

(2013) 01 MAD CK 0211
In the Madras High Court
Case No : H.C.P. (MD) No. 1325 of 2012

Habiunnisa

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 07-01-2013

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22(5)

Citation : (2013) 2 MLJ(Cri) 656

Hon'ble Judges : S. Nagamuthu, J; M. Jaichandren, J

Bench : Division Bench

Advocate : S. Palanikumar, for the Appellant; Shanmuga Vellayutham, State Public Prosecutor, B. Vijay Karthikeyan, Senior Standing Counsel for Customs and Central Excise, for the Respondent

Judgement

M. Jaichandren, J.—This Habeas Corpus Petition has been filed to call for the records relating to the order of the first respondent, dated

5.10.2012, made in G.O. No. SR. 1/143-9/2012, and quash the same, and to produce the detenu, namely, Mohamed Haniffa Jafar, son of

Mohamed Hanifa, aged about 43 years, confined in the Central Prison, Madurai, before this Court and to set him at liberty. The petitioner has

stated that the second respondent had passed the impugned detention order, dated 5.10.2012, u/s (1)(i) of the Conservation of Foreign Exchange

and Prevention of Smuggling Activities Act, 1974, (Central Act 52 of 1974), directing the detention of Mohamed Hanifa, in the Central Prison,

Madurai.

2. Even though various grounds had been raised by the petitioner, in the present Habeas Corpus petition, while challenging the impugned detention

order, dated 5.10.2012, the learned counsel appearing on behalf of the petitioner

had submitted that the said detention order in G.O. No. SR.

1/143-9/2012, is liable to be set aside, merely on the ground of delay in the disposal of the representation, dated 19.10.2012, made on behalf of the detenu.

3. The learned counsel appearing on behalf of the petitioner had submitted, inter alia, that there has been an inordinate and unexplained delay in disposing of the representation, dated 19.10.2012, submitted on behalf of the detenu, to the Union of India, the second respondent, herein.

Therefore, the impugned detention order, dated 5.10.2012, is liable to be set aside.

4. The learned counsel appearing on behalf of the petitioner had referred to the averments made in paragraph No. 2.2 of the counter affidavit, dated 27.11.2012, filed on behalf of the second respondent, which reads as follows:

2.2. With regard to the averments made in Para-20 of the Petition insofar as these relate to the Respondent No. 2 i.e. Union of India, it is

respectfully submitted that as per the records maintained in the Cofeposa Unit of the Ministry, the purported representation dated 19.10.2012 in

Tamil language from Smt. Habibunnisa, wife of Shri Mohamed Haniffa Jafar, COFEPOSA Detenu (but signed on 22.10.2012 by the detenu

himself, not by his wife/petitioner as claimed), forwarded by the Superintendent of Prisons, Central Prison, Madurai vide his letter dated

22.10.2012, was received in the COFEPOSA Unit of the Ministry of Finance, Department of Revenue, New Delhi on 25.10.2012. However, in

the forwarding letter of the Superintendent of Prisons, Central Prison, Madurai dated 22.10.2012 it was inadvertently mentioned that the said

representation was of Shri Mohamed Haniffa Jafar, COFEPOSA Detenu (not of his wife). Parawise comments on the representation along with its

English translation and other relevant information were called for from the Sponsoring Authority, viz. the Directorate of Revenue Intelligence,

Chennai and the Detaining Authority viz. the State Government of Tamil Nadu, Chennai on 25.10.2012 itself. A copy of the said representation of

the Petitioner along with a copy of the identical representation of Shri. Mohamed Haniffa Jafar, Cofeposa Detenu dated 20.10.2012 (signed by the

