
(2012) 02 MAD CK 0021
In the Madras High Court
Case No : H.C.P. No. 1761 of 2011

Lakshmi

APPELLANT

Vs

State of Tamilnadu

RESPONDENT

Date of Decision : 24-02-2012

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Madras Prohibition Act, 1937 — Section 4(1), 4(1A)

Citation : (2012) 02 MAD CK 0021

Hon'ble Judges : K. Mohan Ram, J;G.M. Akbar Ali, J

Bench : Division Bench

Advocate : V.R. appaswamee, for the Appellant; A. N. Thambi Durai Additional Public Prosecutor, for the Respondent

Judgement

Mr. Justice G.M. Akbar Ali

1. The wife of the detenu is the petitioner. The detenu came to the adverse notice of the authorities in five adverse cases and in the ground case, the

detenu was arrested on 29.9.2011 and a case was registered in Cr. No. 357 of 2011 for the offences under Sections 4(1)(i) r/w 4(1-A)(ii) of the

Tamil Nadu Prohibition Act, 1937 and was produced before the Judicial Magistrate, Arni, who remanded him to judicial custody till 13.10.2011.

2. The sponsoring authority, by placing the necessary materials before the Detaining Authority, recommended for the detention of the detenu under

the Tamil Nadu Act 14 of 1982. The Detaining Authority, after arriving at the subjective satisfaction, that the detenu comes under the definition of

"Bootlegger", as contemplated under the Act 14 of 1982 and further recording the satisfaction that there is a compelling necessity to detain him in

order to prevent him from indulging in such further activities in future, which are

prejudicial to the maintenance of public health and public order

under the provisions of the Act 14 of 1982, passed the impugned order of detention.

3. Challenging the order of detention, the above petition has been filed by wife of the detenu.

4. Heard both.

5. The learned counsel for the petitioner submitted that the detaining authority has not considered the representation of the petitioner, dated

14.11.2011, which was received on 15.11.2011. It was sent within 12 days from the date of passing of the detention order, which was passed on

10.11.2011. The learned counsel pointed out that as per the grounds of detention in paragraph 6, the detaining authority has informed the detenu

that the detenu has a right to make representation to the detaining authority and on behalf of the detenu, the petitioner has sent such a

representation which has not been considered by the detaining authority.

6. The learned counsel relied upon the decision reported in 2011-2-L.W.(Crl.) 754 (K. Manoharan vs. State represented by Secretary to Govt.

Home, Prohibition & Excise Department, Secretariat, Chennai -9 and another).

7. On the other hand, the learned Additional Public Prosecutor submitted that the detenu has sent three representations and all the representations

were duly forwarded to the Government and the Government has duly considered the same and has rejected the representation. The learned

Additional Public Prosecutor stated that the representation to the detaining authority has to be sent within 12 days from the date of passing of the

detention order i.e., before the approval of the Government. But it was received only after the approval of the detention order by the Government

and therefore, the same was forwarded to the appropriate authority for consideration and hence, nothing wrong in forwarding the same to the

Government by the detaining authority, which would not vitiate the detention order.

8. We have considered the aforesaid submissions and perused the materials available on record.

9. In paragraph 6 of the grounds of detention, the detaining authority has stated as follows:

Thiru. Jothi is informed that this detention order shall not remain in force for

more than 12 days after making thereof unless in the meantime, it has been approved by the State Government and Thiru. Jothi is also informed that he has a right to make representation in writing against the said detention order to the detaining authority and if any such representation is received by the detaining authority before the approval of the Government, the said representation will be duly considered by the detaining authority.

10. According to the detaining authority, the detenu has a right to make representation in writing against the said detention order to "the detaining authority" and if such representation is received by the detaining authority before the approval of the Government, the said representation will be duly considered by the detaining authority.

11. The detention order was passed on 10.11.2011. The order and the grounds of detention were served on the detenu on 12.11.2011. On

14.11.2011 a representation was sent to the detaining authority and the receipt of the same was acknowledged by the detaining authority on the same day. In the affidavit filed by the petitioner in ground No. 12, it is stated as follows:

12. The detention order passed against the petitioner is liable to be set aside on the ground that the petitioner sent a representation (within 12 days) dated 14.11.2011 to the Detaining Authority, the second Respondent herein prior to the approval of the Government. Though the second respondent received the representation on 15.11.2011, there is no order passed on the representation

12. Countering the said ground, in paragraph 18 of the counter filed by the second respondent, it is stated as follows:

Regarding the averments in Para 12 of the grounds of the affidavit, it is not correct to state that the detention order is liable to be set aside on the ground that the representation dated 14.11.2011 (within 12 days) was not considered by the detaining authority. In fact, though the said representation is dated 14.11.2011 (as the detention order was passed on 10.11.2011) the said representation was received by the office of the detaining authority subsequent to the date of approval of the detention order by the Government. So, the said representation was duly forwarded to the Government for disposal according to the procedure. Hence the contrary

averments are not correct.

