA Nos. 1, 2, 3, 4, 5, 6, 7, 8 & 9 of 2012 & O.P. No. 3821 of 1990

Appellant : Petitioner

Respondent : Respondent

Judgement :

Thottathil B. Radhakrishnan J.

1. WP(C) 14978 of 2016 is registered suo motu in exercise of authority under Article 226 of the Constitution of India on the basis of the letter and materials furnished by learned Brother Honourable Mr Justice V. Chitambaresh and the report made available by the District Legal Services Authority, Kollam by mid-night following the day of the incident that occurred on 10.04.2016 in Puttingal Devi Ternple, Paravur, Kollam, in which we are told that as of now, around 109 persons are reported dead and large number are still in hospital. Some of the dead bodies appear to have been charred beyond identification and are awaiting classification through DNA finger printing processes.

2. Brother Honourable Mr. Justice V.Chitambaresh has, in his erudite letter, emphasised the value of life and fundamental right to life guaranteed under Article 21 of the Constitution of India. He has, in our view, quite rightly, pointed out that the right to profess, practice and propagate religion of one's choice as guaranteed under Article 25 of the Constitution of India does not take with it the freedom to use dangerous crackers. We may here note specifically that Article 21 of the Constitution of India is the guarantee of the seminal right to life, co-extensive with human rights and also generated on the basis of the Indian concept of life in its fullest sense. Article 25 is essentially a covenant by which a protection is granted to profess, practice and propagate religion. Though that provision is brought in Part-III of the Constitution of India, it does not run with the qualitative potency co-extensive with the fundamental right to life guaranteed under Article 21 or the secular equality doctrine enshrined in Article 14. Article 25 is thus, essentially, a component of constitutional guarantee, which is fundamental for the existence of an Indian citizen, if that person intends to profess, practice or propagate religion. In that sense, in its truest nature it has to be treated only as one that is subservient to Article 21 of the Constitution of India. Equally so, we cannot also ignore that the fundamental right guaranteed under Article 25 carries with it the inexcusable exceptions founded on doctrines of morality, public order etc. Therefore, those exclusions run as salutary compliments to the fundamental right to life guaranteed under Article 21 and energise the equality doctrine under Article 14. While operating the constitutional guarantee under Article 25, which is fundamental in nature, the exclusionary provisions thereof lay down the extent to which the primary secular provisions of Part-III of the Constitution would operate. Insofar as the right to life under Article 21 is concerned, there can be no abridgment with reference to Article 25 because the doctrines of morality, public order etc. are nothing but an infeasible reflection of right to life enshrined in Article 21 of the Constitution of India.

3. We are, therefore, in agreement with the views expressed in the communication addressed by brother Mr. Justice Chitambaresh that time appears to be ripe to consider immediate judicial intervention to the extent that may be required, having regard to the totality of the facts and circumstances of the gruesome situation that has resulted out of the man made catastrophe in Paravur. We see that this is

required, not only to analyze and reach at the wrongdoers of that incident, but also to provide a future firm and well informed platform to be operated upon by the executive, so that there will be complete control of such activities throughout the State of Kerala.

4. Before we proceed to look at certain aspects touching the Paravur incident in relation to alleged failure of the executive machinery or the police machinery, or otherwise, we would initially address certain broader aspects that relate to the use of explosive materials in connection with places of worship and festivals, including public festivals;. 'Adirvettu or Kadina' is permitted to be fired as an activity using explosives. A search of the law relating to explosives will show that these materials are permitted to be used in the States of Andhra Pradesh and Kerala and may be in the other southern States as well, recognizing the use of such materials in connection with rituals and religious activities. But, it was specifically laid down by this Court in Chandran v. Cochin Devaswom Board (2012 (2) KLT 675) that such activity, even if referable to rights under Article 25 of the Constitution, could be exercised only in accordance with the regulatory provisions contained in the Explosives Act and the Rules. The requirement of licences and the connectivity between different licences in relation to such activities were elaborately dealt with in that judgment. Concluding that judgment, it was directed that though what were being considered therein were activities in different temples of the CDB, the law noticed and stated therein is not confined to temples. Therefore, the law enforcing authorities under the Union of India and the State of Kerala, including the District Administrations, that is to say, District Magistrates, ADMs etc. and the authorities under the Explosives Act and Rules were required to take immediate steps to ensure that there is no violation of those laws in that regard. Through a different order issued in that case on 11.04.2012 it was also stated that there was no intelligible differentia to classify temples depending upon its managements, genesis, ownership or trusteeship to fall within the laws governing the use of explosives, including use of gun powder, in the State of Kerala. This means that it is one of the fundamental principles of law that in all activities where explosive substances are utilised in connection with religious institutions or otherwise, such activities can be carried out only in accordance with the provisions of the Explosives Act and the Rules framed thereunder. If licences

are required, they have to be obtained. If law is violated or if any of the conditions of licence is violated, the law has to take its course against the offender. There can be no braking system, that could be applied by extra constitutional power points in the free flow of the consequences of illegal actions.

