

Santhamma Vs. District Magistrate

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Court : Kerala

Decided On : Dec-14-2009

Reported in : 2010(1)KLT172

Judge : R. Basant and; M.C. Hari Rani, JJ.

Acts : Kerala Anti Social Activities (Prevention) Act, 2007 - Sections 2, 3, 3(3) and 10(4)

Appeal No. : W.P.(Crl.) No. 470 of 2009

Appellant : Santhamma

Respondent : District Magistrate

Advocate for Def. : P. Ravindra Babu, Government Pleader

Advocate for Pet/Ap. : K. Ramakumar, Sr. Adv.,; T. Ramprasad Unni and; Manu Tom

Disposition : Petition allowed

Judgement :

R. Basant, J.

1. The petitioner has come to this Court for issue of a writ of Habeas Corpus to cause the production of and direct the release of her husband Victor, S/o.

Youhanan who is under detention by Ext.PI order passed by the first respondent under Section 3 of the Kerala Anti Social Activities (Prevention) Act, 2007 (hereinafter referred to as 'the KAAPA'). The said order was issued on 28.10.2009. The detenu was taken into custody in execution of that order on 6.11.2009. The order of approval under Section 3(3) of the KAAPA has already been passed by the Government. The order of confirmation under Section 10(4) of the KAAPA has not been passed so far. The detenu has been classified as a known goonda. Reliance is placed on five cases. The following are the five cases relied upon:

Offences	Stage	Remarks	No.	Crime No.	Date of	proceedings
324	&	Final	report	Nil	1 97/07 16.2.2007	Section 294(b)IPC filed
Act	Final	report	Both	witnesses	2 328/08 7.6.2008	Sand seized to the seizure mahazar are police witnesses
435/08	22.7.2008	Sand Act	Final	report	Both	witnesses filed to the seizure mahazar are independent witnesses
22/09	13.8.2008	Sand	Act	Final	report	No seizure effected sand is effected
Sand	Act	Final	report	No	seizure	offiled sand is effected

2. We have heard the learned Counsel for the petitioner and the learned Government Pleader. Various grounds of challenge are raised. For the purpose of resolving the controversy in this Writ Petition, we are satisfied that only the following ground need be considered.

There is no material to show that the detenu is a known goonda under Section 2(o)(ii) of the KAAPA.

3. It is trite that the detaining authority must entertain twin satisfaction to justify the passing of an order of detention under Section 3 of the KAAPA. The former is the threshold, initial, objective satisfaction that the detenu is a known goonda or known rowdy. After entertaining that satisfaction the authority must further

entertain the latter subjective satisfaction that the detention of the detenu is necessary to prevent him from indulging in anti-social activities. It is only after entertaining both those satisfactions that the authority can proceed to pass a valid order of detention. It is contended that at any rate the initial threshold objective satisfaction was not and could not have been entertained in this case.

4. The learned Counsel for the petitioner contends that though cases 2,3,4 and 5 are relied on by the sponsoring and detaining authorities to support their conclusion that the detenu is of a depredator environment under Section 2(g) of the KAAPA and consequently a goonda under the latter part of Section 2(j) and a known goonda under Section 2(o) of the KAAPA,, cases 2,4 and 5 cannot at all be taken into consideration to bring the detenu within the sweep of the expression known goonda under Section 2(o)(ii) of the KAAPA. This, the counsel contends, is because of the fact that these three cases - 2,4 and 5, have been initiated on the basis of complaints of the police officers. The proviso to Section 2(o)(ii) of the KAAPA cannot have any application and hence these three cases are liable to be excluded, contends the learned Counsel for the petitioner.

5. The learned Government Pleader accepts this contention. Case No. 2 is a case where there was seizure of sand. The mahazar shows that both witnesses who attested the seizure mahazar of sand in case No. 2 are police officials and there is no independent witnesses to attest the seizure mahazar dated 16.2.2007. The learned Counsel for the petitioner relies on the dictum in Vinija v. State of Kerala : 2009 (3) KLT 110. The dictum in Vinija's case clearly establishes that such a seizure mahazar in which all the attesting witnesses are police officials cannot be taken into reckoning under the proviso to Section 2(o)(ii) of the KAAPA.

