

Babu Vs. State of Kerala

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Court : Kerala

Decided On : Dec-17-2009

Reported in : 2010(1)KLT132; JT2010(8)SC560

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

Acts : Kerala Anti-social Activities (Prevention) Act, 2007 - Sections 3, 3(3) and 10(4); ;Code of Civil Procedure (CPC) - Section 302; ;Code of Criminal Procedure (CrPC) - Section 167

Appeal No. : W.P.(Crl.) No. 446 of 2009

Appellant : Babu

Respondent : State of Kerala

Advocate for Def. : K.K. Ravindranath, Addl. Director General of Prosecution and; P. Ravindra Babu, Government Pleader

Advocate for Pet/Ap. : S. Sreekumar and; P.M. Ziraj, Advs.

Disposition : Petition dismissed

Judgement :

R. Basant, J.

1. Is a second order of detention possible and permissible when an earlier order of detention remains contumaciously unexecuted?

ii) Are Exts.P1 and P2 separate orders of detention or are they to be reckoned as a composite order of detention - the latter representing only application of mind on the question whether the former deserves to be executed under the new situation and changed circumstances

These interesting questions are canvassed ably by the learned Counsel in this Writ Petition.

2. The petitioner, claiming to be a friend of one Anil Kumar @ Keppan Ani (hereinafter referred to as 'the detenu'), has filed this petition for issue of a writ of habeas corpus to direct production and release of the detenu, who is under detention under Section 3 of the Kerala Anti-social Activities (Prevention) Act, 2007 (hereinafter referred to as the 'KAAPA') as per Ext.P1 and P2 orders dated 19.1.2009 and 27.8.2009 passed by the 2nd respondent.

3. The said order Ext.P1 was passed on 19.1.2009. It was not executed till 27.8.2009. On 27.8.2009. Ext.P2 order was passed and accordingly the detenu, who remained in judicious custody in connection with another case from 5.6.2009, was taken into preventive detention custody with effect from 28.8.2009. Orders approving the detention under Section 3(3) and confirming the detention under Section 10(4) of the KAAPA have already been passed, it is submitted.

4. A brief reference to the vital facts may be crucially relevant. The detenu is classified as a known rowdy. The learned Government Pleader takes the stand that the detention is on the basis of both Exts.P1 and P2. Ext.P1 is the original order of detention dated 19.1.2009. Ext.P2 dt.27.8.2009 is the addendum to Ext.P1 passed by the 2nd respondent immediately prior to the execution of the order under Section 3 of the KAAPA and detention of the detenu w.e.f. 28.8.2009. Exts.P1 and P2 taken together refer to 6 cases which are pending against the detenu. We give below the details of the said cases.

Status	No.	offence	offences	Sl. report	Crime No. alleged	Date of Main filed	Final or
not	-----	-----	-----	-----	-----	-----	-----
1	33	of	2004	31.1.2004	324	&	
filed	pending	trial	427	IPC	-----	2	9
2005	7.1.2005	379	IPC	filed	pending	trial	-----
120B	&	filed	pending	trial	395	IPC	-----
incorrect	-----	-----	-----	-----	-----	-----	-----
308	IPC	filed	pending	trial	-----	5	23
2008	20.1.2008	308	IPC	not	filed	pending	-----
investigation	-----	-----	-----	-----	-----	-----	-----
1.6.2009	302	IPC	not	filed	-----	-----	-----
pending	investigation	-----	-----	-----	-----	-----	-----

5. The learned Counsel for the petitioner and the learned Government Pleader have advanced their arguments. The learned Counsel for the petitioner assails the impugned orders Exts.P1 and P2 and the consequent detention of the detenu on the following grounds.

i) Both Exts.P1 and P2 reveal gross and total inadequacy in application of mind to the relevant circumstances;

ii) The KAAPA does not contemplate a second order of detention when an unexecuted first order is already in existence:

iii) There has been gross delay in the execution of Ext.P1 order and this must lead to the irresistible conclusion that there has been snapping of nexus between the alleged contumacious acts and the act of detention on 28.8.2009;

iv) The detaining authority while passing Ext.P2 totally ignored the fact that the detenu was in custody and his preventive detention was unnecessary.