5. Deputy Chief Controller of Explosives, Thiruvananthapuram has brought to the notice of this Court through a report submitted through the learned Assistant Solicitor General of India that there were clear violations of laws in relation to the Paravur incident. After evaluation of the site and materials, he has included in that report the different aspects touching the matter. The materials produced will also show that the District Magistrate, Kollam and the District Police Chief, Kollam City were alerted about the requirements of law. We take on record that report and order that the said report, including the annexure thereto, will stand appended to this order.

6. From the aforementioned laws and the report, it is beyond doubt that the use of explosives can be only in accordance with what is contained in the laws relating to explosives, the relevant provisions of which are reflected in the appended report. This includes complete exclusion of sound producing explosives between sunset and sunrise and what could be had during the night times is only colour-lights performances without creating any sound whatsoever. The sound, during the time for which it is permitted to be used during day time, cannot also exceed the prescribed limit. All such activities have to be only by maintaining and obeying the distance rules and security measures. This applies to places of storage and places where fireworks are activated.

7. In furtherance of all directions issued hereinbefore by this Court, it is hereby directed that all officials of the Union of India and the State of Kerala having control over the territory of State of Kerala, including the Police Officers, shall ensure that there is no use of explosives in any part of the state except in strict obedience of the contents of the law relating to explosives. If there is any lack of supervisory control or superintendence by the executive or the police, it has necessarily to be treated as dereliction of duty resulting in activity which may tend to impair the life and property. This ought to be visited with penal consequences in

accordance with law, apart from liability in compensatory jurisdictions. It is so found. It is further ordered that any infraction of the statutory provisions over the aforesaid declaration and direction can be brought to the notice of the Chairman of the District Legal Services Authority having jurisdiction over the area concerned or the Member Secretary of the Kerala State Legal Services Authority, who will look into all such cases and put up such matters with requisite reports for consideration of the jurisdictional courts, including the High Court; if necessary with necessary legal aid, as may be found necessary, on case to case basis.

8. Now, we proceed to consider certain aspects in relation to Paravur incident. The learned Senior Government Pleader assisting the learned Advocate General submitted that the District Magistrate, Kollam has refused the application of the temple authorities or the persons who were intended to perform the fireworks, for licence. Going by his submissions and also that of the other Advocates, who were appearing, it appears that the executive and the police tried to distinguish between fireworks (kambam), which are competitive and non-competitive. Competition in performance of kambam (fireworks) is stated to have been in vogue. The laws relating to explosives do not make a distinction on the application of the statutory provisions on the basis of the display being competitive or otherwise. No dilution is made in the rules for non-competitive fireworks display. If competitive firework display is itself an element which would alert the State or the District Magistrate to refuse permission, that is altogether a different matter. But, the mere fact that a particular firework display is not a competitive one does not bring home for that performance any softer terms insofar as the application of the statutory provisions is concerned.

9. The learned Senior Government Pleader further submitted that immediately before the fireworks started, the local Circle Inspector of Police went over to the office of the temple committee and asked for evidence of permission to carry out the fireworks, According to the Circle Inspector, he was assured that the permit will be brought and made available to the Police Station, it is submitted. We are dealing with a substance and a branch of law, where ignition happens without waiting for orders. No reasonably prudent common man, leave alone a police officer of the rank of Circle Inspector, could have ever gone back from the temple

committee's office with such an assurance. We would not be able to swallow that explanation even with a spoon full of salt. The Commission of Police, Kollam City is before us. He is also the District Police Chief, Kollam. There is no material available with the Police that the temple administration had any licence under the explosives law to carry out the activity which resulted in the incident in hand. The materials disclose that large amount of explosive materials and other add-ons which are required to make the crackers were available at the scene of occurrence. It is submitted that there are two permanent sheds in the temple compound, where crackers and other materials are stored. Are they magazines for explosives, in accordance with law? Are they licensed premises to store explosive substances? If this activity is an annual event and if the Police and the local executive officials were aware that it was an unlawful activity, it was the clear obligation of those officials to prevent such activity being carried on. Chapter XI of Code of Criminal Procedure deals with preventive action of the Police. Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate, and to any other officer whose duty is to prevent or take cognizance of the commission of any such offence. This is a statutory duty of every police officer under Section 150 CrPc. Every police officer is entitled to interpose for the purpose of preventing and he is duty bound, to do so to the best of his ability, to prevent commission of any cognizable offence, going by Section 149 Cr PC. Section 151 authorises a police officer to make an arrest if the commission of a cognizable offence cannot be otherwise prevented. Such a preventive power of arrest is enjoined in law. Equally so is the power to prevent injury to public property. If the police knew about the presence of a large collection of explosive materials and the eminent and inexcusable event that would happen, that is to say, the unauthorized fireworks activity, it was the bounden duty of the police to immediately intervene and enforce the rule of law by preventive police power. This is among the fundamental guarantees, which is seminal to the rights of every individual citizen to equality before law and equal protection of the laws.

