
(2013) 11 MAD CK 0169
In the Madras High Court
Case No : H.C.P. No. 2330 of 2013

J. Abdul Rahim

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 19-11-2013

Acts Referred:

Citation : (2014) CriLJ 250 : (2014) 2 CTC 290 : (2013) 4 MLJ(Cri) 703

Hon'ble Judges : S. Rajeswaran, J;P.N. Prakash, J

Bench : Division Bench

Advocate : Radhakrishnan for Mr. P. Pugalenth, for the Appellant; Shanmugha Velayudham, PP Assisted by Mr. A.N. Thambidurai, APP, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—This Habeas Corpus Petition has been filed by the friend of the detainee, namely, Bakrudeen @ Police Bakrudeen, S/o. Sikandar, aged 36 years, seeking a direction to the respondents to produce him before this Court and set him at liberty. According to the petitioner, the detainee was in illegal custody of the respondents. A news item published in Chennai Edition of "Times of India" on Saturday, 5th October, 2013 stating that the sleuths of Special Investigation Team of CBCID nabbed one S. Fakrudeen, @ Police Fakrudeen on the previous day, i.e. Friday, 4th October, 2013, who is listed as "wanted" in some high profile criminal cases. Immediately, on the same day, i.e. 5.10.2013, the petitioner herein, who claims himself to be a friend of the said Fakrudeen, knocked the doors at the residence of His Lordship the Hon'ble The Chief Justice of this High Court and prayed for issuance of the above said direction by way of Writ of Habeas Corpus, alleging that the police had illegally detained his friend S. Fakrudeen based on the above said news item. The Hon'ble Chief Justice, constituted a special Bench on 05.10.2013 comprising Thiru Justice R. Sudhakar and Thiru Justice A. Arumughasamy to hear the grievance of the petitioner. On 5.10.2013, the special Bench of this Court heard the learned counsel for the petitioner and the learned Advocate General, appearing for the State and passed

the following order:

(Order of the Court was made by R. SUDHAKAR, J.)

This Habeas Corpus Petition is filed praying to issue a writ of Habeas Corpus for a direction to the respondents to produce the petitioner's friend namely, Bakrudeen @ Police Bakrudeen, S/o. Sikandar, aged 36 years who is illegally detained by the respondents before his Court and set him at liberty.

2. Heard Mr. P. Pugalenth, learned counsel, who appears on behalf of the next friend to the detenu Bakrudeen @ Police Bakrudeen. Learned counsel states that the detenu Bakrudeen @ Police Bakrudeen has been illegally detained by the respondents police, more particularly, the third respondent Superintendent of Police, CBCID (Special Investigation Team), No. 293, NMK Road, Alandur, Chennai-600 016.

3. On notice Mr. A.L. Somayaji, learned Advocate General appears for the first respondent State and also the respondents 2 and 3.

4. Learned Advocate General states that the following three criminal cases have been registered against the detenu Bakrudeen @ Police Bakrudeen:

(1) FIR in Crime No. 554 of 2013 registered under Sections 147, 148 and 302 IPC of Madurai Thedir Nagar Police Station relating to murder of one Suresh in Madurai;

(2) FIR in Crime No. 599 of 2013 registered u/s 302 IPC read with Section 5 of Explosive Substances Act, 1908 relating to murder of one Vellaiappan;

(3) FIR in Crime No. 297 of 2013 registered u/s 302 IPC of Hasthampatti Police Station relating to murder of one Ramesh alias Auditor Ramesh.

5. Learned Advocate General further states that the Bakrudeen @ Police Bakrudeen has been arrested at Periamet in connection with Crime No. 599 of 2013 registered u/s 302 IPC read with Section 5 of Explosive Substances Act, 1908 on 4.10.2013 at 8.30 pm. The fact of arrest of the accused Bakrudeen @ Police Bakrudeen has been intimated to the mother of the accused, namely, Syed Meera at Madurai. The Procedure as per law has been followed. Advocate General further states that the accused will be dealt with as per law and undertakes to file a report on the next hearing date.

