
(2009) 07 KL CK 0063

In the High Court Of Kerala

Case No : Writ Petition (Criminal) . No. 229 of 2009 (S)

Leena Sajeevan

APPELLANT

Vs

Sub Inspector of Police and Others

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 8

Constitution of India, 1950 — Article 19, 21, 22, 22(1), 22(2)

Citation : (2009) 3 ILR (Ker) 739 : (2009) 16 KLJ 883 : (2009) 3 KLT 512

Hon'ble Judges : R. Basant, J;M.C. Hari Rani, J

Bench : Division Bench

Advocate : Joby Joseph and M.R. Dhanil, for the Appellant; P.N. Sukumaran, G.P., C.M. Kammappu and K.K. Ravindranath, Addl. Dir. General, for the Respondent

Final Decision : Allowed

Judgement

R. Basant, J.—Is a detenu under the Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as the "KAAPA") entitled as of right to appear before the Advisory Board through a legal practitioner?

2. Is he entitled at least to make a representation for permission to appear through a legal practitioner?

3. Is he entitled to insist that such request must be considered and a decision taken by the Advisory Board before it proceeds to hear him?

4. Does the non-consideration of the said request justify invalidation of his detention?

These are the questions that arise for consideration in this writ petition.

2. To the crucial and vital facts first. The petitioner's husband was involved in as many as ten cases. Three cases had ended in acquittal, in two cases he was

convicted and five cases are pending against him. A report (Ext.P2) was made initially by the first respondent a subordinate police officer to the Superintendent of Police (R2). On the basis of that, the second respondent, Superintendent of Police submitted Ext.P3 report u/s 3(1) of "KAAPA" to the District Magistrate, i.e. (the third respondent). On the basis of the said report, Ext.P4 order of detention dated 18-3-2009 was passed by the District Magistrate u/s 3(1) of the KAAPA. The detenu was arrested on 22-3-2009. The order of detention has been approved by the Government u/s 3(3) of the KAAPA. Reference was made to the Advisory Board. The detenu submitted Ext.P7 representation to the Government which was disposed of under Ext.P8 order. He submitted Ext.P9 representation to the Advisory Board. After receipt of the opinion of the Advisory Board, Ext.PIO order u/s 10(4) of the KAAPA has been passed confirming the order of detention. The detenu is under custody. The petitioner, the wife of the detenu has come before this Court with this petition for issue of a writ of habeas corpus to produce the detenu before court, to set aside Ext.P4 order of detention and to direct immediate release of the detenu.

3. Arguments have been advanced by the learned Counsel for the petitioner and the learned Additional Director General of Prosecutions. The learned Counsel for the petitioner assails the impugned detention on the following grounds:

1) The right of the detenu under Article 22 of the Constitution of India and u/s 7 of the KAAPA to make an effective representation to the Advisory Board has been infringed by the non-consideration of his prayer to be assisted by a legal practitioner in the proceedings before the Advisory Board.

2) There has been no proper consideration of Ext.P7 representation in Ext.PQ order passed by the Government.

3) No proper opportunity to make a representation u/s 7(3) of the KAAPA was afforded to the detenu.

4) There is no live link between the past acts alleged and the present order for future preventive detention. There was no nexus between the two. No proper application of mind had preceded Ext.P4 order of detention.

4. Though all these grounds have been urged, we are satisfied that it is sufficient to consider Ground No. 1 alone to dispose of this writ petition.

5. Ground No. 1. It is by now trite that a detenu is entitled under the Constitution as also under the KAAPA to a real and effective right to make a representation before the Government as well as the Advisory Board. It is unnecessary to advert to the precedents on this aspect;. This right of the detenu to make effective and expeditious representation before the Government and the Advisory Board has been accepted and recognized in many binding precedents. Where there is vital infraction or infringement of this right, certainly the detention is liable to be invalidated.

6. Ext.P7 representation was made to Government. Ext.P9 representation was

made to the Advisory Board. It is by now trite that the right to make a representation includes the right to have such representation considered properly. The crux of the contention of the petitioner is that he has been denied the right to be represented by a legal practitioner before the Advisory Board. Nay, the counsel concedes that a detenu may not have a right to insist that he must be permitted to be represented by a counsel before the Advisory Board. But the counsel contends that a detenu is entitled to make a request for permission to be represented by a counsel and if such a representation is made he is entitled to have that representation considered by the Advisory Board. In this case there was no such consideration at all. By the conduct of the Advisory Board in not considering his prayer for permission to be represented by a counsel before the Advisory Board, there has been frustration of his" right to make a representation before the Advisory Board. Consequently, the order of detention passed u/s 10(4) of the KAAPA confirming the earlier order u/s 3(1) is liable to be set aside, contends counsel.