10. The provisions of the Explosives Act, include the power to arrest without warrant. The different provisions of punishments are provided therein. Abetment, aiding etc. also fall as offences under the Indian Penal Code as well as under the

Explosives Act.

11. We queried with the Senior Government Pleader as to what is the quality of any police action taken at least after the event. He said that first information report has been registered in the local police station for offences punishable under Section 304 and other provisions of the IPC, however not with reference to Section 34, Section 120B or Section 302 IPC. We wonder for ourselves as to why the police, at the very initial stage of registering an FIR should be concerned of starting an investigation with a lesser offence where the totality of the facts and circumstances to a police officer is of due magnitude and policing powers would have the vision to see that the case made out could fall at least under the definition of murder in Section 300 (fourthly). We make this statement in a very conservative manner and being aware of the repercussions of such statements being made by the High Court. We here and now make it clear that this is not to be used ultimately against any person, but we cannot but make the statement if we are to proceed further on what we want to say. We envision the role of the Station House Officer who registers the FIR and the investigator and ultimately the role of the public prosecutor as the expected seat between the investigating agency and the adjudicating judicial authority. The fourth limb of Section 300 IPC provides that if the person committing the act knows that it is so eminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid, such culpable homicide is murder. The exceptions provided do not in any manner bring in this particular clause to be relevant for the exceptions. If the person involved in the activity of committing the act of carrying out the fireworks and the temple authorities are to be presumed to be the normal human beings, it is within the common course of human conduct to infer that the consequences of their act will be in violation of the laws when such activity is carried out in breach of the requirement for licence. If such activity results in causing death or injury, there is no reason why such a case should have been dumped off even at the FIR stage to be one as not falling within the scope of Section 300 (fourthly), thereby providing a safety valve at the exception from the penalty prescribed under Section 302 IPC. Chapter V of IPC deals with abetment. The third limb of Section 107 provides that if a person who intentionally aids, by

any act or illegal omission, the doing of a thing, that person abets the doing of that thing. Explanation 2 to Section 107 provides that whoever, either prior to or at the time of the commission of an act, does anything inordinate to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act. The illegal omission contemplated in the third limb of Section 107 is abundantly available when the executive and police officials had failed to carry out their statutory and public duty of preventing the commission of offence, punishable in law and also by not doing the needful to protect the life and property of the citizens. The statutory duty of every such officer in command is an inexcusable component of acts and omissions which would fall within the terminology "illegal omission" when omissions are made in violation of the command of law. Section 119 IPC provides, among other things, that whoever, being a public servant, inter alia knowing it to be likely that he will thereby facilitate the commission of an offence, which it is his duty as a public servant to prevent; voluntarily conceals, inter alia by his omission, the existence of a design to commit such offence, such public servant is punishable. If the police officers and the executive officers of the area concerned were aware of the likelihood of commission of such offence of using explosives without licence, there is an intrinsic aiding process in them which makes it culpable under Section 119 IPC. Section 12 of the Explosives Act deals with abetment. As already stated by us earlier, we note all these provisions to indicate that even the bare minimum has not been done while registering the FIR as if it is one of those cases of the traditional run of the mill, and matters that would go under the carpet of an allegation of an offence punishable under Section 304 and allied sections of IPC and the marginal less punitive provisions of the Explosives Act.

12. We do not know as to what is the explanation of the police to the aforesaid situation. All that has been mentioned is that the local Circle Inspector of Police was an apparently bona fide good Samaritan who took statements for granted. We do not know whether the District Police Chief, who is the City Police Commissioner, has a different version than the fact that the District Magistrate had refused the request for explosive licence.