detenu on 22.10.2012 only) was also received in the Cofeposa Unit from the

State Government of Tamil Nadu (i.e. the Detaining Authority) on 30.10.2012. Both the Detaining Authority and the Sponsoring Authority were reminded by the Ministry on 5.11.2012 to furnish their comments on the said representation urgently. The comments of the Detaining Authority on the representation, sent vide letter dated 2.11.2012, were received in the COFEPOSA Unit of Ministry of Finance, Department of Revenue, New Delhi on 8.11.2012. The comments of the Sponsoring Authority on the representation, sent vide letter dated 12.11.2012, were received in the COFEPOSA Unit of Ministry of Finance, Department of Revenue, New Delhi on 19.11.2012. COFEPOSA Section submitted the file along with all the relevant records & documents to the Consultant (COFEPOSA) on 19.11.2012 for examination. After conducting detailed examination of the issues raised in both the representations and the comments of the Sponsoring Authority and Detaining Authority thereon, the Consultant (COFEPOSA) submitted the file with a comprehensive note to the Joint Secretary (Cofeposa) on 21.11.2012. Joint Secretary (Cofeposa), in turn, submitted the file to the Special Secretary & Director General, Central Economic Intelligence Bureau, New Delhi on 22.11.2012, with her remarks. The representations were considered by the Special Secretary & Director General, Central Economic Intelligence Bureau, Ministry of Finance, Department of Revenue, New Delhi on behalf of the Central Government and the same were rejected by her on 22.11.2012, being devoid of merit. The representations as well as the detenu were intimated about the rejection of their representations dated 19/22.10.2012 and 20/22.10.2012 vide Ministry's Memoranda both dated 22.11.2012.

5. The learned counsel had pointed out that it is clear from the averments made in paragraph 2.2 of the counter affidavit filed on behalf of the second respondent that there has been an inordinate and unexplained delay in the disposal of the representation submitted on behalf of the detenu, dated 19.10.2012. He had submitted that the representation, dated 19.10.2012, submitted on behalf of the detenu, which was in Tamil, had been received by the COFEPOSA Unit of the Ministry of Finance, Department of Revenue, New Delhi, on 25.10.2012. However, the said representation had been rejected, only on 22.11.2012, by the Special Secretary

and Director General, Central Economic Intelligence Bureau, Ministry of Finance, Department of Revenue, New Delhi. The said order of rejection had been served on the detenu, on 27.11.2012.

6. The learned counsel appearing on behalf of the petitioner had relied on the following decision of a Division Bench of this Court, dated

12.12.2011, made in H.C.P. (MD). No. 505 of 2011 Pathumuthu v. The State of Tamil Nadu, rep. by. The Secretary to Government and Others

to substantiate his contention that the impugned detention order, dated 5.10.2012, is liable to be set aside, due to the undue and unexplained delay,

in the disposal of the representation, submitted on behalf of the detenu, dated 19.10.2012.

7. The learned counsel appearing on behalf of the petitioner had further submitted that, even though the representation submitted on behalf of the

detenu had been considered by the Special Secretary and Director General, Central Economic Intelligence Bureau, Ministry of Finance,

Department of Revenue, New Delhi, on behalf of the Central Government, the rejection of the request, made on behalf of the detenu, had been

communicated by the Under Secretary to the Government of India, by way of a memorandum, dated 22.11.2012, even though, he is not the

competent authority to do so. The said memorandum, dated 22.11.2012, which had been communicated to the detenu, on 27.11.2012, reads as

follows:

With reference to her representation dated 19/22.10.2012 addressed to the Secretary, Government of India, Ministry of Finance, Department of

Revenue, Central Economic Intelligence Bureau, Janpath Bhavan, Janpath, New Delhi, Smt. Habibunisa, wife of Thiru. Mohamed Haniffa Jafar,

COFEPOSA detenu is hereby informed that the aforesaid representation has been carefully considered by the Special Secretary & Director

General, Central Economic Intelligence Bureau, Ministry of Finance, Department of Revenue, New Delhi on behalf of the Central Government, but

it is regretted that the same has been rejected.

8. The learned counsel had submitted that the communication issued by the Under Secretary to the Government of India, dated 22.11.2012, is

cryptic in nature and no proper reasons have been communicated to the detenu, by way of the said memorandum, for the rejection of the said

representation, submitted on behalf of the detenu. Hence, the rejection of the representation, submitted on behalf of the detenu, by the second respondent, is arbitrary and illegal. Therefore, the impugned detention order is liable to be set aside.