6. The statement made by the learned Advocate General is recorded. Since the procedure prescribed by law is said to have been followed, there is no necessary to issue any direction as sought for in this Habeas Corpus Petition.

List the matter after two weeks for filing report.

2. Thereafter, when the matter came up for hearing before this Bench (Portfolio Bench), the Superintendent of Police, SIT, CBCID filed a counter, stating that "Fakrudeen @ Police Fakrudeen was arrested in connection with a case registered on the file of Vellore North Police Station in Crime No. 599/2013 u/s 302 IPC r/w.

Section 5 of the Explosive Substances Act, 1908, which was later transferred pursuant to the orders of the Director General of Police, Tamil Nadu, Chennai to the file of CBCID (Special Investigation Team) vide proceedings in RC. No. 126136/Crime 4(1)/2013, dated 21.07.2013.

3. Subsequently, the detenu, Fakrudeen was produced before the learned Judicial Magistrate No. III, Vellore on 5.10.2013, who initially remanded him to judicial custody till 18.10.2013, by making the following order on the remand application, which reads as under:

The accused Fakrudeen @ Police Fakrudeen has been produced before me by Mr. Annadurai, Inspector of Police, CB CID. The accused has been explained the grounds of his arrest. He did not make any complaint against the police. His right eye was found to be reddish and swelling. When he was questioned about it, he said that at the time of his apprehension, there was a scuffle with the police, on account of which, he sustained the injury.

The case file was perused. Since there are sufficient reasons to remand the accused to judicial custody, he is remanded till 18.10.2013 to judicial custody. The accused has been explained about legal aid to him

(Translated from vernacular)

4. Thereafter, the police appeared to have moved an application for police custody of the detenu for the purpose of interrogation, from time to time, which were also granted by the Remanding Magistrate for a total period of 15 days.

5. Thus, it is clear that the accused was arrested by the police on 4.10.2013 and on the very next day, he was produced before the jurisdictional Magistrate for remand and as on date, he is in legal custody. It is settled legal proposition of law that at the time of consideration of Habeas Corpus Petition, if the detenu is in legal custody, no writ of habeas corpus can be issued. (Refer: Kanu Sanyal Vs. District Magistrate, Darjeeling and Others,).

6. Therefore, we are of the view that the present Habeas Corpus Petition can be decided and dismissed on the above referred short ground and the learned counsel for the petitioner has also fairly acceded to the same. However, the learned counsel for the petitioner further endeavored to build up his case on the basis of the grist provided by the police in the form of the arrest memo and remand order, copies of which were annexed with the counter affidavit filed by Mrs. B. Vijaya Kumari, Superintendent of Police, Special Investigation Team, CB CID and demanded the scalp of the police for not following the second commandment laid down by the Hon'ble Supreme Court in D.K. Basu Vs. State of West Bengal, and therefore, he prayed this Court to initiate contempt proceedings against the concerned Police Officers and also direct the State Government to take departmental action against them.

7. It was contended by the learned counsel for the petitioner that no responsible witness was made to attest the arrest memo and the arrest intimation was also

not given to the family members of the arrestee.

8. D.K. Basu's case was rendered in the year 1997 by the Hon'ble Supreme Court, to curb illegal arrests by the police. The Hon'ble Supreme Court itself says in para 35 of the judgment that the directions issued by them should be followed till legal provisions are made in that behalf. By Central Act, 25 of 2005, with effect from 23.6.2006, the second commandment in "D.K. Basu's case has been given a statutory form by incorporating Section 50(A) in the Code of Criminal Procedure. In the light of this amendment, any complaint of infraction of the second commandment cannot be viewed as violation of the judgment of the Hon'ble Supreme Court, but as a violation of statutory provision and therefore, no contempt can lie. However, we proceeded to examine the veracity of the allegations made by the learned counsel for the petitioner in this regard.

