

(2002) 09 KL CK 0014
In the High Court Of Kerala
Case No : OP No. 15734 of 2002 (S)

Aysha Nazreem

APPELLANT

Vs

Government of Kerala

RESPONDENT

Date of Decision : 19-09-2002

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 13, 3(1)
Constitution of India, 1950 — Article 22(5)

Citation : (2002) 09 KL CK 0014

Hon'ble Judges : K.S. Radhakrishnan, J;K. Padmanabhan Nair, J

Bench : Division Bench

Advocate : Sunny Mathew, Mohammed Zahir and T.V. Asharaf, for the Appellant;
P.S. Sreedharan Pillai, SCGSC for R2 and Roy Chacko, Government Pleader for R1
and R3, for the Respondent

Judgement

Radhakrishnan, J.—This writ of habeas corpus is preferred by the wife of Abdul Salam Abu, S/o Abdu Rahiman, who is under detention pursuant to detention order No 69324/SSA/4/01/ Home dated 27.12.2001 issued by the first respondent. Detenu was detained by the first respondent in exercise of the powers conferred by Section 3(1)(i) and 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short COFEPOSA Act").

2. Detenu was apprehended on 20.11.2001. H was a passenger of IC 598 of India Airlines coming from Sharja to Calicut. He was found to carry 90 mobile phones and four movie cameras. One hundred and fifty numbers of gold coins were also found out. A statement was recorded on the same day. He was also arrested at 10.00 p.m. and was produced before the Chief Judicial Magistrate, Manjeri at 11.00 a.m. on 21.11.2001 and was remanded to judicial custody till 4.12.2001. He moved bail application. CrI. M.P. No. 11415 of 2001 in O.S. No. 18 of 2001 before the Additional Chief Judicial Magistrate (Economic Offence). Ernakulam. Bail was granted to him on 11.12.2001. While he was on bail order of

detention was passed on 27.12.2001 detaining him in Central Prison, Thiruvananthapuram.

3. The only contention raised by the counsel for the petitioner is that while the detenu was detained under the COFEPOSA Act he was on bail granted by a competent criminal court. Counsel submitted that application for bail and the order granting bail are vital documents but were not noticed, adverted to and considered by the detaining authority and consequently the order of detention is vitiated. Counsel made reference to the decisions of the apex Court in *M. Ahamedkutty Vs. Union of India (UOI) and Another, , Abdul Sathar Ibrahim Sait v. Union of India* (1992 (1) SCC) and the decisions of this court in *Ashraf v. State of Kerala* (2001 (1) KLJ 684) and *Hajra v. State of Kerala* 1997 (1) KLT 597 Reference was also made to the decision of the apex court in *Chowdarabu Raghunandan v. State of Tamil Nadu* 2002 S.C.C. (CrL.) 714 and the decision of this court in O.P. No 7571 of 2002.

4. Counsel appearing for the respondents submitted that when the sponsoring authority has made available the bail application and the order granting bail, it must be taken that the detaining authority had before it the said bail application and the order granting bail and formed its subjective satisfaction and passed the detention order in exercise of the powers conferred under Sections 3(i)(i) and 3(1)(iii) of the COFEPOSA Act. The fact that there is no reference about the bail application and the order granting bail in the detention order does not mean that the detaining authority has not applied its mind while passing the order of detention. We find it difficult to accept the contention advanced on behalf of the respondents. The apex court in *M. Ahamedkutty Vs. Union of India (UOI) and Another*, stated that the bail application and the bail order are vital documents. We may extract relevant portion of the judgment for easy reference.

"Considering the facts in the instant case, the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with grounds of detention and without them the grounds themselves could not be said to have; been complete. We have therefore, no alternative but to hold that it amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of Article 22(5) of the Constitution of India rendering the continued detention of the detenu illegal and entitling the detenu to be set at liberty in this case."

This question again came up for consideration before the apex court in *Abdul Sathar Ibrahim Manik Vs. Union of India and others*, . After analysing the various decisions, the apex court laid down several propositions of which we are concerned in this case with proposition No.6, which is extracted below:

"In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu."

A Bench of this Court in *Ashraff v. State of Kerala* (2001 (1) KLJ 684) followed the abovementioned decision and held that bail application and the order of bail are all vital documents and the detaining authority is bound to consider the same. The court also held that the contents of the bail application and the manner in which bail application was considered by the Magistrate and the ground on which he was satisfied of granting bail would also have a bearing in the formation of the subjective satisfaction of the detaining authority in passing the detention order since those documents are vital documents.