9. The learned counsel had relied on the decision of this in Smt. A. Ramani Vs. The Secretary to Government, Cooperation, Food and Consumer

Protection Department, 2nd Floor, Namakkal Kavignar Maligai Secretariat, Chennai 600 009, The District Collector and The District Magistrate,

Cuddalore District, Cuddalore and The Secretary to Government, Ministry of Consumer Affairs, Food and Public Distribution, (Department of

Consumer Affairs) Room No.270, Krish Bhavan, New Delhi-110001 Court, in support of his contention,

10. The learned counsel appearing on behalf of the respondents 1 and 3 had stated that the representation made on behalf of the detenu, dated

22.10.2012, had been received by the State Government, through the Superintendent, Central Prison, Madurai, on 25.10.2012, and it had been

rejected, on 16.11.2012. The same had been communicated to the detenu, on 20.11.2012. The details relating to the disposal of the

representation, dated 22.10.2012, submitted on behalf of the detenu, had been shown in paragraph 15 of the counter affidavit filed on behalf of the

first respondent. Paragraph 15 of the counter affidavit filed on behalf of the first respondent, reads as follows:

15. As far as the averments made in paragraph 20 of the affidavit are concerned, it is submitted that the representation dated 19.10.2012 and

20.10.2012 said to have been sent by the detenu's wife and the detenu, has not been received in this department. However, similar

representations in the name of Thiru. Mohamed Haniffa Jafar, COFEPOSA detenu and his wife Smt. Habibunisa, dated 22.10.2012, was

received by the Government through the Superintendent, Central Prison, Madurai on 25.10.2012 and it was disposed off on 16.11.2012 as

follows-

Similar representations were received on 25.10.2012 and it was disposed off on 16-11-2012. In between 25-10-2012 and 16-11-2012, there

were twenty three days. Out of these, there were seven Government holidays. Excluding these holidays, similar representations were continuously

and carefully considered and disposed off within sixteen days and there was no undue and unexplained delay in considering the representation.

11. The learned counsel for the petitioner had submitted that the inordinate delay that had occurred in the disposal of the representation, made on

behalf of the detenu, would vitiate the detention order passed by the Detaining Authority.

12. The learned Additional Public Prosecutor, appearing on behalf of the respondents, had submitted that the Habeas Corpus Petition, filed on

behalf of the detenu, is premature in nature.

13. The learned counsel had relied on the decision of the Supreme Court, in D.M. Nagaraja Vs. The Government of Karnataka and Others, , to

state that there is no obligation on the part of the Detaining Authority or the State Government to dispose of the representation made on behalf of

the petitioner, before the order of detention is approved.

14. In a number of decisions, the Apex Court, as well as the various High Courts, have made it clear that the delay in disposing of the

representation would vitiate the order of detention. Some of them are as follows:

1. Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others,

2. Rivadeneyta Ricardo Agustin v. Government of the National Capital Territory of Delhi .

3. Rajammal Vs. State of Tamil Nadu and Another,

4. Senthil Kumar Vs. The District Magistrate and District Collector and State of Tamil Nadu

S. Jakkulin v. State of Tamil Nadu (2008) 2 MLJ (CrL.) 1571.

6. State of Tamil Nadu rep. by its Secretary to Government, Home, Prohibition and Excise (ix) Department, Secretariat, Chennai and Another

2009(1) MWN (Cr.) 400 (DB).

15.1. In the decision, in Prabhu Dayal Deorah Vs. The District Magistrate, Kamrup and Others, the Supreme Court has held that the constitutional

requirement of Article 22(5) will not be satisfied, unless the detenu is given the earliest opportunity to make a representation against the detention.