9. The second commandment laid down by the Hon'ble Supreme Court in "D.K. Basu's case (cited supra), in para 35, reads as follows:

35. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

(1).... ..

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3).... ..

... ..

10. In response to this contention, Mrs. B. Vijay Kumari, Superintendent of Police, Special Investigation Team, CB CID, in her affidavit, in para 7, states as under:

7. It is submitted that the accused Fakrudeen @ Police Fakrudeen was arrested on 04.10.2013 at 20.30 hours at Choolai Rountana, Choolai High Road, Chennai, after conforming his identity. After the arrest of Fakrudeen @ Police Fakrudeen, arrest memo was prepared by the Inspector of Police Tr. K. Annadurai and requested the public to put signature in the arrest memo as a witness for the arrest. At the time of apprehending Fakrudeen, a scuffle took place between the accused and the police team as Fakrudeen resisted his apprehending by the police team and tried to escape. Due to this there was a feeling of fear amongst the public. Further Fakrudeen being a notorious terrorist involved in many murder cases, and cases of planting of IEDs, no one came forward to be a witness for the arrest of Fakrudeen out of fear. The arrest intimation was sent to the mother of accused Fakrudeen at Madurai on 05.10.2013 through Smt.

Santhalakshmi, Sub Inspector, Special Investigation Division, Madurai. Intimation was served on Smt. Saeed Meera, mother of the accused Fakrudeen and acknowledgment was obtained in this regard. (copy enclosed)

11. On a perusal of the above, the fact that there was scuffle between the detenu Fakrudeen and the police, as stated by the Superintendent of Police, is confirmed by the detenu Fakrudeen himself in his statement before the Remanding Magistrate. It is specifically stated that due to fear, no one came forward to attest the arrest memo and further, the respondent police have informed the arrest of the detenu to his family member, i.e. his mother Smt. Saeeda at Madurai. In view of the same, we have no reasons to disbelieve the version of the police and therefore, we hold that there is no infraction or violation of the second commandment in the facts and circumstances of the case. The Hon"ble Supreme Court has noted this aspect in *Ambika Prasad and Another Vs. State of (Delhi Administration, Delhi)*, wherein, the Apex Court has observed that-"it is known fact that independent persons are reluctant to be a witness or to assist the investigation. Reasons are not far to seek." Therefore, we are rejecting the contention of the petitioner.

12. Being not content with this, the learned counsel for the petitioner further pointed out that the version of the police that Thiru K. Annadurai, Inspector of Police had arrested the detenu Fakrudeen is not true because the State Government had given special awards in G.O.Ms. No. 848, dated 15.10.2013 to one Thiru Veerakumar, Inspector of Police, L & O, Periamet Police Station, Chennai for arresting Fakrudeen.

13. Per contra, the State placed before us a copy of the above said G.O., dated 15.10.2013 with its annexure, wherein, the State Government has given reward to Thiru K. Annadurai, Inspector of Police also. We are aware that in operations of this nature, the police would employ large number of its sleuths, who work for days on end to nab notorious offenders. Mounting surveillance and adopting "cloak and dagger" methods are part of policing all over the world. Therefore, it is the exclusive prerogative of the State, to suitably reward its minions.

14. The learned counsel for the petitioner submitted that the reward for the Inspector of Police, Thiru Veerakumar for securing the detenu Fakrudeen runs contrary to the version of the police in the counter wherein, it is stated that Thiru K. Annadurai, Inspector of Police had arrested him. We do not find any contradiction in the version. It is relevant to extract the relevant portion contained in the G.O.Ms. No. 848, dated 15.10.2013, i.e. para (ii), which reads as under:

CATEGORY-A: Officers who played a significant role in arrest of Police Fakrudeen and in securing Panna Ismail and Bilal Malik.

On 04.10.2013, Police Fakrudeen resisted his arrest by Inspectors Tvl. Lakshmanan and Raveendran of Special Division, CB CID, Chennai attempted to assault and escape from their clutches. At that time Thiru Veerakumar, Inspector

of Police, L & O, Periamet Police Station, Chennai City assisted the Inspectors in securing Police Fakhrudeen. For his act, he may be awarded a cash reward of Rs. 5 lakhs.

