

Perumal and Another Vs. the State of Kerala Represented by the Public Prosecutor

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Court : Kerala

Decided On : Jul-26-2012

Reported in : 2012(3)KLT618; 2012(3)KLJ632

Judge : N.K. Balakrishnan

Appeal No. : Bail Appl..No. 5249 of 2012

Appellant : Perumal and Another

Respondent : The State of Kerala Represented by the Public Prosecutor

Judgement :

Petitioners are the two accused in Crime No:109/2012 of Vazhikkadavu Police Station, Malappuram District. The offence alleged is under section 5 of Explosive Substances Act. Petitioners have been in custody since 08.07.2012. Hence they request for bail.

2. It is alleged that on 08.07.2012 at 10.00 p.m., when the lorry KA-05-AB-6258 was intercepted and examined by the Police officials, the said lorry was found to contain 340 bags, each bag containing 50 kilograms of Ammonium Nitrate. The petitioners were the driver and cleaner then seen in the said lorry. The total weight of the Ammonium Nitrate was found to be 17,000 kilograms. The lorry with Ammonium Nitrate, was seized. During investigation it was revealed that though

the Ammonium Nitrate was brought in the name of an establishment called Alungal Chemicals, it was actually brought by one Ismail S/o. Ibrahimkuttu. His address and other particulars are seen mentioned in the Case Diary.

3. The learned counsel for the petitioners vehemently argues that the Way Bill and Consignment Note were produced and that those two documents alone were/are sufficient to transport Ammonium Nitrate. It is further argued with vehemence that Ammonium Nitrate does not even require a license under the Explosives Act or Rules and that the Purchase Bill and Way Bill/Consignment Note alone were required and since the Way Bill/Consignment Note was produced, the Police Officer had no authority to seize Ammonium Nitrate. Argument further proceeds that no offence has been committed by the accused and if at all, there was only violation of the provisions of Explosives Act or Rules which would attract only a bailable offence and as such the detention is illegal.

4. In support of that argument, the copies of the Way Bill/Consignment Note have been produced. The name of the Consignee is shown in those bills as Alungal Chemicals, Door No:9/57 B, Vazhayoor East, Malappuram District. It was contended that Ammonium Nitrate was brought here to be used for making fertilizers. The learned counsel has also relied upon the certificate of registration issued in the name of K. Ismail, Alungal Chemicals, mentioned earlier, to show that he was permitted to import or bring Ammonium Nitrate, Ammonium Chloride etc. That is only a Sales Tax Registration Certificate. Clarificatory notification, dated 04.08.2011, stated to have been issued by the Chief Controller of Explosives and another notification dated 27.03.2009, stated to have been issued by Deputy Chief Controller of Explosives have also been relied upon by the learned counsel to fortify his submission that Ammonium Nitrate per se is not an explosive and it does not require any license under the Explosives Act and that till Ammonium Nitrate Rules are finally notified, the "Ammonium Nitrate is not attracting the provisions of the said Rules or Explosives Rules, 2008". Another notification dated 05.07.2012 issued by the Deputy Chief Controller of Explosives also has been relied upon where it is stated that the draft Ammonium Nitrate Rules were published on 16.09.2011 and final Ammonium Nitrate Rules are yet to be published and hence as on date the Ammonium Nitrate Rules have not come into

force and as such no license is obligatory for the possession, sale, use etc of any quantity of Ammonium Nitrate.

5. The learned Public Prosecutor has strongly assailed the validity of these letters. One S.O., S.O. 1678 (E) is referred to in all these alleged clarificatory letters. It is pointed out that the Central Government has issued the following notification:

“MINISTRY OF HOME AFFAIRS

Notification

New Delhi, the 10th December, 2008.

S.O.2899(E) - In exercise of the powers conferred by clause (b) of Section 2 of the Explosive Substances Act, 1908 (6 of 1908), the Central Government hereby specifies "Ammonium Nitrate or a Combination thereof" as a "special category explosive substances" for the purposes of the said Act."

6. The aforesaid notification was issued by the Central Government in exercise of the powers conferred by clause (b) of section 2 of the Explosive Substances Act, 1908. Section 2(b) of the Explosive Substances Act, 1908, defines Special Category Explosive Substances Act thus:

"In this Act -

(b) the expression "special category explosive substance" shall be deemed to include research development explosive (RDX), penta erythritol tetra nitrate (PETN), high melting explosive (HMX), tri nitro toluene (TNT), low temperature plastic explosive (LTPE), composition exploding (CE) (2,4,6 phenyl methyl nitramine or tetryl), OCTOL (mixture of high melting explosive and tri nitro toluene), plastic explosive kirkee-1 (PEK-1) and RDX/TNT compounds and other similar type of explosives and a combination thereof and remote control devices causing explosion and any other substance and a combination thereof which the Central Government may, by notification in the Official Gazette, specify for the purposes of this Act."