7. It will be apposite straight away to note that under Article 22 of the Constitution of India, any person who is arrested and detained under any law providing for preventive detention is not entitled to the rights under Articles 22(1) and 22(2). For the purpose of easy reference, we extract Articles 22(1) to (3) below:

22. Protection against arrest and detention in certain cases.- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in Clauses (1) and (2) shall apply:

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(emphasis supplied)

8. Going by the plain language of Articles 22(1) to (3), it appears to be very evident that a detenu detained under any law providing for preventive detention cannot claim right to be represented by a counsel.

9. It will be apposite now to refer to the specific provision in Section 8(e) of the COFEPOSA which deals with the entitlement of a detenu to appear by a legal practitioner before the Advisory Board. We extract Section 8(e) below.

8(e) a person against whom, an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings . of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

(emphasis supplied)

10. We must straight away advert now to the different provisions in the KAAPA. We deem it necessary to extract both Sections 7(3) and Section 10(3). They are shown below:

7(3) The Superintendent of the Jail where such person is detained shall afford him reasonable opportunity to consult a lawyer and reasonable assistance in making a representation against the detention order to the Government or to the Advisory Board.

10.(3) A person against whom an order of detention has been made under this Act shall not be entitled to

appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, except that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

Provided that the Board has power to permit legal practitioners in the cases deemed fit.

(emphasis supplied)

11. Under the KAAPA a larger right than what is available under the Constitution has been conceded to the detenu. Under Article 22(3) of the Constitution of India, he has no right of legal representation/consultation, but u/s 7(3) of the KAAPA, the Kerala Legislature has conceded to the detenu, opportunity to consult a lawyer. A larger right can be conceded in a statute which right is not protected under the Constitution. Therefore, notwithstanding Article 22(3), the right of the detenu u/s 7(3) of the KAAPA for opportunity to consult a lawyer before he makes a representation has to be respected. We must take note of the significant difference between Section 8(e) of the COFEPOSA and Section 10(3) of the KAAPA. The body of Sections 8(e) and 10(3) are exactly identical. But u/s 10(3) of the KAAPA, a proviso has been included and the proviso specifically clothes the Advisory Board with the power to permit legal practitioners in cases the Board deems it fit.

12. Appearance by legal practitioners is, therefore, no anathema before the Advisory Board. Right to be represented by a legal practitioner may not be there in view of the body of Section 10(3), but a discretion is conceded by law to the Advisory Board to permit appearance by a Legal Practitioner in cases in which the Board deems it fit. The expression used is to permit Legal practitioners." This

permission must certainly be made on some request. The proviso, we must note, does not simply entitle the Board to take legal opinion or. consultation, but it relates to their power to permit legal practitioners to appear. That permission must definitely relate to request made by some one for such permission and such request can only come from the detenu whose representation is to be considered by the Board: In that view of the matter, though there undoubtedly is no right for a person to insist on representation by a Legal Practitioner, his right to seek permission of the Board for appearance by a Legal Practitioner is protected. Certainly then the Board has a duty to consider that request. That request must be considered on its merits and it has to be decided whether it is a fit case in which such permission can be granted. The proviso which is added and included in Section 10(3) of the KAAPA, in evident departure from the rationale of Section 8(e) of the COFEPOSA, must be taken note of while considering the right to claim permission for legal representation before the Advisory Board under the KAAPA.

13. It will now be interesting to note the precedents u/s 8(e) of the COFEPOSA. The law has travelled much on this aspect. The earlier assumption was that in the light of Section 8(e), there can be no right for legal representation at all. Even without a proviso similar to the one u/s 10(3) of the KAAPA, the Supreme Court has clearly held that a request made by a detenu for legal representation must be considered and a proper decision taken on such representation. We need not advert in detail to the earlier precedents. The last one on the point in *State of Maharashtra v. Zubair Haji Qasim* (2009) 1 S.C.C.(Cri) 477 concludes finally that even in the absence of a proviso like the one in Section 10(3) of the KAAPA and even in the light of the specific stipulations of Article 22(3) of the Constitution of India and Section 8(e) of the COFEPOSA, the detenu can seek permission and such request for permission must be considered on merits. The following passages in *Zubair Haji Qasim* (supra) is of crucial relevance.

13. Having considered the submissions made on behalf of the respective parties, we are of the view that the order of the High Court impugned in this appeal does not warrant interference: In *Smt. Kavita Devidasani Vs. State of Maharashtra and Others*, on which reliance was placed by Mr. Adsure, it was also laid down that although a detenu has no right u/s 8(e) of the COFEPOSA Act, 1974, to legal assistance in proceedings before the Advisory Board, he is entitled to make such a request to the Board and the Board is bound to consider such request when made.

