

(1988) 02 MAD CK 0049
In the Madras High Court
Case No : Writ Petition 7189 of 1987.

Megammal

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 29-02-1988

Acts Referred:

Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 324, 394
Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders,
Goondas, Immoral Traffic Offenders and Slum-Grabbers, Act, 1982 — Section 3, 3(2)

Citation : (1988) 02 MAD CK 0049

Hon'ble Judges : S.A. Kader, J;K.M. Natarajan, J

Bench : Division Bench

Advocate : P.V. Bhaktavatchalam, for the Appellant;

Final Decision : Allowed

Judgement

K.M. Natarajan, J.—This writ petition has been filed by one Megammal, who is the mother of the detenu, Kesavan, under Article 226 of the Constitution of India, for issuance of habeas corpus for quashing the order of detention dated 25th June, 1987 passed against the said detenu and setting him at liberty.

2. The impugned order dated 25th June, 1987 was passed by the second respondent, namely, the Collector and District Magistrate, North Arcot Dt. Vellore, in exercise of the powers conferred in sub-S. (1) of S. 3 of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders and Slum Grabbers Act of 1982, Tamil Nadu Act 14 of 1982 (hereinafter referred to as the Act), with a view to prevent the detenu from acting in any manner prejudicial to the maintenance of public order. The detenu came to the adverse notice that he is a goonda in view of the six cases referred to in the preamble to the order of detention and on the basis of the ground case, the said order of detention was passed. Since the entire facts of the ground-case are set out in the detention order, it is needless to narrate the same once again in this order.

3. Though learned counsel for the petitioner, Mr. P.V. Bhakthavatchalam, raised various grounds in the affidavit filed in support of the petition, he has confined his argument only to one ground, namely, on the date of the order of detention, the detenu was in judicial custody, that there was no compelling necessity for detaining him further under Act 14 of 1982, and that there is absolutely nothing to show that the detaining authority has taken into consideration the question that the said detenu might be released or that there was such a possibility of release while passing the said order and as such, the order is vitiated. He has raised the said ground in para v. of the affidavit, wherein it is stated:

The detenu was in judicial custody since 11th June, 1987. He was remanded in the ground case in Vellore town Police Order No. 374/84 under S. 324, I.P.C. The detenu was refused bail before the First Class Magistrate and he did not move for bail in higher courts. While so his detention on 25th June, 1987 is most arbitrary, illegal and unwarranted. Even the Supreme Court is of the view that a detention order to a person who is already in Jail is illegal and unwarranted.

In reply to the said allegation, it is averred in para v. of the counter affidavit filed by the second respondent (detaining authority) as follows:

The averment made in Ground v. of the affidavit is untenable in law. The detenu was detained only with a view to prevent him from further indulging in any criminal activities as to endanger the public peace and order.

The learned Public Prosecutor submitted that the fact the detenu was sent for remand by the Judicial First Class Magistrate I, Vellore, and the investigation of the said case under S. 394, I.P.C., has not been completed has been referred to in para 3 of the detention order. He has further submitted that in paras 4 and 5 of the detention order, the detaining authority has given the reason for the detention of the detenu under Act 14 of 1982, in spite of the fact that he was on remand. It is worthwhile to quote the same for the proper appreciation of the contentions of both parties. Para 4 reads as follows--

I am aware that Thiru Kesavan is now in remand and that he would be proceeded against under the normal law. However, I am satisfied that his activities warrant his detention under Tamil Nadu Act 14 of 1982.

In para 5 also, it is stated as follows--

I am also satisfied that from the materials mentioned above that if Kesavan is let to remain at large, he will indulge in further activities, prejudicial to the maintenance of public order and further the recourse to normal criminal law would not have the desired effect of effectively preventing him from indulging the activities prejudicial to the maintenance of public order and therefore, I consider that it is necessary to detain him in custody prejudicial to the maintenance of public order.