13. A reading of paragraph 18 of the counter would show that the detaining authority has received the representation only after the date of

approval by the Government i.e., after 12 days from the date of passing of the detention order.

14. It is an admitted fact that the Government has approved the order of detention only on 21.11.2011.

Section 3(3) of the Act 14 of 1982 reads as follows:

3. Power to make orders detaining certain persons:-

(3) When any order is made under this section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the State

Government together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the

matter, and no such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved

by the State Government.

15. Further, Section 8 of the Act 14 of 1982 reads as follows:

8. Grounds of order of detention to be disclosed to persons affected by the order:

(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but not later than five

days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of

making a representation against the order to the State Government.

16. Therefore, u/s 8(1) of the Act the detaining authority shall communicate the grounds on which the order has been passed within five days from

the date of passing of the detention order and shall afford him the earliest opportunity of making a representation against the order to the State

Government. In our considered view, while the detaining authority has complied with the provision contemplated u/s 8(1) of the Act, has not

complied with the provision contemplated under sub-section 3 to Section 3 of the Act.

17. In our considered view having informed the detenu of his right to make representation in writing against the detention order to ""the detaining

authority"" and having stated if any such representation is received by the

detaining authority before the approval by the Government the representation will be duly considered by the detaining authority, the detaining authority has failed to consider the representation dated 14.11.2011 which was received by the detaining authority on 15.11.2011 as per the acknowledgement card produced before this Court. Though in the counter it is stated that the said representation was received only after the date of approval by the Government, the petitioner has established that the detaining authority has received the said representation on 15.11.2011 before the date of approval by the Government on 21.11.2011.

18. When the Division Bench of this Court had an occasion to deal with the similar matter as to whether the failure on the part of the detaining authority to consider the representation sent by the detenu through the petitioner, seeking for revocation, prior to its approval by the State Government, would infract the right of the detenu under Article 22(5) of the Constitution in 2011-2-L.W.(CrI.) 754 cited supra, has relied upon the decision of the Apex Court reported in Kamleshkumar Ishwardas Patel V. Union of India (1995) 4 SCC 51, wherein the Constitutional Bench has considered the scope of Article 22(5) of the Constitution pertaining to the right of the detenu to make a representation against the order of detention and has held as follows:

14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.

19. Therefore, Article 22(5) of the Constitution has to be construed to mean that the person has a right to make representation against the order of detention which could be not only to the sponsoring authority but also to the

detaining authority and the detaining authority has to consider the same on the materials available before him and if the representation is received before the order of approval by the Government it has to be disposed of before the order of approval by the Government.

20. Following the decision of the Constitution Bench cited supra, the Division Bench of this Court in the above said decision (2011-2-L.W.-754)

has held as follows:

12. In view of the judicial dictum of the Constitutional Bench in the decision in Kamleshkumar Ishwardas Patel's case, the detaining authority that

has made the order of detention, is competent to give immediate relief by revoking the said order and it is bound to consider the representation of

the detenu till the detention order is approved by the State Government.

13. In the present case, the detaining authority having received the representation sent on behalf of the detenu, before the approval of the detention

order, has failed to consider the same, but has simply forwarded it to the State Government for consideration and that would constitute an

infraction of the valuable constitutional right guaranteed to the detenu under Article 22(5) of the Constitution and consequently, such failure would

make the order of detention invalid. Therefore, for the above reasons, the order of detention is liable to be set aside.

21. The law laid down by the Apex Court and the Division Bench of this Court are squarely applicable to the facts of the case on hand. Therefore,

we are of the considered view that the non consideration of the representation by the detaining authority though it was sent and received by the

detaining authority before the date of approval by the Government vitiates the order of detention and therefore, the order of detention cannot be

allowed to be sustained any further. Accordingly, the order of detention is set aside and the H.C.P. is allowed. The detenu is ordered to be

released forthwith unless his custody is required in connection with any other case.