6. For the sake of convenience, we shall deal with all these 4 grounds together. It is trite that before a valid order of detention is passed under Section 3 of the KAAPA, the detaining authority on the materials placed before him must entertain

the twin satisfactions referred to in Section 3 of the KAAPA. He must first entertain the satisfaction that the detenu is a known goonda or a known rowdy. This is initial threshold satisfaction and it is an objective satisfaction.

7. Having entertained the initial threshold satisfaction, the detaining authority must proceed to consider whether the latter subjective satisfaction can be entertained. He must be satisfied that detention of such known goonda or known rowdy is necessary to prevent him from indulging in anti social activities.

8. The first question is whether mind has been applied to these two aspects. There is no contention that the 6 cases referred above (or any 3 of them) will not bring the detenu within the sweep of the expression 'known rowdy' under Section 2(p) of the KAAPA. The former objective satisfaction is thus entertained satisfactorily.

9. The latter subjective satisfaction is entertained on the basis of the 6 cases referred above. We say so reckoning Exts.P1 and P2 as a composite order which was in existence at the time of execution of the order. Even if Ext.P1 were considered after excluding case No. 6, which was not there in existence when Ext.P1 was passed, it can still be safely held that the latter subjective satisfaction was satisfactorily entertained. So far as Ext.P2 is concerned, after taking into consideration case No. 6, it is absolutely safe to conclude that on the date of Ext.P2, the latter subjective satisfaction was also validly and satisfactorily entertained. So whether Exts.P1 and P2 are reckoned as a composite order or separate orders of detention, both the satisfactions, it can be seen, were sufficiently and satisfactorily entertained by the detaining authority.

10. That takes us to the contention raised by the learned Counsel for the petitioner that 2 orders are not permissible and that Ext.P1 must fail necessarily for the reason that there has been inordinate delay from 19.01.09, the date of Ext.P1 to 28.08.09, the date on which the order was actually executed. According to the learned Counsel, Ext.P1 order of detention must fail for the reason that there has been inordinate delay and such delay must inevitably lead to the conclusion that there has been snapping of the nexus between the alleged contumacious acts and the act of detention.

11. The law on the point appears to be well settled. We have adverted to this aspect in detail in the latest decision in *Soja Begum v. Additional Chief Secretary to Government* 2009 (4) KLT 550. We had referred to all the relevant precedents and have noted with acceptance the decision in *Assia v. State of Kerala* 2000 (1) KLT 673, We had in para.6 of *Soja Begum* (supra) extracted para.6 of the decision in *Assia* (supra) and at the risk of repetition, we extract the said passage again.

6. In view of the above object of preventive detention, it becomes very imperative on the part of the detaining authority as well as the executing authorities to be very vigilant and keep their eyes skinned but not to turn a blind eye in securing the detenu and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of the preventive action and turn the detention order as a dead letter and frustrate entire proceedings. There must be a live and proximate link between the grounds of detention alleged by the detaining authority and avowed purpose of detention, namely, prevention of smuggling activities. The link is snapped if there is long and unexplained delay between date of order of detention and arrest of detenu. In such cases, an order of detention can be struck down unless grounds indicate a fresh application of mind of the detaining authority to the new situation and changed circumstances. But where delay is not only adequately explained but is found to be the result of recalcitrant or refractory conduct of detenu in evading arrest, there is warrant to consider the link not snapped but strengthened. (See *Bhawarlal Ganeshmalji v. State of Tamil Nadu* : AIR 1979 SC 541. Whether delay was unreasonable or not depends on the facts and circumstances of each case. If there is unreasonable delay between date of order of detention and date of arrest of detenu, such delay unless satisfactorily explained throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing detention order and consequently render detention order bad and invalid because the live and proximate link between grounds of detention and the purpose of detention is snapped in not arresting detenu.