4. Learned counsel for the petitioner drew our attention to two decision or the Supreme Court in respect of this aspect. In *Bunod Singh v. Dt. Magistrate*,

Dhanhad, Bihar and others 1986 3 S.V.R. Cri. 178, in respect of detention under the National Security Act 1980, while considering a similar contention, it was held:--

It is well settled in our constitutional frame work that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by various provisions of different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of facts necessitating preventive custody of a person for social defence. If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order detention was served upon the detenu, the detenu was in jail There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order. A bald statement is merely an ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent. Eternal vigilance on the part of the authority charged with both law and order and public order is the price which the democracy in this country extracts from the public officials in order to protect the fundamental freedoms of our citizens. In the affidavits on behalf of the detaining authority though there are indications that transfer of the detenu from one prison to another was considered but the need to serve the detention order while he was in custody was not properly considered by the detaining authority in the light of the relevant factors. At least the records of the case do not indicate that. If that is the position, then however disreputable the antecedents of a person might have been, without consideration of all the aforesaid relevant factors, the detenu could not have been put into preventive custody. Therefore, though the order of preventive detention when it was passed was not invalid and on relevant considerations, the service of the order was not on proper consideration.

It may be mentioned that in the petition it is nowhere stated that the detenu has since been released or that the prospect of his imminent release was properly and with seriousness considered by the detaining authority. The order of detention, therefore, is set aside....

In the said case, their Lordships of the Supreme Court relied on the earlier decisions tendered in Rameswar Shaw v. Dt Magistrate, Burdwan and another 1964 4 S.C.C. 921, and Ramesh Yadav Vs. District Magistrate, Etah and Others, . Also in Gulab Mehra Vs. State of U.P. and Others, , it was held--

Preventive Detention--Detention order--Validity--Detenu already in jail at the time of preventive detention in connection with criminal case against. Him-- Detaining authority's awareness of this fact as also his satisfaction about likelihood of recurrence of the prejudicial activities in case of detenu's release on bail not shown. Held--detention order invalid--National Security Act 1980, S. 3(2).

Held:--There was nothing to show that there was awareness in the mind of the District Magistrate, the detaining authority, of the fact that the appellant was in jail at the time of clamping of the order of detention, and that the detaining authority was satisfied in considering his antecedents and previous criminal acts, that there was likelihood of his indulging in criminal activities jeopardising public order if he is enlarged on bail on that there is every likelihood that the appellant will be released on bail within a short time. On this ground alone, the order of detention is invalid. The respondents could very well proceed with the criminal case pending against the detenu-appellant, oppose the bail application, execute it against the appellant and could get him punished if the case is proved. If at all the appellant is released on bail the respondents are not without any remedy. They can also file application in revision for cancellation of the bail application. In such circumstances, the passing of the order of detention of the appellant who is already in custody is bad and invalid in law.

The above was reiterated in the latest decision in Smt. Shashi Agarwal v. State of U.P. and others 1988 1 Cri 542.

5. It is not in dispute that the detaining authority can pass the order of the detention against the petitioner even if he is in judicial custody. But the detaining authority must be aware of this fact and that he must have also considered the same and must have been satisfied with the compelling necessity to detain him notwithstanding the fact that he is in judicial custody. In view of the ratio laid down in the above quoted decisions of the Supreme Court, the mere averment that if he were to remain at large he would endanger further activities, that it would be prejudicial to the maintenance of public order and that the recourse to the normal criminal law would not have the desired effect of effectively preventing him from indulging any such activities, is, in our view, hardly a sufficient ground for passing the order of detention. In the instant case, except referring the fact that the detenu is on remand and is in judicial custody, neither in the grounds of detention nor in the counter affidavit filed by the detaining authority, there was any indication that this factor or the question that the detenu might be released or there was such a possibility of his being released was taken into consideration by the detaining authority while passing the order. If there were cogent materials for thinking that the detenu might be released; then these things should have been made apparent. There is absolutely nothing to show that there was any imminent possibility of his being released and the necessity of passing the order of detention. Further, there was nothing to show that the detaining authority considered the antecedents of the detenu and previous criminal acts that there was likelihood of his indulging in criminal activities jeopardising public order if he is enlarged on bail on that there is every likelihood of his being released on bail within a short time. On the other hand, it is seen from the affidavit filed by the petitioner (mother of the detenu) that the detenu was refused bail before the First Class Magistrate and that he did not move for bail in higher courts and that the offence for which he has been remanded is one under S. 394 , I.P.C. In view of the absence of allegations even

in the counter affidavit about the imminent possibility of the detenu being released on bail and the compelling necessity for his detention, though not in the order of detention, we are of the view that the impugned order of detention passed against the detenu, who is already in judicial custody, is bad and invalid in law.

6. In the result, the writ petition is allowed, the order of detention is quashed and the detaining authority is directed to set the petitioner at liberty forthwith, if he is not otherwise required in connection with any other case against him.