
(2000) 02 KL CK 0042
In the High Court Of Kerala
Case No : OP. No. 24426 of 1999 (S)

M.K. Abdulla

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 28-02-2000

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 22, 226

Citation : (2000) 69 ECC 587

Hon'ble Judges : Arijit Pasayat, C.J.;K.S. Radhakrishnan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Arjit Pasayat, C.J.—Questioning legality of the order of detention passed in respect of Kunnath Pathukutty (hereinafter referred to as "detenu"), her husband has filed this habeas corpus application under Article 226 of the Constitution of India, 1950 (in short "Constitution"). Detenu has been detained in Thiruvananthapuram jail pursuant to order of detention dated 7.4.1999 passed in purported exercise of powers u/s 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short "the Act"). Said order was passed with a view to prevent detenu from smuggling goods.

2. Grounds of detention, inter alia, show that detenu was involved in smuggling activities on a large scale. She was intercepted on her arrival from Sharjah at Calicut Airport and subsequent search of her person conducted by a lady officer resulted in recovery of 24 gold biscuits concealed inside pouches of a knicker worn by her. Certain other activities were referred to which according to detaining authority, is sufficient to show potentiality of her indulging in similar activities. It was, inter alia, stated in grounds of detention that she was arrested on 15.2.1999 and produced before Additional Chief Judicial Magistrate (Economic Offences) Court, Ernakulam (in short "ACJM") on 16.2.1999 and was remanded

to judicial custody till 2.3.1999. Though, it was mentioned that order of remand was extended, the period was left blank in the order of detention, and read as follows:

XXX?Later your remand was extended upto....

3. Only point urged in support of application was that though initially ACJM had refused bail, subsequently bail was granted by Sessions Judge, Ernakulam on 19.3.1999. Subsequently, conditions imposed by him were modified by this Court. Bail application and orders passed by different courts were not supplied to detenu. This, according to petitioner, constituted violation of the protection afforded by Article 22(5) of Constitution which mandates grant of reasonable opportunity to make a representation. It also shows non-application of mind to relevant aspects. It is stated that detaining authority has not referred to these documents which are of vital importance and, therefore, order of detention is vitiated. In any event, these documents, if available, should have been supplied.

4. Learned Counsel for State and Central Government referred to the list of documents which were supplied to the detenu. It is stated that these documents were subsequently supplied and, therefore, detenu cannot make a grievance. In any event, when bail has been granted to detenu, he knows about it and even non-supply would not have caused prejudice, though, in fact, documents were supplied.

5. It is fairly accepted by learned Counsel for respondents that though the documents in question were available for consideration and have been considered, there is no reference to them in grounds of detention. As a matter of fact, detaining authority was in possession of the materials as is evident from the fact that copies have been supplied subsequently to detenu. But, though they were available on the date of order of detention, they have not been referred to in grounds of detention. That being the position, the inevitable conclusion is that there was non-application of mind by detaining authority thereby vitiating the order of detention.

6. The position is similar to a case, if not better placed, where documents are there, stated to be considered, but copies are not supplied. In *M. Ahamedkutty Vs. Union of India (UOI) and Another*, it was, inter alia, observed as follows:

27. Considering the facts in the instant case, the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. We have, therefore, no alternative but to hold that it amounted to denial of the detenu's right to make an effective representation and that it resulted in violation of Article 22(5) of the Constitution

of India rendering the continued detention of the detenu illegal and entitling the detenu to be set at liberty in this case.

7. Stand of the respondents that detenu having knowledge about those orders is not prejudiced does no stand on firm footing. As was observed in M. Ahamedkutty's case (supra), it is immaterial whether detenu had knowledge about such order or not. In Mehrunissa Vs. State of Maharashtra, , it was held that the fact that detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the documents was held to be fatal. Similar view was expressed by Apex Court in Mohd. Zakir Vs. Delhi Administration and Others, . In Ahamed Nassar Vs. The State of Tamil Nadu and Others, it was observed as follows:

20--So far stand of the respondent with reference to the advocate's letter dated 19th April 1999 it cannot be held to be a justifiable stand. These technical objections must be shun where a detenu is being dealt under the preventive detention law. A man is to be detained in the prison based on subjective satisfaction of the detaining authority. Every conceivable material which is relevant and vital which may have bearing on the issue should be placed before the detaining authority. Sponsoring authority should not keep it back, based on his interpretation that it would not be of any help to a prospective detenu. Decision is not to be made by the sponsoring authority. The law on this subject is well settled, a detention order vitiates if any relevant document is not placed before the detaining authority which reasonably could effect his decision.

8. In Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another, , Apex Court held as follows:

If material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal

9. This is a case of preventive detention u/s 3(1) of the Act, where the confessional statement retracted by detenu was not placed before detaining authority

10. In Ayya alias Ayub Vs. State of U.P. and Another, Apex Court held thus:

There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The detaining authority might very well have come to the same conclusion after considering this material; but in the facts of the case the omission to consider the material assumes materiality.

11. In *Sita Ram Somani Vs. State of Rajasthan and Others*, Court held;

It appears to be clear to us that the documents mentioned by the appellant in his petition were not placed before the detaining authority and, therefore, were not considered by the detaining authority. It is possible that they were placed before the Screening Committee in the first instance, but that is immaterial. It was the detaining authority that had to consider the relevant material before taking a decision whether it was necessary to detain the appellant under COFEPOSA. That was not done and there was, therefore, a clear non-application of mind by the detaining authority to relevant material.

12. In *Abdul Sathar Ibrahim Manik Vs. Union of India and others*, , it was observed that in a case where detenu is released on bail and is not in custody at the time of passing order of detention, then the detaining authority has to necessarily rely upon this as that would be a vital ground for recording detention. In such cases, the bail application and the order granting bail should necessarily be placed before the authority and copies should also be supplied to detenu. In *Noor Salman Makani Vs. Union of India and others*, , it was observed that whether a particular document is vital or not again is an issue which depends on the facts in each case. In the said case, it was held that detention order itself was passed when detenu was in jail and the detaining authority noted this fact and being satisfied that there was every possibility of his being released on bail, passed the detention order. If subsequently detenu is released on bail, even subject to certain conditions that does not bring about any material change. On the other hand, release on bail is a stronger ground showing that detenu who is not in custody is likely to indulge in prejudicial activities again. A distinction between bail being granted before order of detention and bail being granted subsequent to order of detention is of relevance. When detenu was already on bail before detention order was passed, bail order and bail application are vital documents which are to be considered by the detaining authority.

In the result, the Original Petition is allowed. Order of detention is quashed. Detenu Kunnath Pathukutty, is set at liberty forthwith unless her continued detention is required in connection with any other case.