

(1996) 07 KL CK 0073

In the High Court Of Kerala

Case No : O.P. No. 4642 and 10258 of 1996-B

Aji Kumari

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 17-07-1996

Acts Referred:

Constitution of India, 1950 — Article 22(4), 22(5)
Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —
Section 10, 10(1), 10(2), 3(1), 3(2)

Citation : (1996) 07 KL CK 0073

Hon'ble Judges : K.G. Balakrishnan, J;K. Narayana Kurup, J

Bench : Division Bench

Advocate : B.S. Swathi Kumar, for the Appellant; P. Jayasanker, Government Pleader for Respondents 1 and 3 and George Poonthottam, for 2nd Respondent, for the Respondent

Judgement

K.G. Balakrishnan, J.—Petitioners in both the Original Petitions have been detained under the provisions of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (hereinafter it will be referred to as "PITNDPS Act 5"). In both the cases the detention orders have been passed under Sections 3(1) and 10(1) of the PITNDPS Act. The detention is challenged on the ground that the Advisory Board under the PITNDPS Act has not given opinion regarding the continued detention and, therefore, the Petitioners prayed that they are entitled to be released on completion of one year period of detention ordered u/s 3(1) of the PITDNPS Act.

2. In O.P. No. 4642/96 the order of detention u/s 3(1) was passed on 11th July 1995 and it was served on him on 15th July 1995. Subsequently an order of detention was passed by the Central Government on 11th August 1995 and that was served on the detenu on 1st September 1995. The order of detention passed u/s 3(1) on 11th July 1995 was referred to the Advisory Board constituted under Article 22(4) of the Constitution for its opinion and the Board met on 23rd August 1995 and gave its opinion to the effect that there was sufficient cause for

detention of the detenu u/s 3(1) of the PITNDPS Act. The contention of the Petitioner is that the order of continued detention passed u/s 10(1) of the PITNDPS Act was received by the detenu only on 1st September 1995 and the Petitioner did not get an opportunity to place his case before the Advisory Board and the Advisory Board had no occasion to give its opinion regarding the sufficient cause for the continued detention in respect of the order passed u/s 10(1) of the PITNDPS Act.

3. In O.P. No. 10258/96 the detention order passed u/s 3(1) of the PITNDPS Act was passed on 11th July 1995 and it was served on him on 12th July 1995. Thereafter, the order of continued detention was passed u/s 10(1) of the PITNDPS Act on 11th August 1995 and it was served on him on 12th September 1995. In this case also the detention order passed u/s 3(1) of the PITNDPS Act was referred to the Advisory Board and the Advisory Board in its meeting held on 23rd August 1995 considered the question of the sufficiency of cause for detention of the detenu u/s 3(1) of the Act and gave its opinion. The contention of the Petitioner is that as regards the order passed u/s 10(1) of the PITNDPS Act for continued detention the Petitioner did not get an opportunity to place his case before the Advisory Board as the Advisory Board had already given its opinion as early as 23rd August 1995. Therefore, the order of continued detention is challenged.

4. We heard Counsel for the Petitioners, learned Government Pleader and also the learned Counsel who appeared for the Central Government. First Respondent has filed a counter affidavit. In paragraph 11 of the counter affidavit it is stated that after the passing of the detention order u/s 3(1) of the PITNDPS Act the matter was referred to the Central Government u/s 3(2) of the PITNDPS Act by letter dated 12th July 1995. It is alleged that after the passing of continued detention order u/s 10(1) of the PITNDPS Act, the detenu could have filed a representation before the Central Government.

5. In the counter affidavit filed by the Union of India it is stated that the State Government issued the detention order on 11th July, 1995 and the declaration u/s 10(1) of the PITNDPS Act was passed on 11th August, 1995. The detenu was also informed that he has a right to represent before the Detaining Authority, Government of Kerala, Central Government and the Advisory Board against the declaration made against him and no representation was filed by the detenu. In O.P. No. 10258/96, the Respondents have not chosen to file any counter affidavit.

