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Court : Kerala

Decided On : Jun-20-2011

Judge : K.M. Joseph &Amp; M.L. Joseph Francis

Appeal No. : W.P.(Crl.).No.228 of 2011(S)

Appellant : Manju

Respondent : The State of Kerala, Represented by the Chief Secretary and Others

Advocate for Pet/Ap. : Shri. C. Rajendran

Judgement :

K.M. Joseph, J.

1. Petitioner seeks the following relief:

"Issue a writ in the nature of Habeas Corpus or any other appropriate writ, order or direction compelling and commanding the respondents to produce the detenue before this Honourable Court, to quash Exhibit P1 detention under which was approved and confirmed by the Government and set the detenue at liberty."

2. By Ext.P1 detention order issued under the Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as the Act), the husband of the petitioner stands detained under Section 3 of the Act. Four Crimes are referred to as the foundation for invoking Section 3 of the Act. They are Crime Nos.346/09, 437/10, 537/10 and 422/09, all of the Thekkumbhagam Police Station. All these cases fall under the Kerala Protection of River Banks And Regulation of Removal of Sand Act, 2001 (hereinafter referred to as the Sand Act).

3. We heard Shri C. Rajendran, learned counsel for the petitioner and also Shri K. J. Mohammed Anzar, learned Senior Government Pleader appearing on behalf of the respondents.

4. Learned counsel for the petitioner would address before us the following arguments:

He would submit that invocation of the powers under Section 3 of the Act is illegal for the reason that the very invocation of the Sand Act was without any legal basis and, therefore, the Act could not have been invoked, as the Act is intended for protection of river banks and in the cases, the allegation relates to removal of sand from the vicinity of lakes. Secondly, he would contend that this is a case where the detenu has been detained on the strength of criminal cases wherein he stands convicted in three out of four cases mentioned above and the conviction in all the three cases are ab initio void. This he would say, is for the reason that the conviction was obtained on the basis of a police report and not a complaint. He would rely on Section 364 of the Code of Criminal Procedure to contend that the Judgments evidencing detenu's conviction are all void. This he would submit, on the strength of the decision of this Court in Ismayil v. State of Kerala (2010 (3) KLT 706) wherein this Court has taken the view that only a complaint can be filed, and that police report will not amount to a complaint. He would contend that there was inordinate delay in considering the representation. He would further submit that material documents were suppressed by the sponsoring authorities and that there is no real and proper consideration of the representation. Further, it is submitted that there is clear non-application of mind disclosed by the fact that the detaining authority has not applied his mind to the fact that proceedings under Section 107

of the Code of Criminal Procedure have been taken against the detenu and in this regard, he relied on the Judgment of this Court in Susi v. State of Kerala (2011 (1) KLT 760).

5. Per contra, learned Senior Government Pleader would submit that the contention that no action can be taken in respect of activities in and around lake which is otherwise offensive to the Act, cannot be countenanced. Secondly, it is his contention that in two of the cases, there were complaints. Thirdly, it is contended that it will not render the Judgments void. In this context, he relied on Section 365 of the Cr. P. C. He would further submit that there was no inordinate delay in disposing of the representation which was disposed of considering the grievances raised as required in law. As far as the contention that proceedings under Section 107 of the Cr. P. C. has not been considered, it is the case of the respondents that there were indeed proceedings under Section 107. and that they have been supplied to the detenu admittedly. They form part of the file and having regard to the phraseology of the order of detention, it must be understood that the detaining authority has actually considered the issue, it is submitted. Further more, it is pointed out by the learned Senior Government Pleader that unlike the facts of the case relied on by the learned counsel for the petitioner, this is a case where Counter Affidavits have been filed indicating that there has been application of mind and the authority has come to the conclusion that invoking provisions under Section 107 would not suffice to deal with the detenu.