(emphasis supplied)

12. The learned Government Pleader vehemently places emphasis on the observation in para.6 extracted and emphasised above that if grounds indicate fresh application of mind by the detaining authority to the new situation and changed circumstances, the gap in time between the date of the order and its execution cannot be held to result in snapping of nexus as to invalidate the order of detention.

13. Following the decision in Soja Begum, we have no hesitation to agree that there has been inordinate delay in execution of Ext.P1 order. On that aspect we entertain no doubt. The order was passed on 19.1.2009. It remained unexecuted till the date of Ext.P2, i.e. 27.8.2009. During this period, admittedly in case No. 2 above, the detenu had appeared personally before the Judicial Magistrate of the First Class-III, Trivandrum on 4.2.2009. He had also appeared before the learned Judicial Magistrate of the First Class-II, Ernakulam in case No. 4 above on 6.4.2009 and 25.5.2009. It is also not disputed that the detenu was available in judicial custody from 5.6.2009 to 28.8.2009. He was available in judicial custody for the detaining and executing authority to take him in custody at any time. There is no contention that any action as required under Section 6 of the KAAPA was taken to exercise powers in relation to absconding persons. There is also nothing to show that after 5.6.2009 to 28.08.09 any attempt was made to transform judicial custody into preventive detention custody in execution of Ext.P1. We are in agreement with the learned Counsel Sri. S. Sreekumar that applying Soja Begum, it would have been held that the delay in execution is not attributable to any recalcitrant or refractory conduct on the part of the detenu and there is no valid reason to justify the delay in execution.

14. But the question is whether case No. 6, the incident in which occurred on 1.6.2009 after the passing of Ext.P1 order dt. 19.1.2009 and the application of mind by the detaining authority as revealed from Ext.P2, are sufficient to undo the effect of inaction on the part of the detaining/executing authorities.

15. It is in this context that we take note of the observations of the Division Bench in Assia which states that where the grounds indicate a fresh application of mind by the detaining authority to the new situation and changed circumstances, the

lapse of time in execution may not be vital and crucial.

16. We note that the observation of the Division Bench in Assia is evidently on the basis of another earlier decision of the Supreme Court in Bhawarlal v. State of Tamil Nadu : AIR 1979 S.C. 541. We extract below the relevant portion of para. 6 of the said judgment.

Para.6: We may in appropriate cases assume that the link is 'snapped' if there is a long and unexplained delay between the date of the order of detention and the arrest of the detenu. In such a case we may strike down an order of detention unless the grounds indicate a fresh application of the mind of the detaining authority to the new situation and the changed circumstances. But, where the delay is not only adequately explained but is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened. That, precisely, is the state of affairs before us.

(emphasis supplied.)

17. The decision of the Supreme Court in Bhawarlal followed by this Court in Assia clearly and unmistakably suggests that where grounds indicate a fresh application of mind by the detaining authority to the new situation and changed circumstances, the delay between the order of detention and the arrest of the detenu cannot lead to a conclusion of snapping of nexus.

18. The question then is whether in the facts of this case there has been such fresh application of mind to the new situation and changed circumstances. We note that when Ext.P1 order was passed, case No. 6 referred above had not taken place. That case is registered under Section 302 I.P.C. and the decision in Elizabeth George v. State of Kerala 2008 (4) KLT 425 clearly shows that even though the final report has not been filed, that can be taken into consideration to entertain the former objective as well as the latter subjective satisfactions. Thus a very important event had taken place after Ext. P1 order and before execution of the order of detention. That is the involvement of the alleged detenu in case No. 6. What was apprehended in Ext.PI, as rightly pointed out by the learned