15. From the above narrated portion, it is evident that one Thiru Veerakumar, Inspector of Police had assisted the Special Investigation Team in securing the detenu "Police Fakhrudeen" when he assaulted two Inspectors of Police and attempted to escape from their clutches. In fact, it is to be noted that the arrest does not commence from there in the facts and circumstances of this case. The vexed question as to when a person is said to be arrested was settled by a Full Bench judgment of this Court reported in Roshan Beevi and Others Vs. Joint Secretary to Government of Tamil Nadu and Others, , wherein, this Court has completely analysed the word "arrest" in all its contours and held that in every arrest there is custody, but not vice versa. Incidentally, this Full Bench was constituted to reconsider the judgment of another Division Bench of this Court in Kaiser Otmar Vs. The State of Tamil Nadu and 2 Others , wherein, this Court had held as under in para 14:

14.... Our legal system does not requires that an arrest should be attended with any ritual or even that it should be ostentatious. It is not necessary that a man in order to get arrested should be taken prisoner, nor does the law regard as arrest only the ceremonial of hand-cuff or manacle. An authority is said to arrest another man if it prevents the latter from willing his movements and moving according to his will. Under enlightened modern conditions it seldom becomes necessary for any police officer or other authority empowered to make arrests to actually seize or even touch a person's body with a view to his restraint. Utterance of a guttural word or sound, a gesture of the index finger or hand, the sway of the head or even the flicker of an eye are enough to convey the meaning to the person concerned that he has lost his liberty.

16. While dissenting with the above proposition of the Division Bench of this Court, the Full Bench in "Roshan Beevi's case (cited supra), has held as under in para 29, which reads as under:

29.... In our view the interpretation that the two terms "custody" and "arrest" are synonymous is an ultra legalist interpretation, and if accepted and adopted, would lead to a startling anomaly resulting in serious consequences.

17. The Hon"ble Supreme Court, in Directorate of Enforcement Vs. Deepak Mahajan and another, approved the proposition laid down in "Roshan Beevi's case (cited supra).

18. At this juncture, the learned Public Prosecutor, appearing for the State would contend that when the sleuths tried to secure Police Fakhrudeen, he first resisted his apprehension and when he was overpowered, he denied that he was Fakhrudeen and in such circumstances, it is imperative for the police to first satisfy themselves that they have apprehended the correct person for which, a minimum enquiry is essential. Effecting his formal arrest after satisfying about

the identity of the apprehended person, cannot be faulted with. The learned counsel for the petitioner expressed apprehension that if police are permitted to hold a person in their custody without arresting him, it would lead to gross violation of personal liberty guaranteed under Article 21 of the Constitution of India. We are conscious of this and we are not giving a carte blanche to the police to keep a person in detention without placing him in arrest via this order. We hold in the facts and circumstances of this case that Thiru Veerakumar, Inspector of Police had assisted in securing the said Police Fakrudeen and the actual arrest was done by Thiru Annadurai, Inspector of Police later and hence there is no contradiction between the reward G.O. and the police version. Finally, it was contended by the learned counsel for the petitioner that the learned Judicial Magistrate has noted in the remand order that the eye of the detenu was found to be "swollen and reddish" which necessarily leads to the inference that he was tortured by the police. We are unable to persuade ourselves to agree with this contention, because, the detenu Fakrudeen himself in his statement to the learned Judicial Magistrate has made no complaint of ill-treatment against the police and further, he explained that the injury was sustained by him during the scuffle he had with the police at the time of his apprehension. In the teeth of this categorical admission by the detenu Fakrudeen himself to the learned Judicial Magistrate, we cannot draw an inference that the detenu was tortured by the police.

For the foregoing reasons, we do not find any merit in this Habeas Corpus Petition and accordingly, it is dismissed.