6. The first question which is raised by the learned counsel for the petitioner, namely that invoking the power under Section 3 of the Act is illegal for the reason that the activities alleged against the detenu are not in respect of removal of sand from a river bank but from in and around a lake, is in our view, without merit. We will consider the argument of the petitioner. According to the petitioner, the Sand Act was enacted to protect river banks and river beds. In this context, he emphasised the words of the preamble. They read as follows:

"Preamble.- Whereas it has come to the notice of the Government that indiscriminate and uncontrolled removal of sand from the rivers cause large scale river bank sliding and loss of property;

And whereas large scale dredging of river and also disturb the biophysical environment system of the river in different degrees;

And whereas due to the executive regulatory orders in force, complaints have been received regarding the hardship to the employees engaging in construction works;

And whereas, in the public interest, it is expedient to provide for regulatory measures for the protection of river banks and removal of sand from rivers;

Be it enacted in the Fifty-second year of the Republic of India as follows:"

Action has been taken against the detenu under Sections 20 and 21 of the Sand Act. They read as follows:

"20. Penalty for contravention of this Act.-

Whoever contravenes any of the provisions of this Act or Rules made thereunder shall, on conviction be punished with imprisonment for a term of which may extend to two years or with fine which may extend to twenty-five thousand rupees or with both and in case of continuing contravention with an additional fine which may extend to one thousand rupees for every day during which such contravention continues.

21. Abetment of offences.- Whoever abets any offence punishable by or under this Act or attempts to commit any such offence shall be punished with the penalty provided by this Act for committing such offence."

Section 12 in fact provides for general conditions for sand removal. It reads as follows:

"12. General conditions for the sand removal operations in a kadavu.- (1) The Grama Panchayat or the Municipality concerned shall, before carrying out the sand removal operation obtain passes from the Geology Department which shall issue them on the recommendation of the District Expert Committee for a period of one month in advance, on payment of royalty as provided for in the law applicable for the payment of royalty.

(2) No sand removal operation shall be carried out in a Kadavu before 6 a.m. and after 3 p.m.

(3) The Grama Panchayat or Municipality concerned shall subject to the other provisions of this Act and the rules made thereunder, make necessary arrangements to carry out the sand removal operations.

(4) Removal of sand shall be permitted only from the river bed and no sand removal operation shall be done within 10 metres of the river bank.

(5) No sand removal operation shall be done within a distance of 500 metres from any bridge or any irrigation project.

(6) The vehicle for loading sand shall be parked at a distance of at least 25 metres from the river bank, and no vehicle shall be brought to the river bank for loading.

(7) No sand removal shall be done in a Kadavu or river bank in excess of the quantity fixed by the District Expert Committee.

(8) No `Kollivala', pole scooping or any mechanized method shall be carried out in the sand removal operation.

(9) No sand removal shall be done where there is likelihood of saline water mixing with river water.

(10) No sand removal shall be done in a river or in any river bank where Government have expressly prohibited the same by general or special order."

It is, therefore, the case of the petitioner that the purport of the Sand Act is to protect river banks and river beds. He would also submit that the order would show that it was passed to prevent destruction of the "Kayal" and for protection of the lake. Learned counsel for the petitioner also relied on the Judgment of a learned Single Judge of this Court in Subramanaian v. State of Kerala (2009 (1) KLT 77).

7. We must consider the Scheme of the Sand Act. The Sand Act defines the word "Kadavu" as follows:

"2 (e) "Kadavu" means a river bank, or water body where removal of sand is carried out."

The Act provides for the Kadavu Committee to be constituted under Section 4, inter alia. Moreover, the very heading of Section 12 deals with operations in a Kadavu. The definition of the word "Kadavu" would show that the intention of the Legislature is to take in not only a river bank, but any water body also. Sub-section (2) of Section 12 specifically prohibits carrying out of sand removal operations before 6 a.m. and after 3 pm. in a "Kadavu". No sand removal can be done in a Kadavu or river bank in excess of the quantity fixed by the District Expert Committee. Sub-section (8) provides that no "Kollivala", pole scooping or any mechanized method shall be carried out in the sand removal operation. The said provision will be applicable both in respect of a river bank and also any other water body coming under the definition of "Kadavu". Still further more, Section 9 of the Act speaks of the powers and functions of the District Expert Committee. Section 9 reads as follows:

"9. Power and Functions of the District Expert Committee.- Subject to the other provisions of this Act and the rules made thereunder, the District Expert Committee shall have the following powers and functions, namely:-

(a) to identify the Kadavu or river bank in a district in which sand removal may be permitted;

(b) to fix the total quantity of sand that can be removed from a Kadavu or river bank giving due regard to the guidelines of expert agencies like the Centre for Earth Science Studies and Centre for Water Resources Development and Management;

(C) to control the transportation of sand from a Kadavu or river bank to another area;

(d) to close a Kadavu or river bank opened for sand removal;

(e) to ensure the protection of river banks and keep them free from encroachment;

(f) to consider the opinion of the Kadavu Committee and take suitable measures to achieve the objectives of this Act;

(g) to ensure that the Kadavu Committees of the District are performing their powers and functions conferred on them by this Act;

(h) to advise the Government on the measures to protect the biophysical environmental system of the river banks;

(i) to recommend to the Government the necessity to ban sand removal from any river or Kadavu during any season of the year;

(j) to carry out the Directions given by the Government, from time to time;

(k) to exercise such other powers and perform such other duties as are conferred on it by this Act and rules made thereunder;

(l) to advise on any other matter to carry out the provisions of this Act."

Section 9(a) tends to indicate that the District Expert Committee is to identify the Kadavu or river bank in a District in which sand removal may be permitted. No doubt, it is subject to other provisions of the Sand Act and the Rules. Therefore, unless a water body as defined in the word "Kadavu" is identified by the District Expert Committee as one in which sand removal is to be permitted, in respect of all other water bodies, removal of sand by necessary indication stands prohibited. Section 11 of the Sand Act speaks about the powers and functions of the Kadavu Committee. It reads as follows:

"11. Powers and functions of the Kadavu Committee.- Subject to the other provisions of this Act and the rules made thereunder, the Kadavu Committee shall supervise and monitor all activities of sand removal and recommend to the District Expert Committee on the following matters, namely:-

(a) the suitability of the Kadavu or river bank for sand removal;

(b) the quantity of sand that may be removed from a particular Kadavu;

(c) the additional measures to be taken for protection of the Kadavu or river bank;

(d) the necessity to ban sand removal during any season of the year;

(e) to recommend to the Grama Panchayats and the Municipalities for publication of list of country boats used for and labourers engaged in sand removal operations;

(f) to carry out the instructions issued by the Government and the District Expert Committees, from time to time; and

(g) advise on any other matter to carry out the provisions of this Act."

Section 20 purports to visit contravention of the Act and the Rules as punishable offences. Essentially, the substantive provisions in the Sand Act is Section 12 which we have already referred to. While it is true that the words "Kadavu" and river bank are used, by no stretch of imagination can we come to the conclusion that a lake will not fall within the mischief of the Sand Act. A lake is a water body as contemplated in Section 2(e) of the Act by which the word "Kadavu" is defined. We would think that any other interpretation will not only against the golden rule of interpretation, but it will also defeat the very object of enacting the Act. In fact, the cases raised against the detenu in this case relate to the Ekkappuram lake which is a part of Ashtamudi lake. Of course, the argument of the learned counsel for the petitioner is that a river is understood as a body of flowing water and in the lake the water does not flow. We would think that the said distinction which is sought to be engrafted between a river and a lake would not have any relevance in the context of the definition of the word "Kadavu" which we have already extracted. We also think that the reliance placed on the words in the preamble by the petitioner is without any merit. The words in the preamble would be undoubtedly generally a key to open the mind of the legislature in cases where there is any ambiguity. Where the words of the substantive provisions are clear, we are of the view that the preamble cannnot control the language used in the Act. It is far too well settled for us to refer to any case law in this regard. In this case, notwithstanding the absence of any allusion to the words "lake" in the preamble, the conclusion that removal of sand from the whereabouts of a lake will also be

comprehended within the mischief of the Act is inevitable on a consideration of Sections 2 (e), 9, 11, 12, 20 and 21 of the Sand Act.