13. We have also heard the other captioned writ petitions which are tagged along with the matter registered suo motu. Those were tagged along to avoid conflict of decisions. There are allegations in the connected matters as to how there would have been unauthorised intrusion by different means to have the fireworks to be permitted to be carried out even without a licence. We would not from the judicial seat use words like corruption, nepotism, administrative inefficiency etc., as of now, particularly when an investigation is on. But one thing is certain. We have a police force which is treated as a credible one. We have an executive which also has its good way of doing things. But how and where did the failure happen? How was it that large quantities of explosives and add-ons were utilised? The explosives and the preparations could not have been had overnight. Where was the intelligence wing of the State? We are told by the Police Commissioner that there are good number of festivals, processions etc., which happen in jurisdictions under him and all of them have to be handled by providing appropriate police support. He says that there was contingent of about 100 police men at the scene of occurrence in question and one police man lost his life:. Well, we leave it to the State to tell us as to whether it would be appropriate for the State Police to continue with the investigation of the case. We are told by the learned Senior Government Pleader that the Investigation was taken over from the local unit and is now being dealt with by the Crime Branch under the supervision of the Additional Director General of Police. But, having regard to the quality of allegations and the probability of different aspects emanating out of what we have pointed out above with reference to the statutory provisions in the IPC and elsewhere, that issue, we are sure, would gain better attention of the State Government, particularly when there is a relief sought for in one of the writ petitions, that the case be made over for investigation by the Central Bureau of Investigation. One thing that we want to sound at this point of time is that passing over an investigation, either under the compulsion of court or otherwise, to a different agency should not happen after a long lapse of time, if it is decided to do so. Delay in such matters has often reflected in the quality of investigations, prosecutions and the resultant decision making process in judicial jurisdictions, owing to lacuna in the investigation, solely attributable to the enormous delay that happens in such matters.

14. Before parting, we may also sound a word of caution which occurs to us. The geographical situation of Paravur is such that it has the high seas as boundary on one aspect. Another sector is bound by backwaters. It is easily accessible from the high seas, unless of course the protection of our high sea boundaries and India's territorial waters are fully under the command and control to the fullest satisfaction of the protection agencies of the Union of India and the State. The case involves use of large quantity of explosives. If for any reason there is likelihood of some tampering of the evidence which, we are sure, would not happen, having regard to the assurance given by the Police Commissioner that the requisite areas have been appropriately cordoned off, it would be worthwhile to think, not twice, but thrice, as to what would be the course of action in the investigation that the State Government would take. If there is possibility of involvement of anti national elements, or some seeds of attempt to commit offences which ultimately, may turn out to be those covered by the provisions of different statues of national governance and policing, including UAP, Act; that should be pondered over deeper.

15. We have heard the other captioned writ petitions which are tagged along with the matter registered suo motu. There are some cases which are already pending before this Court in relation to the fireworks and allied matters in temples. They are the DIBAs which are also listed today, apart from OP No.3821 of 1990, which relates to general administration of Devaswom Boards.

16. WP(C)I No.14978 of 2016 is admitted. Learned Assistant Solicitor General of India appears for respondent Nos.1 and 4. Learned Government Pleader appears for respondent Nos.2, 3 and 5 to 8. Respective learned standing counsel appear for respondent Nos.9, 10, 11 and 12. Adv.P.Chandrasekhara Pillai appears for CBI. Member Secretary in-charge, Ke LSA has been instructed to make appropriate arrangements. Service treated as complete.

17. WP(:C) Nos.14993, 15004 and 15008 of 206 are also admitted. Learned Senior Government Pleader appears for respondent Nos.1 and 2 in WP(C) No.15008 of 2016. Insofar as WP(C) No.14993 of 2016 is concerned, learned Senoir Government Pleader appears for respondent Nos.1 and 2, learned

Assistant Solicitor General of India, appears for respondent No.3 and learned standing counsel for CDB appears for respondent No.4. Issue notice to respondent No.5. Insofar as WP(C) No.15004 of 2016 is concerned, learned Senior Government Pleader appears for respondent Nos.1 to 7 and the learned Assistant Solicitor General of India appears for respondent No.15. Issue notice to others by special messenger.

18. The learned Senior Government Pleader submitted that State Government has convened an all party conference which is scheduled to be on 14.04.2016 at 2 p.m. and that the decision could be made available at 4 p.m. and, that the State Government will be able to apprise this Court of the views that would be generated in that meeting. We can visualise that matters relating to compensation and measures of rehabilitation, including identification of the real victims, so that rehabilitation measures reach the real victims etc., would fall as matter for deliberations in that meeting. On agreement of all parties, this Bench has decided to hold its next sitting at 4 p.m. on 14.04.2016.

19. Having regard to the importance of the questions raised in this matter, we had requested Adv.C.S.Dias and he has consented to act as amicus curiae in the case. Show his name in the cause list.

We hasten to add that we have not entered any concluded finding or made any observation that would impair the course of any other proceedings, including investigation.

Post on 14.04.2016 at 4 p.m.

Handover to all sides.

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