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Court : Kerala

Decided On : Mar-13-1975

Reported in : 1976CriLJ320

Judge : T. Chandrasekhara Menon, J.

Appellant : Abdulla and ors.

Respondent : State

Judgement :

ORDER

T. Chandrasekhara Menon, J.

1. In all these cases the notification issued by the Government of Kerala No 48789/SSI/Home dated 9-10-1974 is under attack. Tho said notification amends the Kerala Security Prisoners Order, 1971 (hereinafter referred to as the Order). By the same, Clause 4 of the Kerala Security Prisoners Order was substituted, The substituted clause states that:

Security Prisoners shall be treated as on class without discrimination irrespective of their education status or mode of living before detention and shall be provided with diet clothing and other privileges as laid down under the Order. But prisoners detained on grounds referred to in Section 3(1)(a)(iii) or 3(1)(c) of the Maintenance of Internal Security Act, 1971, shall be treated as 'C Class Prisoners under the

Kerala Prison Rules in respect of matters covered by clauses 6, 7, 8, 9, 10, 14 and 19 of the Kerala Security Prisoners Order.

Also, in the said notification, after clause 15, the following clauses were inserted as 15 (A) namely, '15A. Interviews of persons detained under Section 3 (1) (a) (hi) or 3 (1) (c) of the Maintenance of Internal Security Act, 1971 - Notwithstanding anything contained in clause 15, applications for interviews of Security Prisoners detained on ground referred to hi Section 3 (1) (a) (iii) or 3 (1) (c) of the Maintenance of Internal Security Act, 1971, by relatives, Advocate/ Lawyer or other person shall be made to the Government and Government may allow such application subject to such conditions or restrictions as they think fit to impose. The notification also deletes Clause 29 of the Order.

2. The Government, by Order dated 19th December, 1974, No, 60222/SS1/74/ Horn which was issued in exercise of powers conferred by Section 5 of the Conservation of Foreign Exchange and Prevention of Smuggling; Activities Act, 1974, (Central Act 52 of 1974), ordered, that the provisions of the Order, 1971, as amended by the notification referred to earlier, as are applicable to persons detained on the ground referred to in Section 3 (1) (a) (iii) of the Maintenance of Internal Security Act, 1971, shall mutatis mutandis apply to any person in respect of whom detention Order has been made under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

3. O. P. No. 239 of 1975 has been Iffier by one K. S, Abdulla, who has been arrested and detained at the Central Prison, Trivandrum by order dated 20th September, 1974 of the State of Kerala and another order passed by the Central Government dated 21st September, 1974, ordering his detention under Section 3 (1) (c) of the Maintenance of Internal Security Act, (M. I. S. A.) 1971 as amended by Ordinance No. 11 ot 1974, on the ground that he smuggled goods to India and abetted others to smuggle goods into India.

4. O. P. No. 313 of 1975 has bee. filed by the wife of Kallatra Abdul Khadar Haji, similarly detained. O. P. No. 321 of 1975 has been filed by the wife of Ibrahim Soopi, who was also detained under M. I. S.A, The wife of M. B,. Abdulla who is also detained under similar grounds has filed O. P. 323 of 1975. O. P. Nos. 326

and 329 of 1975 have been filed by the wives of two other detenus, M. B. Moosa and v. A. Mohanan. Another detenu T, M. Thomas who also like the others has been detained on the ground that he smuggled goods to India and abetted others to smuggle goods into India, has filed O. P. 437/75:

5. The contention taken up in all these Original Petitions are that the detenus who are accustomed to a decent and superior mode of life are being treated as ordinary convicts on account of the notification amending the order. It is stated that no distinction is made between a convicted prisoner and detenus. They have been deprived of their bedding and mattress and are being served only with inferior type of food unfit for human consumption, It is further alleged that the furniture, bed, clothes, slippers etc., provided for them have been taken away after the notification and they are made to sleep on the floor without any pillow or mattress, and they are not free to get any legal aid.