6. So far as cases 4 and 5 are concerned, the learned Counsel for the petitioner points out that there is no seizure mahazar of sand to attract the proviso to Section 2(o)(ii) of the KAAPA. We extract Section 2(o) of the KAAPA and the proviso also for the sake for easy reference.

2. In this Act, unless the context otherwise requires,:

(o) 'known goonda' means a goonda who had been, for acts done within the previous seven years as calculated from the date of the order imposing any restriction or detention under this Act,:

(i) found guilty, by a competent Court or authority at least once for an offence within the meaning of the term 'goonda' as defined in Clause (j) of Section 2; or

(ii) found in any investigation or enquiry by a competent police officer, or other authority or competent court on complaints initiated by persons other than police officers, in two separate instances not forming part of the same transaction, to have committed any act within the meaning of the term 'goonda' as defined in Clause (j) of Section 2:

Provided that an offence in respect of which a report was filed by a Police Officer before a lawful authority consequent to the seizure, in the presence of witnesses, of alcohol, spirit, counterfeit notes, sand, forest produce, articles violating copyright, narcotic drugs, psychotropic substances, or currency involved in hawala racketeering may be included for consideration though the report had resulted from an action initiated by a police officer.

(emphasis supplied)

7. Under Section 2(o)(ii) of the KAAPA, a case can be taken into consideration only if it is initiated on the basis of a complaint of a person other than a police officer. But the proviso may apply in a case where the proceedings are initiated on the basis of a report filed by a police officer, provided such initiation is on the basis of a report consequent to seizure of certain specified articles (of which sand is one) under a mahazar in the presence of witnesses. The seizure effected in cases 4 and 5 does not include any sand. Only certain equipment for extraction of sand are seized under the seizure mahazar in cases 4 and 5 above. Inasmuch as the specified articles have not been seized and inasmuch as the seized article does not include sand, the conclusion is inevitable that cases 4 and 5 must also be excluded.

8. It is axiomatic that the statutes which have the effect of depriving a citizen of his life and liberty must receive a strict construction. A piece of legislation which has the effect of exposing the citizen to the risk of arrest and detention without trial, and not punitively, on the basis of the suspicion and hypothesis that he may commit offences deserves, by that very same reason, a strict construction. Seizure of sand will bring the case within the sweep of the proviso to Section 2(o)(ii) of the KAAPA. But seizure of equipment for extraction of sand cannot. The expression 'sand' cannot be interpreted purposively by this Court to include 'equipment used for extraction of sand'. Considering the nature of draconian powers conferred on the executive authorities under the KAAPA and considering the impact of the statute on the right to life, freedom and personal liberty of the individual, this Court must resist the temptation to revert to the canons of purposive interpretation to expand the contours of the expression 'sand' in the proviso to bring within its sweep not sand alone but equipment used for extraction of sand.

9. When cases 2,4 and 5 are excluded, there is only one case falling within Section 2(t) of the KAAPA and another which can bring the detenu within the sweep of the definition of depredator environment in Section 2(g). Two such cases are required under Section 2(o)(ii) of the KAAPA and three such cases are required under Section 2(p)(iii) of the Act. Either requirement is not satisfied. In these circumstances, we accept the contention of the learned Counsel for the petitioner which is not disputed by the learned Government Pleader that detention of the detenu is not justified in the circumstances of the case.

10. In the absence of serious contest, it is not necessary for us to advert to the facts in any greater detail.

11. In the result:

a) This petition is allowed.

b) The impugned order of detention Ext.PI and the consequent detention of the detenu Victor, S/o. Youhanan is hereby set aside;

(c) If the detention of the detenu is not necessary in any other case, he shall forthwith be released from custody by the prison authorities from the Central Prison, Trivandrum;

d) The Registry shall forthwith communicate the order to the prisons authorities.

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