6. The main thrust of the arguments of the Petitioners' Counsel is that there was no opinion by the Advisory Board regarding the sufficiency of cause for the continued detention passed u/s 10(1) of the PITNDPS Act. It is admitted that the Advisory Board met on 23rd August 1995 and the order of continued detention passed u/s 10(1) of the PITNDPS Act was served on these Petitioners only after the Advisory Board gave its opinion u/s 9(c) of the PITNDPS Act. Petitioners are justified in their contentions. The detenus were not given an opportunity to submit their case before the Advisory Board as the order of continued detention

u/s 10(1) of the PITNDPS Act was served on them after the Advisory Board gave its opinion.

7. If a continued detention was ordered u/s 10(1) of the PITNDPS Act by the Central Government, the procedure for reference and the time given to the Advisory Board to give its opinion are different. That is evident from Section 10(2) of the PITNDPS Act. The procedure for giving opinion by the Advisory Board is given in Section 9 of the PITNDPS Act. Section 9(b) says that in the case of the detention order u/s 3(1) the appropriate Government shall within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board and Section 9(c) says that the Advisory Board to which a reference is made under Clause (b) shall consider the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned.

8. Section 10(2) of the PITNDPS Act says that in case there is a continued detention order u/s 10(1) of the PITNDPS Act, the time schedule mentioned in Section 9 shall have certain modifications. From Section 10(2) it is clear that in the case of a continued detention order u/s 10 of the PITNDPS Act a reference is to be made to the Advisory Board for" its opinion within four months and two weeks and the Advisory Board is given time of five months and three weeks to give its opinion regarding the continued detention. It is also important in Section 10(2) of the PITNDPS Act that in the case of a continued detention order was passed u/s 10, the opinion of the Advisory Board shall be in respect of the sufficiency of cause for the continued detention order.

9. In these two cases the orders of detention passed u/s 10(1) of the PITNDPS Act were served on the detenus after 23rd August 1995 on which date the Advisory Board gave its opinion and the order of confirmation was passed by the State Government on the basis of that opinion. The Petitioners did not get an opportunity to submit their representation before the Advisory Board. It has been held in Abdula Mamad Mithani and etc. Vs. State of Gujarat and Others, that "since the Advisory Board can go behind the declaration, it stands to reasons to hold that the detenu must have an opportunity to represent against his continued detention by pointing out that the material on the basis whereof the declaration was made was not sufficient for reaching the subjective satisfaction required for making the declaration".

10. While dealing with a similar provision contained in COFEPOSA Act Supreme Court held in Hawabi Sayed Arif Sayed Hamif v. L. Hmingliana AIR 1993 S.C. 8110 that:

The detenu has got a constitutional right to challenge the order of detention by making a representation against the detention order as envisaged under Article 22(5). It may be recalled that the detenu against whom the order of detention has been passed and thereafter a declaration u/s 9(1) has been made, has got a statutory right u/s 8(c) of the Act, to be heard in person if he so desires and the Advisory Board had to submit its report only after hearing him. Therefore, it follows that the detenu should be served with the initial order of detention within the specified period and the order of declaration within a reasonable time so that he could make his personal representation to the Advisory Board leaving apart his right of making representation to the detaining authority under Article 22(5), challenging the order of detention.

Similar view was taken in *P. Vimalamma v. State and Ors.* 1986 (1) K.L.J. 483.

In both the cases the orders passed u/s 10(1) of the PITNDPS Act were not placed before the Advisory Board for its consideration as to the sufficiency of cause for the continued detention and in the absence of such opinion by the Advisory Board the continued detention order passed by the Central Government has to be set aside. We are told that the Petitioners have already undergone the period of detention u/s 3(1) of the PITNDPS Act. As that period of detention is already over, the detenus are ordered to be released forthwith if they are not required in any other case.

Original Petitions are disposed of in the above terms.