5. In this connection we may also refer to the recent decision of the apex court in *Chowdarabu Raghunandan v. State of Tamil Nadu and Ors.* (2002 S.C.C. CrL 714). In that case apex court was considering the provisions of the COFEPOSA Act and emphasised the necessity of advertent to vital documents and held as follows:

"Though the courts exercising powers of judicial review do not consider the challenges to an order of detention as if on an appeal reappreciating the materials, yet since an order of detention in prison involves the fundamental rights of a life and liberty, no absolute immunity can be claimed by the respondents as to the decision arrived at and it is open to the courts to see whether there has been due and proper application of mind and that all the relevant and vital materials for the purpose have been noticed, adverted to and considered."

We have indicated that when a competent court grants bail on the basis of an application filed by the detenu grounds urged in the bail application as well as the order granting bail are vital documents to be examined by the detaining authority. It is always open to the detaining authority to come to its own subjective satisfaction on the basis of those materials. We have already indicated those are all vital materials to be considered by the detaining authority. In this case the bail application and the order granting bail are vital documents since the competent court has granted bail on certain grounds and hence those documents are to be adverted to and considered.

6. Incidentally we may also point out that the decisions in *M. Ahamedkutty Vs. Union of India (UOI) and Another*, and *Abdul Sathar Ibrahim Manik Vs. Union of India and others*, came up for consideration before the apex court in *K. Varadaraj v. State of Tamil Nadu* (2002 SCCL Com 448). That was a case arose out of the Tamil Nadu Prevention of Dangerous Activities of Bottleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1982 (Tamil Nadu Act 14 of 1982). In that case before the detention order was

passed on 8.11.2001. detenu was arrested for indulging in the trade of bootlegging. Pursuant to the arrest he made an application for bail and as per order dated 19.10.2001 bail was granted to him and the court directed him to be released on bail on his executing a bond for Rs. 5.00/with two sureties for the like sums, each to the satisfaction of the Judicial Magistrate. Krishnagiri, Bail was granted since no objection was raised by the Public Prosecutor. However, he was not released on bail since he failed to comply with the conditions imposed while granting bail and consequently continued to be in custody. Order of detention was passed on 8.11.2001. When the detention order was passed, detaining authority did not have before it the application for bail nor the order passed thereon by the Sessions Judge. However, detaining authority took into consideration remand order made by the court to note the fact that the detenu was in police custody. Contention was raised before the High Court by the detenu that application for bail preferred by him as well as the order on it were not placed before the detaining authority. Consequently order of detention was vitiated. The High Court however rejected the contention noticing that the detenu did not come out on bail and he had remained to be on remand in prison on the basis of the order bail application or the order made thereon were on relevant material. The apex court after considering its earlier decision in Abdul Sathar's case held as follows:

"We have considered the argument advanced on behalf of the parties as also perused the records. The issue that arises for our consideration in this case is not really *res integra*. In the case of Ahamedkutty (*supra*), this court held: "Considering the facts the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired....." It is based on this observation of the court that learned counsel for the appellant argued that non-consideration of the bail application and order made thereon would vitiate the order of detention. But we should notice that the said observation of this court was made on facts of that case, therefore, we cannot read into that observation of this court that in every case where there is an application for bail and an order made thereon the detaining authority must as a rule be made aware of the said application and order made thereon. In our opinion the need of placing such application and order before the detaining authority would arise on the contents of those documents. If the documents do contain some material which on facts of that case would have some bearing on the subjective satisfaction of the detaining authority then like any other vital material even this document may have to be placed before the detaining authority. In our opinion, the judgement of this court in Ahamedkutty (*supra*) does not lay down a mandatory principle law that in every case the application for bail and the order made thereon should be placed before the court. We are supported in this view of ours by the judgment relied on by the State in Abdul Sathar (*supra*)."

After holding so, apex court further held as follows:

"From the facts of this case, we must note that the fact that the detenu was in custody was taken note of by the detaining authority by reference to his remand order therefore that is a vital fact which is taken note of by the court. The contents of the bail application also in our opinion do not contain any vital material notice of which the detaining authority had to take. However, in our opinion there was a vital fact in the order of the court notice of which ought to have been taken by the detaining authority. The said fact is that the court specifically noted in the bail order that the Public Prosecutor had no objection for grant of bail therefore the court was inclined to grant bail to the appellant. This is a circumstances, in our opinion, which ought to have been noticed by the detaining authority because the counsel representing the State in express terms said that he which would also mean his client which is the State, did not have any objection to the grant of bail. Therefore in our opinion this is a vital fact notice of which the detaining authority ought to have taken."

