

(2011) 11 MAD CK 0251
In the Madras High Court
Case No : H.C.P. (MD) No. 657 of 2011

Krishna Latha

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 25-11-2011

Acts Referred:

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

Citation : (2011) 11 MAD CK 0251

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

Bench : Division Bench

Advocate : C.K.M. appaji, for the Appellant; T. Mohan, Additional Public Prosecutor, 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 second respondent, dated 20.07.2011, made in P.D. No. 17/2011, and quash the same, and to produce the detenu, namely, Rajan, confined in the Central Prison, Palayamkottai, before this Court and to set him at liberty. The petitioner has stated that the second respondent had passed the impugned detention order, dated 20.07.2011, under subsection (1) of Section 3 of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Forest-Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Slum-grabbers and Video Pirates Act, 1982. (Tamil Nadu Act 14 of 1982), read with the order issued by the State Government, in G.O.(D) No. 136, Home, Prohibition and Excise (XVI) Department, dated 18.07.2011, under subsection (2) of Section 3 of the said Act, directing the detention of Rajan, in the Central Prison, Palayamkottai, terming him as a "Goonda".

2. Even though various grounds had been raised by the petitioner, in the present Habeas Corpus petition, while challenging the detention order passed by the second respondent, the learned counsel appearing on behalf of the petitioner had submitted that the detention order passed by the second respondent, on 20.7.2011, is liable to be set aside, merely on the ground of delay in the disposal

of the representation, dated 24.8.2011, made on behalf of the detenu.

3(1). It has been pointed out that the remarks, relating to the representation made on behalf of the detenu, had been called for, on 29.8.2011. The remarks had been received, on 3.10.2011. As such, there has been a delay of 35 days. Between 29.8.2011 and 3.10.2011, 13 days, i.e., 31.8.2011, 1.9.2011, 3.9.2011, 4.9.2011, 9.9.2011, 11.9.2011, 17.9.2011, 18.9.2011, 24.9.2011, 25.9.2011, 30.9.2011, 1.9.2011 and 2.9.2011 were government holidays. Thus, there has been an actual delay of 22 days, on the first count.

3(2). It has also been pointed out that the Deputy Secretary concerned had dealt with the representation made on behalf of the detenu, on 7.10.2011 and the Minister for Electricity and Prohibition and Excise had dealt with the same, on 13.10.2011, after a delay of 6 days, out of which two days i.e., 8.10.2011, and 9.10.2011 were government holidays. As such, there has been an actual delay of four days in dealing with the representation made on behalf of the detenu, on the second count.

4. The learned counsel for the petitioner had submitted that the inordinate delay that has occurred in the disposal of the representation made on behalf of the detenu would vitiate the detention order passed by the Detaining Authority.

5. In support of his contentions, the learned counsel appearing for the petitioner had relied on the decision of this Court, in *Sumaiya Vs The Secretary to Government*, reported in 2007 (2) MWN (Cri.) 145, (DB), to state that even a delay of three days in considering the representation is fatal to the detention order passed by the Detaining Authority concerned. He had further submitted that the unexplained delay caused in considering the representation would vitiate the detention order passed by the Detaining Authority.

6. 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. He had submitted that the Habeas Corpus Petition has been filed even before the order of detention, passed by the detaining authority, had been considered by the Advisory Board. Therefore, it is liable to be dismissed. He had relied on the decision of the Kerala High Court, in *R.P. Goyal and Another Vs. The State of Kerala and Others*, wherein, it has been held that the protection envisaged by the Constitution of an Advisory Board, for looking into the defects in the passing of an order of detention, is a substantial protection. Normally, therefore, before the order has become final, on the application of mind relating to the question of existence or otherwise of the grounds justifying the detention, by the State Government, and the Advisory Board expressing its opinion, as to whether there is sufficient cause for such detention, it should not be interfered with by the High Court, as it should not deal with the question on insufficient material.

6.1. The learned counsel had relied on the decision of the Supreme Court, in *D.M. Nagaraja Vs. The Government of Karnataka and others*, reported in 2011

(2) TLNJ 361 (Criminal), 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.

7. 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 Vs. Government of Delhi (1994 SCC (Cri) 354)
3. Rajammal Vs. State of Tamil Nadu and Another (1999 SCC (Cri) 93)
4. Senthil Kumar Vs. District Magistrate and District Collector (2008(2) MLJ (Crl.) 1071)
5. Jakkulin Vs. 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))

7.1. 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.

7.2. 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.

7.3. 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.

7.4. 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 as under:

Except merely mentioning that the representation was forwarded to the concerned sponsoring authority on August 25, 1989 and the comments from the sponsoring authority was received by the Department on September 11, 1989, there is absolutely no explanation as to why such a delay had occurred. This undue and unexplained delay is in violation of Article 22(5) rendering the detention order invalid.