6. According to the petitioners, the preamble of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act Central Act 52/74, would indicate that the Act had been enacted for the effective prevention of smuggling and smuggling activities which affected the national economy. They would contend that the object of the preventive detention is to prevent persons from carrying on their alleged illegal activities. The detention being preventive and not punitive, it would be unjust and inequitable to treat them as ordinary convicts as no offence or crime has been proved against them. No purpose would be served by imposing such onerous and unjust conditions which have no relation or nexus to the objects of the Act.

7. It is further pointed out in the petitions that under the law relating to the preventive detention, several persons including persons who are now being detained as economic offenders are being detained, in accordance with the Kerala Security Prisoners Order, 1971, while it is only persons who have been detained for alleged smuggling activities or acts prejudicial to the Conservation of Foreign Exchange are being detained as if they are convicts. This distinction even among persons who are detained under the law relating to preventive detention and even among persons who are otherwise called economic offenders is alleged to be

illegal and void and violative of Article 14 of the Constitution. Their case is that, under the guise of a detention under Act 52 of 1974, the conditions imposed by the impugned notification are really intended to make it what otherwise will be preventive detention into punitive detention and therefore the detenus are imposed the punishment without their being put on trial for any alleged offence committed by them.

8. Another contention that is raised by the detenus or on their behalf is that there is no change of the purpose or object for which they are being detained, except that a new Act has been passed for regulating such detentions. They submit that it does not call for conditions being imposed relating to maintenance which are different from and at variance with the Rules relating to such detenus as originally framed under the Order. Classification and distinction sought to be made are alleged to be unjust and that they have no connection with the object or scope of Central Act 52 of 1974. The amending notification passed by the State of Kerala is alleged to be mala fide in so far as it singles out persons detained under Central act 52 of 1974 for unjust treatment for no apparent reason whatsoever,

9. It is also alleged that even in respect of persons convicted for offences, classifications are made consistent with the status of the convicted prisoner. It is stated, there is no reason for the Government to make a different set of rules by the amending Notification in respect of persons detainee under Act 52 of 1974. Now, I would refer to the specific grievances which the petitioners have on account of the amending notification.

10. Clause 7 of the Order shows the schedule of food that shall be given to all security prisoners. It is also provided therein that the additional allowance of Rs, 15/-per month would be given for purchase of sundry items and that the diet prescribed may be modified by the Superintendent on the Medical Officer's recommendation. The security prisoners are allowed to bring their own cooking vessels and feeding utensils. Further, by the amendment introduced by the notification the detenus are now given the food of a 'C Class prisoner as prescribed in the Kerala Prisoners Rules.

11. Under Clause 6 of the Order, the Security Prisoners shall be supplied with one cot. Under Clause 9 of the said Order, a security prisoner will be supplied with a bedding given to 'A' class prisoners of the jail when he is unable to provide himself with sufficient bedding. The said Clause further provides that two pairs of chappals Shall be supplied to each security prisoner in a year. He shall also be supplied with mosquito net. These facilities were taken away by the impugned notification. By that the detenu is not allowed to wear suppers which he is accustomed to use. He has also been deprived of the bedding and mattress with the result that he is made, to sleep on the floor without the pillow or mattress. The security prisoners usually will be provided with six shirts, six pyjamas or clothings, six banians, six under-wears and six towels annually as provided in Clause 8 of the Order. They are allowed to change the items according to their requirements. They could also make private arrangements at their own cost for additional clothings over and above what is supplied by Government to them. By the impugned notification, now they are given only two shirts and two dothies which are quite inadequate. They cannot also make private arrangements at their costs for the additional clothings, It is alleged by the petitioners that these are quite illegal and unjust. .

12. Clause 10 of the Order which had given facilities for use of toilet articles have also been deleted now by the impugned notification; similarly, Clause 19 (4) of the Order which had permitted the security prisoners to have table fans at their own expenses. The petitioners contend, that the conditions now imposed by the impugned notification are onerous and unjust.