(underlined by me to lay emphasis)

As said earlier it is in exercise of the power conferred under section 2(b) of the Act the afore quoted notification was issued by the Central Government.

7. As such the aforesaid notification has all the statutory force. In other words it has to be read and interpreted that Ammonium Nitrate or a combination thereof is a 'special category of explosive substances'. Therefore, the letter issued by the Controller or others cannot override the statutory notification issued by the Central Government.

So long as this statutory notification dated 10.12.2008 remains in force, the validity of the same cannot be assailed by pointing out some letters issued by the Controller of Explosives or other officials. It is incomprehensible how in the light of the notification No:S.O.2899(E), the Controller of Explosives could issue letters quoting an earlier S.O. (S.O. 1678(E)). Therefore, the learned Prosecutor submits that even that aspect, as to how such letters happened to be issued by the Controller of Explosives ignoring the notification of the Central Government is a matter to be enquired into/investigated.

8. The decision of the Supreme Court in Mohammad Usman Mohammad Hussain Maniyar V. State of Maharashtra (1981) 2 SCC 443 has also been relied upon, where it was held:

"Explosive substance" has a broader and more comprehensive meaning than the term 'Explosive'. 'Explosive Substance includes 'Explosive'.

9. The F.I.R. has been registered alleging commission of offence under section 5 of Explosive Substances Act.

Section 5 reads:

"Any person who makes or knowingly has in his possession or under his control any explosive substance or special category explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punished, -

(a) in the case of any explosive substance, with imprisonment for a term which may extend to ten years, and shall also be liable to fine;

(b) in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

(underlined by me to lay emphasis)

It can be seen that the punishment prescribed under section 5(b), which is pertaining to special category explosive substances, is more grave than the punishment prescribed under section 5(a) of the Act.

10. The learned Public Prosecutor has also pointed out that Alungal Chemicals, the name of the consignee shown in the Way Bill, is not functioning now. The Investigating Officer had sent letters to the Village Officer, Agricultural Officer, Secretary of the Panchayat etc to ascertain whether any such institution/establishment by name Alungal Chemicals, shown in the Way Bill, is actually in existence. The Village Officer, as per certificate dated 11.07.2012 has certified that no such institution/establishment by name Aungal Chemicals is functioning within Vazhayoor Village. Similar is the certificate issued by the Agricultural Officer, Krishi Bhavan, Vazhayoor. It is also mentioned that no such fertilizer factory, company or shop is being run nor was any such institution given license to use Ammonium Nitrate as fertilizer. In other words, this certificate would show that no fertilizer shop, godown or factory was being run in Door No:9/57B of Vazhayoor East Village, in the name of Alungal Chemicals or under any other name. There is another certificate dated 17.7.2012 issued by the Secretary of Vazhayoor Grama Panchayat, which also strengthens the contention raised by the Prosecution that no such institution by name Alungal Chemicals is in existence and that no license was issued by the Panchayat for conducting business in the name 'Alungal Chemicals'.

11. The learned Public Prosecutor submits that these are some of the documents which would show that Ammonium Nitrate was imported by Ismail mentioned above, by showing the name of a fictitious or non-existing institution by name

Alungal Chemicals to hood wink the authorities, to make it appear that Ammonium Nitrate was being imported to be used as fertilizers. It is also submitted by the learned Public Prosecutor that the mobile phone call details pertaining to the mobile phone used by the accused persons would show that they made frequent contacts with Ismail mentioned above, just prior to the seizure and also thereafter.

12. Ismail mentioned above, who is stated to be arrayed as the 3rd accused could not be arrested as he is evading arrest, the prosecution contends. It is further argued on behalf of the prosecution that huge quantity of Ammonium Nitrate is being brought to Kerala not for using it as fertilizers but with sinister motives. It is a dangerous explosive substance. If it reaches the hands of terrorists and anti national elements, it would cause incalculable harm to the society. Such huge quantity of explosive substances, if used for such unlawful activities, would affect the safety and security of the Nation. The quantity imported is so large that by using the same even the whole State can be burnt to ashes, the learned Prosecutor submits. Indeed it is a matter of grave concern. Investigation is only at the initial stage. It is stated that the Investigating Officer is taking sincere effort to see that A3 is arrested and all the relevant materials are collected.

Considering all the aspects, I am not inclined to grant bail to the petitioners at this stage. This application is hence dismissed.

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