Thus, it is clear that the State has a concomitant and corresponding duty to dispose of the representation, without any delay. Therefore, the

Supreme Court has repeatedly held that the State government is bound to

consider the representation made on behalf of the detenu, at the earliest possible, as it is a mandatory obligation cast on it, by Clause (5) of Article 22 of the Constitution of India.

15.2. In *Ramamurthy Vs. The State of Tamil Nadu*, , this Court had set aside the order of detention on the ground of delay in considering the representation made on behalf of the detenu.

15.3. In a decision of the Constitution Bench of the Supreme Court, in *Jayanarayan Sukul Vs. State of West Bengal*, , it has been held as follows:

The reason for immediate consideration of the representation is too obvious to be stressed. The personal liberty of a person is at stake. Any delay

would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional because the Constitution enshrines the

fundamental right of a detenu to have his representation considered and it is imperative that when the liberty of a person is in peril, immediate action

should be taken by the relevant authorities.

15.4. The Supreme Court, in *Mahesh Kumar Chauhan alias Banti Vs. Union of India and others*, while dealing with a case of preventive detention,

has observed that an undue and unexplained delay in the disposal of the representation of the detenu is in violation of Article 22(5) of the

Constitution of India, rendering the detention order invalid.

15.5. In *Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others*, , the Supreme Court has observed that a representation of a

detenu, whose liberty is in peril, should be considered and disposed of, as expeditiously as possible. The continued detention will render itself

impermissible and invalid as being violative of Article 22(5) of the Constitution of India. If any delay occurs in the disposal of a representation, such

delay should be explained, by the appropriate authority, to the satisfaction of the Court.

15.6. In the decision, in *Venkatesan @ Maya Venkatesan Vs. State of Tamil Nadu* , it has been held that it is clear that the Government is bound

to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. The test is not the duration or

range of the delay, but how it is explained by the Authority concerned.

15.7. In the decision, in *Sumaiya v. The Secretary to Government, Prohibition and Excise Department, Government of Tamilnadu, Fort St.*

George, Chennai-9 and Another 2007(2) MWN (Cr.) 145 (DB), this Court had held that an unexplained delay of three days in the disposal of the

representation, made on behalf of the detenu, would be sufficient to set aside the detention order.

15.8. In *G. Kalaiselvi v. The State of Tamil Nadu* 2007(5) CTC 657, a Full Bench of this Court had held that it is by now well recognised that the

authorities concerned are duty bound to afford to the detenu an opportunity of making a representation and such right of the detenu, obviously,

encompasses the corresponding duty that the representation must receive careful and expeditious attention and should be disposed of without any

unnecessary delay, and the result of such representation should also be communicated without any such delay.

15.9. In *Rekha Vs. State of T. Nadu tr. Sec. to Govt. and Another*, it has been held that the personal liberty of a person is protected, under

Article 21 of the Constitution of India. As it is so sacrosanct and so high in the scale of constitutional values, there is an obligation on the part of the

Detaining Authority to show that, while passing the impugned order of detention, the procedures established by law have been meticulously

followed. The procedural safe guards are required to be zealously watched and enforced by the Courts of law and their rigour cannot be allowed

to be diluted on the basis of the nature of the alleged activities of the detenu.

15.10. In *K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others*, , it had been

held that any unexplained delay in the disposal of the representation made on behalf of the detenu would be a breach of the constitutional

imperative and it would render the continued detention impermissible and illegal.

15.11. In fact, this Court, in its order, dated 9.11.2011, in *Smt. Sowdun Bivi v. The State of Tamilnadu* (H.C.P. No. 108 of 2011), has clarified

the position relating to the issue regarding the consideration of the representation made on behalf of the detenu, referring to the Full Bench decision

of this Court, in *Rajammal v. State of Tamil Nadu and Another* (supra). Thus, it is clear, from the catena of cases decided by the Supreme Court,

that there is an obligation cast on the Detaining Authority, as well as the State Government, to consider the representation made on behalf of the

detenu, as early as possible, as per the mandate enshrined in Clause (5) of

Article 22 of the Constitution of India.