13. Another grievance is that Clause 29 of the Order which provides that the security prisoner shall be allowed all reasonable faculties to obtain legal advice will, as per the impugned notification, be not applied to detenus under the Central Act 52 of 1974, Clause 29 provides that correspondence in regard to legal advice will be treated as personal matter, which is deleted by the impugned notification. It is alleged that the Government is now permitting to meet the detenu's Advocate only in the presence of the Officers of the Customs, Enforcement Directorate or Central Excise etc, The further allegation is that it is only intended to coerce and compel the detenu from conveying or discussing his legal matters freely and confidentially. Clause 15A introduced by the impugned notification is said to be an

inroad to the freedom of A detenu to discuss the legal matters with his lawyers freely and confidentially. It is also averred that Clause ISA confers unlimited power on the Government to impose such unlawful restrictions and therefore the said Clause is ultra vires of Central Act 52 of 1974. No guideline is prescribed as per Clause 15A introduced by the notification as regards reasonable restrictions imposed at the time of the interview with the detenu. It has given arbitrary and naked power to the authority. Clause 15A is alleged to be violative of Articles 14 and 16 of the Constitution.

14. In some of the cases applications for amendment have been filed, by which a new ground is taken. The said ground is that the petitioners in those Original Petitions belong to the Malabar area or the erstwhile State of Madras which is governed by the Prisoners Act of 1894. Though they are detained in Trivandrum, they were arrested from Malabar area. It is said that Sections 31, 32, 33 and 40 of the Prisoners Act which are relating to the food, clothing bedding and visits of prisoners of Civil and unconvicted criminal prisoners are totally violated by the amendment introduced to the Order by the impugned notification.

15. As will be clear from the above the main contention that is taken in all the cases is that the object of the detention being only preventive and not punitive there is absolutely no justification to deny the privileges granted to other security prisoners under the Order to the detenus who are detained under Section 3 (1) (c) of the M. I. S. A. 1971. The classification made by the Government under the impugned notification deleting those rights to persons like the petitioners is unreasonable and hence illegal and violative of Article 14 of the Constitution. The classification has no relation or nexus to the objects of the Act.

16. In the common counter that has been filed to these Original Petitions, on behalf of the first respondent, State, the following contentions are taken:

(I) The detenus referred to in the Writ Petitions are being detained under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities, Act, 1974. The reliefs prayed for in the Writ Petitions are ancillary to the detention ordered in exercise of the power referred to above, the validity of which cannot be challenged in courts of law in view of the Presidential Proclamation

under Article 359 of the Constitution of India. Therefore, the Writ Petitions are not maintainable.

(II) The Central Act 52 of 1974 was enacted to provide for preventive detention for the purposes of conservation and augmentation of Foreign Exchange and Prevention of Smuggling Activities and for matters connected therewith. Violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy which in turn adversely affect the security of the State, Having regard to the persons by whom and the manner in which such activities or violations are organised and carried on, and having regard to the fact that smuggling activities of a considerable magnitude are clandestinely organised and carried on, these detenus stand as a class of economic offenders who have to be dealt with differently from other detenus. The treatment meted out to them should serve as a deterrent to persons indulging in economic offences of smuggling and foreign exchange violations.

(III) The petitioners' allegations that the provisions contained in the impugned notification are discriminatory in treatment, and that the classification contemplated therein is not a reasonable one, and that it has no nexus to the objects sought to be achieved by the Act are incorrect and untenable. It is stated anti-social, but at the same time deceptively respectable members of the community, tempted by the heavy pay off in white collar crime, such as, smuggling and foreign exchange racketeering, invariably face the perils of the law hoping that they could get away lightly even if their antisocial activities are detected. A very serious view therefore has to be taken of such activities which, it is said, show a distressingly growing tendency. It is said that if members belonging to high status of life should show scant regard for the laws of this country which are for public good for protecting our foreign trade or exchange position, the consequences for the violation of such laws must be equally deterrent. The kind of treatment meted out to them while under detention should have a deterrent effect and in this regard should be different from the kind of treatment meted out to other categories of detenus, as for instance, persons detained for activities on the basis of certain ideologies believed in by them. It is said that the economic offences committed by white collar criminals are unlikely to be dissuaded if a gentle treatment is offered to persons