Government Pleader, has come true with the incident that gave rise to registration of case No: 6. The learned Government Pleader submits that the nexus between the need to pass Ext.P1 order and the execution of Ext.P1 order is fortified convincingly by the occurrence of the event in case No. 6. If Ext.P1 order dt. 19.1.2009 were executed promptly, the 6th case - i.e., the incident on 01.06.09, could have been successfully prevented. The learned Government Pleader submits that whatever may have been the inadequacy in not promptly executing Ext.P1 order, the incident in case No. 6 defaces and obliterates all such inadequacy and brings to light with renewed vigor the need for executing Ext.P1 order. It is not as though Ext.P1 order dt.19.1.2009 was executed on 28.8.2009 without fresh application of mind. Such fresh application of mind is clearly revealed from Ext.P2 order. Case No. 6 convincingly fortifies and strengthens the subjective satisfaction in Ext.P1 that detention is essential. After applying his mind, the detaining authority had reiterated the direction to preventively detain the detenu in Ext.P2.

19. The observations of the Supreme Court in Bhawarlal and the Division Bench in Assia clearly show that where there is such a gap of time between the order and execution, the detaining authority is entitled to, nay obliged to, consider the materials afresh by a proper application of mind to decide whether under the new situation and changed circumstances the order of detention deserves to be executed. To us it appears that, that is exactly what has been done by the detaining authority in Ext.P2. What Bhawarlal and Assia mandate has been performed by the detaining authority by passing Ext.P2 order. In these circumstances, we take the view that whatever be the delay/inadequacy in execution of Ext.P1 order, the fact that the detaining authority after adverting to the delay relied on the changed circumstances on the basis of case No. 6 and directed execution of the order of detention, is sufficient to cure all such defects arising from the delay in execution.

20. The learned Counsel raises an interesting contention that no second order of detention is permissible when already there exists an earlier unexecuted order. We agree with the learned Government Pleader that Exts.P1 and P2 must be reckoned together as a composite order now and not separate orders. Ext.P2

does not divorce itself from Ext.P1 and the consideration is given in Ext.P2 pointedly to the question whether the order of detention passed under Ext.P1 on 19.1.2009 deserves to be executed after 27.8.2009 in the light of the intervening changed circumstances. We find absolutely no embargo against fresh consideration of the need to execute an earlier order of detention in the light of subsequent intervening circumstances and the changed and altered situations. That is exactly what Bhawarlal permits and Assia accepts. The argument that, by Ext.P2 a dead order of detention cannot be revived, cannot be accepted.

21. We now come to the last contention raised by the learned Counsel for the petitioner that the detenu was actually in judicial custody and the detaining authority erred grossly in blindly assuming that there is a possibility of the detenu being released from custody. That unsupported and unsubstantiated circumstance should not have made use of to justify future detention or execution of a stale order of detention. The learned Counsel for the petitioner places reliance on the decision in *T.V. Sravanan v. State* : (2006)2 SCC 664 to contend that while a detenu is in custody, the subjective satisfaction that his future preventive detention is necessary can be reached only by proper and effective application of mind. The counsel contends that the detenu was alleged to have committed an offence under Section 302 I.P.C. He had remained in custody from 5.6.2009. There was absolutely no tangible material which could have persuaded the detaining authority to suddenly assume that he was likely to be released from judicial custody. There is no case that any application for bail had even been filed or was pending. The learned Counsel with the help of the decision in *Sravanan* (supra) contends that in the absence of materials to induce the satisfaction that the detenu might go out of bail, the alleged subjective satisfaction entertained in Ext.P2 is vitiated.

22. The question raised is interesting, How did the detaining authority entertain the satisfaction that the detenu might be released from judicial custody? This is the crucial question. Admittedly there has been no reference to any particular bail application that has been filed. But did the detaining authority go off the mark and act perversely in entertaining the subjective satisfaction that the detenu was likely to be released and such release would give him the opportunity to indulge in anti social activities to prevent which detention is necessary under Section 3 of the

KAAPA?. This question arises for consideration.

23. The law on the point, we feel, has been stated succinctly in *Kamarunnissa v. Union of India* : (1991) 1 SCC 128 in para. 13, (which is quoted in *Sravanan* (supra). We extract that passage.