8. Learned counsel for the petitioner sought to draw assistance from the Judgment of a learned Single Judge in Subramanian v. State of Kerala (2009 (1) KLT 77). Therein, the learned Single Judge was dealing with the vires of the Sand Act. The Court took the view that the Sand Act will have to be treated in pith and substance as one sourced to Entry 17 of List II of Schedule 7 of the Constitution, while the M.M.R.D. Act is sourced to Entry 54 of List I of Schedule 7 of the Constitution of India. We must, in fact, refer to paragraphs 42 and 43. They read, inter alia, as follows:

"The preamble of the Act may not be conclusive of its pith and substance. But, it would definitely be indicative. The preamble of the Sand Act makes it clear that the Act is intended to address the indiscriminate and uncontrolled removal of sand from the rivers, causing large scale loss of sand from river banks and river beds and loss of water. Chap.III of the Sand Act deals with the protection of river banks and biophysical environment of river banks and river beds.....In other words, the prime motive of the legislation is the regulation of removal of sand from the river banks and river beds, not with the aim of regulating or winning of any minor mineral, but with the essential motive of maintaining the river banks and river beds.

43. Regulation of river banks and river beds is necessary for the "upkeep of the biophysical environment." Chap. 4 of the Act is an integral part of a pro-active measure to see that a river continues to flow as a river and that indiscriminate removal of sand does not lead to its premature death. The Supreme Court has, time and again, held that sources of water, either as rivers or lakes are so vital to the very upkeep and maintenance of the ecological plans and the upkeep of its stability. Maintenance of river banks and river beds and its upkeep will have to be treated as one other step to achieve the said objective."

Therefore, if at all, we think that there is nothing in the view which has been taken by the learned Single Judge which detracts from the view which we have taken. "Lakes" form part of the environment and apparently it is for the protection of the

water body system which comprehends not only rivers, but also lakes and as removal of sand in the value judgment of the legislature has been found sufficiently dangerous to require protection by the enactment of the law, the said Act is enacted.

9. As far as the other questions are concerned, we are of the view that the petitioner must, however, succeed on the last point which is raised before us, namely that there was non-application of mind by the detaining authority to the proceedings under Section 107 taken. Ext.P7 is the Report of the Sub Inspector of Police indicating that action has been taken under Section 107. This point actually is not res integra as this Court has spoken through a Bench decision in Susi v. State of Kerala (2011 (1) KLT 760). Therein, the Bench took the following view:

"20. We are in complete agreement that the jurisdiction of the Executive Magistrate under Chapter VIII is certainly distinct and different qualitatively from the power or jurisdiction of the District Magistrate to order detention under S.3 of the KAAPA. There can be no dispute of that proposition at all. But, we are unable to go to the extent of holding that initiation of proceedings, pendency of proceedings, orders passed or the actual detention under Chapter VIII are irrelevant that it can be eschewed altogether or ignored by the detaining authority when he deals with the question of invoking the powers under S.3. We are in total agreement that the legislature was obliged to enact, the KAAPA as Chapter VIII Cr. P.C. was found to be unequal to the challenge before the society at present. But that is far from saying that initiation, pendency, disposal or detention in security proceedings are irrelevant, extraneous or alien to the invocation of power under S.3 of the KAAPA. We are in complete agreement that such initiation, pendency, culmination or detention in security proceedings may by itself not be sufficient in law to vitiate a preventive detention by invoking the power under S.3 of the KAAPA. But, we are unable to go to the extent of stating that such proceedings are irrelevant and can be ignored and eschewed altogether by a detaining authority contemplating preventive detention under S.3 of the KAAPA."

10. Here also, the case of the petitioner is that neither the Sponsoring Authority nor the Detaining Authority has applied their mind to the existence of proceedings

under Section 107 of the Cr. P. C. against the detenu. He would, no doubt, agree that the detenu received Ext.P7, but according to him, in law, that would not suffice and the order does not disclose application of mind and it renders the detention flawed.