kept in detention to prevent such anti-social activities. Having regard to the nature of the activities indulged in by the detenus for which their preventive-detention became necessary, it is said, the Government were of the view that they should be treated no better than 'C class prisoners in jails in the matter of physical amenities like food, clothing etc., and in matters affecting security like interviews etc., the provisions of the Order as amended by the impugned notification, should apply. The State's case is that the notification is based on rational classification of detenus having a nexus to the object of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. ,

17. The first contention put forward on behalf of the State by the learned Additional Advocate General is that the validity of the notification concerned cannot be challenged in courts of law in view of the Presidential Proclamation which reads as follows:

G. S. R. 694 (E).- In exercise of the powers conferred by Clause (1) of Article 359 of the Constitution, the President hereby declares that

(a) the right to move any court with respect to orders of detention which have already been made or which may hereafter be made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), or with respect to any other action (including the making of any declaration under Section 9 of the said Act) which has already been, or, may hereafter be, taken or omitted to be taken in respect of detention under such orders, for the enforcement of the rights conferred by Articles 14, 21 and Clause (4), Clause (5)' read with Clause (6), and Clause (7) of Article 22 of the Constitution, and

(b) all proceedings pending in any court for the enforcement of any of the aforesaid rights with respect to orders of detention made under the said Act or any other action (including the making of any declaration under the said Section 9) taken or omitted to be taken in respect of detention under such orders,

shall remain suspended for a period of six months from the date of issue of this Order or the period during which the Proclamation of Emergency issued under Clause (1) of Article 352 of the Constitution on the 3rd December, 1971, is in

force, which ever period expires earlier.

2. This order shall extend to the whole of the territory of India.

What is suspended as per the said Presidential Order is the right to move any court with respect to orders of detention which have already been made or which may hereafter be made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Central Act 52 of 1974 or with respect to any other action which has already been, or may hereafter be taken or omitted to be taken in respect of detention under such orders. The petitioners are not questioning the order of detention nor any action taken in respect of detention under such orders. The expression 'any other action' referred to in the Presidential Order in the context in which it occurs cannot take in the treatment that has to be meted out to the persons who are to be detained when they are being detained, The 'any other action' there, takes in matters similar to the making of any declaration under Section 9 of Central Act 52 of 1974 which enables particular cases in which and circumstances under which persons may be detained for longer than three months without obtaining opinion of the Advisory Board, They are matters directly connected with the making of the order of detention. According to me, the Presidential Order could have no application in respect of matters which are not so directly connected with the order of detention like the manner in which a detenu is to be treated in Jail. Therefore I hold that the petitions are maintainable.

18. Reading the State's Counter, one gets the impression that the State has missed in this case the, object of preventive detention. Preventive detention is a serious invasion of personal liberty. I may in this connection quote the following words of B.K. Mukerjea, J., as he then was, in *Gopalan v. State of Madras* : 1950 CriLJ1383 .

The expression has its origin in the language used by Judges or the Law Lords in England while explaining the nature of detention under Regulation 14 (B), Defence of Realm Consolidated Act, 1914 passed on the outbreak of the First World War; and the same language was repeated in connection with the emergency Regulations made during the last World War. The word 'preventive' is used in contradiction to the word 'punitive', To quote the word of Lord Finlay in *Rex*

v. Halliday, 1917 A.C. 260 at p. 269: (86 LJKB 1119), it, is not a punitive but a precautionary measure. The object is' not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, not any charge formulated; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence: vide Lord Macmillan in Liversidge v. Anderson. (1942) A.C. 206 at p. 954: (110 LJKB 724). Detention in such form is unknown in America, It was resorted to in England only during war time but no country in the world that I am aware of has made this an integral part of their Constitution as has been done in India. This is undoubtedly unfortunate, but it is not our business to speculate on questions of policy or to attempt to explore the reasons which led the representatives of our people to make such a drastic provision in the Constitution itself, which cannot but be regarded as a most unwholesome encroachment upon the liberties of the people.