14. In the instant case, the detenu's prayer for being allowed to be represented by a legal practitioner was rejected by the Advisory Board upon observing that such prayer could not be considered "for some obvious reasons". The said reasoning runs counter to the decision of this Court in *Kavita* case and cannot, therefore, be sustained. The decision of the Division Bench of the Bombay High Court, relied upon by the High Court in quashing the detention order, says much the same thing as has been stated by this Court in *Kavita* case and also in *Nand Lal Bajaj Vs. State of Punjab and Another*, . It is quite clear that while rejecting

the detenu's representation the Advisory Board took refuge in vague verbiage without really applying its mind as it was required to do, to the merits thereof.

15. Detention of a citizen under any of the preventive detention enactments is a serious and severe invasion on the fundamental rights guaranteed to citizens under Articles 19 and 21 of the Constitution. Recognising such detention to be an evil necessity, various safeguards have been placed at different stages of the detention proceedings to ensure that such powers were not used indiscriminately to settle scores or to short-circuit the process of investigation and trial of an alleged offence.

16. In Kavita case and also in Nand Lal Bajaj case this Court held that even if the detenu had no right to appear through a legal practitioner in the proceedings before the Advisory Board, he was entitled to make a representation for the services of a lawyer to appear before the said Board which was under an obligation to consider the same dispassionately in the facts of the particular case. The representation made by a detenu for legal assistance before the Advisory Board, has, therefore, to be considered not perfunctorily, as has been done in this case, but with due application of mind, since in each case of detention the liberty of an individual is involved.

(emphasis supplied)

14. If that be the position u/s 8(e) of the COFEPOSA as held in Zubair Haji Qasim, there can be no element of doubt that the request made by a detenu under the proviso to Section 10(3) of the KAAPA for permission to be represented by a Legal Practitioner must be considered by the Advisory Board and a reasonable decision taken on such request for representation.

15. We come back to the facts of the case. We need only look at Ext.P9 which is the representation made before the Advisory Board. In paragraph 17 of Ext.P9, the following specific request is made.

The detenu may be permitted to appear personally before the Advisory Board and represent his grievances. An Advocate on behalf of the detenu may be permitted to appear before the Board and make his representation" (translation).

16. It is very evident that the detenu had made such a request. Has that request been considered by the Advisory Board? There is nothing to indicate that the request in paragraph 17 was considered by the Advisory Board. Proceedings of the Advisory Board are confidential in the light of Section 10(3) of the KAAPA. We requested the Additional Director General of Prosecutions to apprise us as to whether the Board had considered this request in the representation. The report of the Advisory Board was available before the Additional Director General of Prosecutions and the learned A.D.G.P. concedes unambiguously that the said request has not been considered in the opinion/order of the Advisory Board. The learned A.D.G.P. has offered to place the said order/recommendation/opinion of the Advisory Board. But in the light of the unambiguous statement that this

request has not been considered by the Advisory Board, we do not think it necessary to peruse the contents of the recommendation of the Board ourselves.

17. Was the request considered at any time before the hearing commenced? The learned A.D.G.P. accepts that there is absolutely no record to show that this request of the detenu was considered or any decision taken by the Advisory Board. The petitioner on behalf of the detenu submits that the detenu was never informed of such consideration of the request at any time.

18. We cannot and we do not hold that a detenu has a right to be represented by a Legal Practitioner before the Advisory Board. But it is indisputable that he has a right to request for permission to be represented by a counsel. It is mandatory that the said request must be considered. It is undoubtedly the duty of the Advisory Board to consider the representation and take a reasonable decision. The request for permission to be represented by a Legal Practitioner must be considered and must be considered reasonably. In a case like the instant one where the said request has not been considered at all and the detenu has not been informed of the fate of the representation that must certainly be held to affect, impair and infringe the right to make a representation before the Advisory Board. We may cautiously repeat that we should not be reckoned as laying down the law that in every case the detenu is entitled to be represented by a Legal Practitioner before the Advisory Board. But his request must certainly be considered and considered reasonably.

19. In fact Zubair Haji Qasim was a case in which notwithstanding Article 22(3) of the Constitution of India and Section 8(e) of the COFEPOSA (in which the proviso similar to the one u/s 10(3) is not available), the High Court had held (and the Supreme Court had accepted the Said finding) that the rejection of the prayer for legal representation on unsatisfactory grounds shall vitiate the order of detention. In the light of Zubair Haji Qasim, we are clear in our mind that the non-consideration of the request in paragraph 17 of Ext.P9 for permission to be represented by a counsel vitiates the order of detention. The same has to be invalidated.

20. The above discussions lead us to the conclusion that the petitioner is entitled to succeed.

21. In the result:

- a) This Writ Petition Is allowed;
- b) The impugned order of detention (Ext.P4) is set aside.
- c) If the detention of the detenu is not necessary in any other case, he shall forthwith be released from custody by the prison authorities from the Central Prison, Viyyur.
- d) The Registry shall forthwith communicate the order to the prison authorities.