15.12. In *Rashid Sk. Vs. State of West Bengal*, the Supreme Court has held that the right to represent and to have the representation considered

at the earliest flows from the constitutional guarantee of the right to personal liberty-the right which is highly cherished in our Republic and its

protection against arbitrary and unlawful invasion.

15.13. In *Sri Ram Skukrya Mhatre Vs. R.D. Tyagi and Others*, the Supreme Court has held thus;-

...the right to representation under Article 22(5) of the Constitution of India includes right to expeditious disposal not only by the State Government

under the relevant provision of the Statute, but also by the Central Government. But in each case it is one of fact to be ascertained whether the

Central Government or State Government, as the case may be, has caused delay due to negligence, callous inaction, avoidable re-tapism and

undue protraction by the authorities concerned. Expedition is the rule and delay defeats mandate of Article 22(5) of the Constitution of India.

15.14. In *Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others*, , the Supreme Court has held that an avoidable and unexplained

delay in the disposal of the representation would result in rendering the continued detention of the detenu illegal and constitutionally impermissible.

15.15. In *Tara Chand Vs. State of Rajasthan and Others*, and *Raghavendra Singh Vs. Superintendent, District Jail, Kanpur and Others*, the Apex

Court has held that any inordinate and unexplained delay on the part of the Government, in considering the representation, renders the detention

illegal.

15.16. In *Rajammal v. State of Tamil Nadu and Others* (supra), it has been held as follows:

It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is

prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words ""as soon as may be"" in clause (5) of

Article 22 convey the message that the representation should be considered and disposed of at the earliest.

15.17. In *K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others* and *State of Karnataka and Others*, it has been held

as follows:

.... it is settled law that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained

delay in the disposal of the representation would be breach of the constitutional imperative and it would render the continued detention

impermissible and illegal.

15.18. In a recent decision, in Ummu Sabeena Vs. State of Kerala and Others, the Supreme Court has held that the history of personal liberty, as

is well known, is a history of insistence on procedural safeguards. The expression "as soon as may be", in Article 22(5) of the Constitution of

India, clearly shows the concern of the makers of the Constitution that the representation, made on behalf of the detenu, should be considered and

disposed of with a sense of urgency and without any avoidable delay.

16. In the present case, the delay caused in the disposal of the representation, dated 19.10.2012, made on behalf of the detenu, has not been

properly explained by the respondents.

17. In view of the submissions made on behalf of the learned counsel appearing on behalf of the petitioner and the learned counsels appearing on

behalf of the respondents and on a perusal of the records available and in view of the decisions cited supra, this Court is of the considered view

that there has been an inordinate and unexplained delay caused, by the second respondent, in disposing of the representation, dated 19.10.2012,

submitted by the petitioner, the wife of the detenu. It is noted that the said representation, dated 19.10.2012, submitted by the petitioner, signed by

the detenu, on 22.10.2012, had been received by the COFEPOSA-Unit of the Ministry of Finance, Department of Revenue, New Delhi, on

25.10.2012. The said representation had been considered by the Special Secretary and Director General, Central Economic Intelligence Bureau,

Ministry of Finance, Department of Revenue, New Delhi, on behalf of the Central Government and it had been rejected on 22.11.2012, and it had

been served on the detenu, on 27.11.2012. As such, there has been an inordinate and unexplained delay in the rejection of the representation,

submitted on behalf of the detenu. Further, the decision to reject the representation, submitted on behalf of the detenu, had been communicated to

the detenu, by the Under Secretary to the Government of India, by way of a

Memorandum, dated 22.11.2012. The said memorandum is cryptic in nature and it does not contain the reason for the rejection of the representation submitted on behalf of the detenu. In such circumstances, this Court is of the considered view that the impugned detention order, dated 05.10.2012, is liable to be set aside. In such circumstances, in view of the decisions cited supra, the detention order, dated 05.10.2012, passed by the first respondent, is set aside. The detenu is directed to be set at liberty, forthwith, unless his detention is required in connection with any other case or cause.