(underlining is mine).

In H. Saha v. State of W.B. : 1974 CriLJ1479 , Chief Justice Ray observed:

The essential concept of preventive detention is, that the detention of a person is not to punish him for something he has, done but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a Court of law and a detention order under the Act. One is a punitive action and the other is a preventive act.

(underlining is mine).

19. I have no hesitation to agreeing with Shri T.C.N. Menon, learned Additional Advocate General, that in the case of a man guilty of serious economic offence he should be given a deterrent punishment. Justice Krishna Iyer observes in P.K. Tejjani v. M.R. Dange : 1974 CriLJ313 :

No chances can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, these economic offences committed by white collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-making from numbers of consumers furnishes the incentive - not easily humanised by the therapeutic probationary measure. It is not without significance that the recent report (47th report) of the Law Commission of India has recommended the exclusion of the Act to social and economic offences by suitable amendments. It observed: We appreciate that the suggested amendment would be in apparent conflict with current trends in sentencing. But ultimately, the justification of all sentencing is the protection of society. There are occasions when an offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way, because of the paramount need for the protection of society. We are, therefore, recommending; suitable amendment in all the Acts, to exclude probation in the above cases.

In the current Indian conditions the probation movement has not yet attained sufficient strength to correct these intractable. Maybe, under more developed conditions a differed approach may have to be made. For the present we cannot accede to the invitation to let off the accused on probation'.

But here, the persons concerned are not convicted for any offences. As a precautionary measure they are being detained and there is no justification at all in treating them differently from other persons who are also detained as preventive measure. Preventive detention cannot be used as a punitive measure; that will be against law. It would be condemning a person without hearing him.

20. There is no rational classification at all in treating persons like the petitioners as 'C class prisoners, different from the other detenus. As the object of the preventive detention being only to prevent commission of offences or activities prejudicial to the State, any classification or distinction made in the manner of treatment of the persons concerned with the object of treating one set of such

detenus differently from the others and treat them as if they are convicted persons is clearly discriminatory and violative of Article 14 of the Constitution. There is no rational nexus as regards; the classification and the object that is sought to be achieved in detaining them. As has been laid down in a series of Supreme Court cases, permissible classification under Article 14 must satisfy two conditions viz., (A) it must be founded on intelligible differentiae which distinguishes persons or things that are grouped together from others left out of the group; and (B) the differentiae must have a rational relation to the objects sought to be achieved by the State. When the State says, that the classification is made for the purpose that the treatment meted out to persons like the petitioners should serve as 'a deterrent to persons indulging in economic offences of smuggling and foreign exchange violations which have deleterious effect on national economy, the State forgets that the object sought to be achieved by detaining the persons is not for punishing them but only as a preventive and precautionary measure which is the same in the case of the other detenus also:

21. In the circumstances. I would hold that the notification issued by the State of Kerala No. 48789/SSI/74/Home dated 9th October, 1974 amending the Kerala Security Prisoners Order, 1971 is ultra vires and illegal. The subsequent order issued by the Government also, Order No. 60222/SSI/74/ Home dated 19th December, 1974 by which it has been ordered that 'the provisions of the Kerala Security Prisoners Order, 1971, as subsequently amended, as they are applicable to persons detained on the ground referred to in Section 3 (1) (a) (iii) of the Maintenance of Internal Security Act, 1971 shall mutatis mutandis apply to any person in respect of whom detention order has been made under Section 3' of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is also for the same reasons ultra vires and illegal and I declare it to be so. The above Original Petitions are therefore allowed in the aforesaid manner, I make no order as to costs in the circumstances of the case.

22. Carbon copy of the judgment may be given to the petitioners on payment of requisite charges and to the respondents free of charges.

23. The operative portion of the Judgment may immediately be communicated to the Chief Secretary to Government. Tnvandrum.

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