11. Per contra, learned Senior Government Pleader would point out that the fact that proceedings were taken under Section 107 Cr. P.C. was reported by the Sub Inspector of Police to the Superintendent of Police (Sponsoring Authority). The Superintendent of Police has considered it and it was thereafter he made the recommendation for action under Section 3 of the Act. He would also emphasise that the Detaining Authority has passed the order of detention after considering the Report and "the connected records" which includes the Report of the Sub Inspector of Police, which has been expressly stated, and therefore, it must be taken that the Authority has considered the matter. He does not dispute that there is no reference to the matter in the Report of the Sponsoring Authority.

12. Learned counsel for the petitioner would point out that even in the decision in Susi v. State of Kerala (2011 (1) KLT 760), the Court had taken note of the argument of the learned Government Pleader therein that the proceedings under Section 107 were available in the files of the District Magistrate as well as the Government. Still further, we must notice that in the said case, the Government Pleader had contended that the proceedings under Section 107 were available from the files maintained by the District Magistrate and the Government. Therein also, copies of the proceedings under Section 107 were furnished to the detenu. It is thereafter that in paragraph 23, the Court proceeded to hold as follows:

"23. We do accept that such a statement is there in Ext.P3 report under S.3(1). But, significantly there is nothing in Ext.P3 also to suggest that the fact that 107 proceedings have been initiated was known to the sponsoring authority or was brought to the notice of the detaining authority. Along with Ext.P3 a list of documents relied on is appended. Significantly in that there is no reference to Ext.P18 or Ext.P19. The mere fact that Exts.P18 and P19 remained in the file (we will charitably accept that contention) is by itself no substitute for the requirement of application of mind to those documents. We have nothing available to indicate

that there has been such application of mind. The mere fact that copies of Exts.P18 and P19 were furnished to the detenu and were acknowledged by him cannot also according to us improve matters. That only reveals that without proper application of mind a bundle of copies were furnished to the detenu. The furnishing of copies of documents (Exts.P18 and P19) which are not relied on by the sponsoring and detaining authorities and which are not referred to in the S.3(1) report, order of detention or the grounds of detention cannot obviously lead a court to the conclusion that mind must have been applied to all such documents of which copies were unnecessarily furnished to the detenu."

Here also, Ext.P6 purports to be the Report of the sponsoring authority. There is no dispute that in the list of documents attached to the said report, the proceedings under Section 107 Cr. P.C. do not figure. Therefore, we would think that the petitioner is justified in impugning the detention on the ground of non-application of mind to the vital aspect of the pendency of the proceeding under Section 107 Cr. P. C. In this regard, we follow the dictum laid down in Susi v. State of Kerala (2011 (1) KLT 760) and on this ground alone, we would think that the order of detention is illegal.

13. Learned Senior Government Pleader would point out that it has been stated in the Counter Affidavit that unlike in the case referred to by the learned counsel for the petitioner in this case, proceedings under Section 107 Cr. P. C. was not sufficient. Learned counsel for the petitioner would, on the other hand, point out that it is in reply to the ground taken that proceedings under Section 107 would have been sufficient. Pleadings in matters relating to detention are not to be approached in a pedantic manner. We would also notice Ground Q. At any rate, we would think that if the fact of the proceedings under Section 107 has not engaged the mind of the sponsoring authority and the detaining authority going by the actual terms of the order, it may not be appropriate to assume and find such application of mind not on the basis of the order of detention in itself, but with reference to the subsequent pleadings which are set out in proceedings under Article 226. We are also not impressed by the argument of the learned Senior Government Pleader that we must infer application of mind by the detaining authority to proceedings under Section 107 by use of the words "connected

records" in the order of detention. We must also not overlook the fact that what is at stake is the personal liberty of a citizen and application of mind is one of the most prized safeguards which has been engrafted as a duty on the detaining authority. The upshot of the above discussion is that the petitioner must succeed.

In the result, we quash Ext.P1 order of detention and direct the Superintendent of Central Prison, Thiruvananthapuram to set the detenu Shri Manoj at liberty forthwith unless he is wanted in any other case.

Registry will communicate this direction to the Superintendent of Central Prison, Thiruvananthapuram forthwith.

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