Para. 13: From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he has reason to believe on the basis of reliable material placed before him

(a) that there is a real possibility of his being released on bail, and

(b) that on being so released he would in all probability indulge in prejudicial activity; and

(3) if it is felt essential to detain him to prevent him from so doing.

If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher court.

24. In the instant case we note that the incident in Case No. 6 had taken place on 1.6.2009. The detenu was in custody from 5.6.2009. There is no case for anyone that any recent application for bail of the detenu stood rejected on the date of Ext.P2. It is trite that by the operation of the proviso to Section 167 Cr.P.C. in such a case if final report is not filed, the accused/detenu will be entitled to be released on bail on 4.9.2009. Whether charge sheet was filed after investigation or it was not filed there was real possibility of the detenu being released on bail. The impugned order Ext.P2 was passed on 27.8.2009. The counsel contends that this process of reasoning cannot be deciphered or invented from Ext.P2 order. But it must be noted that in Ext.P2 order, it has been stated that the detaining authority anticipates that the detenu is planning to get bail. Of course Section 167 Cr.P.C.

has not been specifically referred to. The fact that the final report will/may not be filed within 90 days has also not been referred to. But, we cannot afford to ignore the fact that these reasons must definitely have weighed with the detaining authority when it passed Ext. P2 order. In these circumstances even though there is no specific reference to any pending application or the possibility of the detenu securing relief by invoking the proviso to Section 167 Cr.P.C., we are of the opinion that it cannot be stated that the subjective satisfaction of the detaining authority of the probability of the detenu getting released from judicial custody in that case is perverse or that mind must be assumed to have been not applied to that circumstance specifically. We are conscious of the decision in Sravanan (supra) which states that the satisfaction that the detenu may go out of custody cannot be lightly assumed or inferred. In the facts and circumstances of this case, we find that such subjective satisfaction is well founded though details are not referred to in Ext.P2 order.

25. The learned Counsel for the petitioner submits that it should not be lost sight of that from 5.6.2009 to the date of Ext.P2, i.e., 27.8.2009 the detenu was actually available in judicial custody. Having not taken any action to get judicial custody transformed into preventive detention custody till 27.8.2009, the action taken on 27.8.2009 to pass Ext.P2 order cannot carry conviction argues the learned Counsel.

26. Even here we note that when he was actually in custody and when there was no likelihood of his release, there evidently may not have been the compelling need to execute Ext.P1 order. When the possibility of the detenu being released became real, it is only natural that the detaining authority can, should and must consider the possibility of his actual release and the need to ensure that he is not given opportunity and liberty to indulge in anti-social activities. If the need to pass Ext.P2 order was realised and revealed only when the possibility of release of the detenu on bail in case No. 6 brightened up, we are unable to find fault with the detaining authority on that score also.

27. The learned Counsel for the petitioner looks at the issue from another angle and contends that the detenu has now been obliged to remain in preventive

detention custody under Ext.P1 only because the detaining authority unnecessarily and unjustifiably waited for the incident in case No. 6 to happen. If Ext.P1 dated 19.1.2009 were promptly executed, the maximum period of 6 months would have elapsed on 19.7.2009 and the detenu would not have been obliged to continue in preventive detention after 19.7.2009. This is not justified, contends the learned Counsel for the petitioner. We have already noted that if case No. 6 had not taken place and the detaining authority had not applied its mind afresh to the changed circumstances, we may certainly have conceded to the detenu the benefit arising from the delayed execution of Ext.P1 order. But what tilts the scales in this case, notwithstanding the inadequacy in not executing Ext.P1 order till 27.8.2009, is the event that took place on 1.6.2009, the arrest of the detenu, in that crime and the subsequent possibility of release on bail. These are the circumstances which tilts the scales against the detenu. We are hence unable to accept the said contention of the learned Counsel for the petitioner.

28. No other contentions are raised. We are in these circumstances satisfied that the impugned orders and the consequent detention of the detenu does not warrant interference.

29. In the result, this Writ Petition is dismissed.

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