7.5. In *Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others*, the Supreme Court has observed as follows:

A representation of a detenu whose liberty is in peril should be considered and disposed of as expeditiously as possible; otherwise, the continued detention will render itself impermissible and invalid as being violative of Article 22(5). 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. In case the appropriate authority is unable to explain personally the delay at various stages, then it will be desirable-indeed appropriate-for the concerned authority or authorities at whose hands the delay has occurred to individually explain such delay. In absence of any explanation, Court cannot wink at or skip over or ignore such an infringement of the constitutional mandate and uphold an order of detention merely on the ground that the enormity of allegations made in the grounds of detention is of a very serious nature as in the present case.

7.6. In the decision, in *Venkatesan @ Maya Venkatesan* (2007 (1) MLJ (Crl.) 1176), it has been held as follows:

10 thus 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 delay, but how it is explained by the Authority concerned. In this case, as pointed out above, there is absolutely no explanation for the delay of four days. It is a constitutional obligation to consider the representation forwarded by the detenu without any delay, when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. Hence, on this ground also the order of detention is liable to be quashed.

7.7. In the decision, in *Sumaiya Vs. 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.

7.8. In *Kalaiselvi. G. Vs. The State of Tamil Nadu* (2007 (5) CTC 657), a Full Bench of this Court had held as follows:

26. The last contention is relating to delay in disposal of the representation. It is by now well recognised that the authorities concerned are duty bound to afford to the detenu an opportunity of making 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 unnecessary delay. This position is apparent from several decisions of the Supreme Court, including the decision *Usha Agarwal Vs. Union of India (UOI) and Others*, wherein, after referring to the Constitution Bench decision of the Supreme Court in *Kamlesh Kumar Iswardas Patel v. Union of India*, (1995) 4 SCC 51 it was observed:

This Court has also repeatedly held that though there can be no specific or mechanical test for determining whether there has been undue delay, where there is an unexplained delay in either making the order or serving the order, it would vitiate the order of detention.

7.9. 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.

7.10. A dissenting note seems to have emerged from the decision of the Supreme Court, in *D.M. Nagaraja Vs. The Government of Karnataka and others* (2011 (2) TLNJ 361 (Cri)), wherein, it has been held that there is no constitutional mandate, under Clause (5) of Article 22, much less any statutory requirement, to consider the representation made on behalf of the detenu, before the order of detention is confirmed. However, it is needless to point out that the correct position of law has been enunciated by the Supreme Court, in its decision, in *K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others*, wherein, it had been held as follows:

12 The requirement however, is that there should not be supine indifference slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal

7.11. In fact, this Court, in its order, dated 9.11.2011, in *Smt. Sowdun Bivi Vs. 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 Vs. State of Tamil Nadu and another (AIR 1999 SCW 139)*. 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.

7.12. In *Rashid Sk. Vs. State of West Bengal*, the Supreme Court has held as follows:

The ultimate objective of this provision can only be the most speedy consideration of his representation by the authorities concerned, for, without its expeditious consideration with a sense of urgency the basic purpose of affording earliest opportunity of making the representation is likely to be defeated. This 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.

7.13. 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.

7.14. In *Aslam Ahmed Zahire Ahmed Shaik v. union of India and others*, reported in 1989 SCC (CrI) 554, the Supreme Court has held as follows:-

The supine indifference, slackness and callous attitude on the part of the Jail Superintendent who had unreasonably delayed in transmitting the representation as an intermediary, had ultimately caused undue delay in the disposal of the appellant's representation by the government which received the representation 11 days after it was handed over to the jail Superintendent by the detenu. This avoidable and unexplained delay has resulted in rendering the continued detention of the appellant illegal and constitutionally impermissible.

.....

When it is emphasised and re-emphasised by a series of decisions of the Supreme Court that a representation should be considered with reasonable expedition, it is imperative on the part of every authority, whether in merely transmitting or dealing with it, to discharge that obligation with all reasonable promptness and diligence without giving room for any complaint of remissness, indifference or avoidable delay because the delay, caused by slackness on the part of any authority, will ultimately result in the delay of the disposal of the representation which in turn may invalidate the order of detention as having

infringed the mandate of Article 22(5).

7.15. 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.

7.16. In *Rajammal Vs. State of Tamil Nadu and Another*, , 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. But that does not mean that the authority is preempted from explaining any delay which would have occasioned in the disposal of the representation. The Court can certainly consider whether the delay was occasioned due to the permissible reasons or unavoidable causes.

If delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned. Even the reason that the Minister was on tour and hence there was a delay of five days in disposing of the representation was rejected by the Apex Court holding that when the liberty of a citizen guaranteed under Article 21 of the Constitution of India is involved, the absence of the Minister at head quarters is not sufficient to justify the delay, since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen.

7.17. 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:-

That part, 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.

7.18. In a recent decision, in *Ummu Sabeena Vs. State of Kerala*, 2011 STPL (Web) 999 SC, 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. In the

present case, the delay caused in the disposal of the representation, dated 24.8.2011, made on behalf of the detenu, has not been properly explained by the respondents, either in the counter affidavit filed on their behalf, or in the oral submissions made by the learned Additional Public Prosecutor, appearing on behalf of the respondents. In such circumstances, in view of the decisions cited supra, the detention order, dated 20.07.2011, passed by the second 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.