Counsel for the respondents submitted that as opined by the apex court in Ahamedkutti's case , there is no general proposition that whenever bail is granted on application made by the detenu application and the bail order are vital documents to be considered by the detaining authority, consequently non mentioning of the bail application and the bail order in the detention order would not vitiate the order of detention.

7. We find it difficult to accept the above contention of the respondents. Apex court in Varadaraj's case has noted that it is not correct to say in every case there is an application for bail and the order made thereon and the detaining authority must as a rule be made aware of the said application and the order made thereon. Need of placing such an order and the application would arise on the contents of those documents. If the document do contain some materials which would enable to form subjective satisfaction of the detaining authority it has to be placed before the detaining authority. In the above mentioned case apex court has found that the concession made by the Prosecutor is a relevant factor which ought to have been taken note of, when an order is passed by a competent court granting bail after hearing the counsel for the accused as well as the prosecutor on merits subject to certain conditions we are of the view the said order is also a vital document though not an order passed on concession by the criminal court. Order passed by the criminal court on concession made by the prosecutor as well as the order passed by the criminal court after hearing both sides is also a vital document. As far as this case is concerned order passed by the criminal court granting bail is a conditional one and the conditions are as follows:

- (1) The accused shall execute bond for Rs.50,000/- with two solvent sureties for the like sum.
- (2) The accused shall appear before the investigating officer on every Monday and Friday for two months or till the investigation is over whichever is earlier.

(3) The accused shall not leave the country without the permission of this court.

We are of the view that detaining authority has to consider whether the conditions imposed by the criminal court while granting bail would be sufficient to safeguard its interest or continued detention is necessary under the COFEPOSA Act. This is a vital fact to be gone into by the detaining authority. It is always open to the detaining authority to detain a person de hors the conditions imposed by the criminal court but that is a fact to be taken into consideration by the detaining authority to from its subjective satisfaction while passing the detention order. In this case we find detenu was already on bail subject to certain conditions. Detaining authority had not noticed, adverted to and considered that fact. Consequently the order of detention is vitiated.

8. Counsel appearing for the sponsoring authority however submitted that even if the detention order is vitiated by procedural infirmity, detaining authority may be permitted to pass fresh orders rectifying the procedural defects. Counsel laid stress on the decision of the apex Court in Naranjan Singh Nathawan Vs. The State of Punjab, which was referred to by the apex court in a later decision in Sanjay Dutt Vs. State through C.B.I., Bombay, . Counsel appearing for the detenu however submitted that if the court finds that the order of detention is invalid and it is set aside, the detaining authority has no jurisdiction to pass fresh orders. In any view of the matter, counsel submitted that in the instant case such a power cannot be exercised since the period of detention is about to expire. We are of the view in the instant case it may not be possible for the detaining authority to pass fresh detention order since only a few more months remain for the detenu to be released. However, we may add in appropriate cases where there are procedural infirmities, the detaining authority can pass fresh orders after clearing the procedural defects. We find in this case detaining authority had failed to take note of the bail application and the order granting bail. Consequently mandatory requirement has not been complied with by the detaining authority.

9. We are of the view in appropriate case it would be possible to cure such defects and pass fresh detention orders. We are fortified in this view by the decision of the apex court in Naranjan Singh Nathawan Vs. The State of Punjab, wherein the apex court after referring to the earlier decision in Makhan Singh Tarsikka Vs. The State of Punjab, held as follows:

"Indeed, the position is now made more clear by the express provisions of Section 13 of the Act which provides that a detention order may at any time be revoked or modified and that such revocation shall not bar the making of a fresh detention order u/s 3 against the same person. Once it is conceded that in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold, in the absence of proof of bad faith, that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible

which is free from defects and duly complies with the requirements of the law in that behalf."

Counsel appearing for the detenu is justified in contending that on the same set of facts a fresh order of detention cannot be passed but in a case where vital documents were not adverted to or noticed and considered while passing the detention order the detaining authority could look into all those vital documents omitted to be considered and pass a fresh order of detention. We therefore quash the order of detention subject to the above observation and set the detenu at liberty unless he is required in connection with any other case.