

(1994) 06 MAD CK 0030
In the Madras High Court
Case No : H.C.P.No. 2383 of 1993

Mrs. Amsa

APPELLANT

Vs

The District Magistrate and District Collector Tricky District,
Trichy and State of Tamilnadu

RESPONDENT

Date of Decision : 28-06-1994

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22(5)
Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders,
Goondas, Immoral Traffic Offenders and Slum-Grabbers, Act, 1982 — Section 2, 2(a),
3, 3(l), 4(l)

Citation : (1994) 2 LW(Cri) 389

Hon'ble Judges : Thanikkachalam, J; Gulab C. Gupta, J

Bench : Division Bench

Advocate : D. Veerasekaran, for the Appellant; S. Shanmughavelayutham,
Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Gulab C. Gupta, J.—The petitioner, Mrs. Amsa, is the wife of the detenu, Selvam son of Karuppanna Gounder, who has been put in preventive detention by order dated 27.10.1993 passed by the first respondent purporting to be in exercise of powers conferred by S. 3(l) of the Tamilnadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum-grabbers Act, 1982, (hereinafter referred to as the Act) and claims that the custody of her husband is illegal and unconstitutional. She, has therefore, filed this petition invoking this Court's jurisdiction under Art. 226 of the Constitution of India claiming a writ of habeas corpus for release of her husband.

2. It appears that on 5.10.1993 the Sub-Inspector of Police, Law and Order, Karur Town, conducted a raid at Church Road, Vengamedu and found the detenu with a mud pot containing about 25 litres of illicitly distilled arrack. It is alleged that the detenu on seeing the police party, tried to escape but was apprehended

and arrested at 6 P.M. The pot with 20 litres of I.D. arrack along with a glass tumbler and a sum of Rs.5/- purporting to be sale proceeds thereof was recovered from him. The sample of 500 ml. of arrack was kept in two sealed bottles and eventually sent to the Chemical Examiner, who, in his report dated 13.10.1993 held that the sample contained ethyl alcohol, acids, esters, higher alcohols and aldehydes and contained atropine of 5.10 mg. The Chemical Examiner also opined that atropine was a poisonous substance. A criminal case was registered against the detenu at the police station, Karur Town and he was produced before the Judicial Magistrate No.II, Karur on 6.10.1993 for remand. He was later released on bail through court. During the course of investigation the Medical Officer, Government Hospital, Karur was examined to obtain his opinion about the I.D. Arrack. According to the Medical Officer, if any person consumed I.D. arrack mixed with atropine of 0.64 mg.w/v and above, he will develop giddiness, vomiting, congestion of eye lids and respiratory failure, which if not treated vigorously will result in death. The first respondent considered the aforesaid material collected during investigation against the detenu including his earlier antecedents and found that there were seven earlier criminal cases under S. 4(I) of the T.N. Prohibition Act, 1937 registered against the detenu and he had been in all of them convicted and sentenced to payment of fine. These cases related to the years 1992 and 1993. The first respondent, therefore, held that the detenu was a bootlegger involved in selling I.D. liquor mixed with poisonous substance which is likely to cause widespread danger to public order and public health. The first respondent further held that since the detenu was on bail he may also indulge in aforesaid prejudicial activities in future. The first respondent, therefore, held that he was satisfied that if the detenu is led to remain at large, he will indulge in future activities prejudicial to the maintenance of public order. He, therefore, held that there was a compelling necessity to detain him in custody under the Act. That is how the impugned detention order was passed and the detenu taken in custody. While in custody he was given copies of the impugned order and grounds of detention which were read over and explained in Tamil. The constitutional validity of this order is under challenge in this writ petition.

3. Learned counsel for the petitioner submits that it was a case of non-application of mind vitiating the detention and entitling the detenu to a writ of habeas corpus by this Court. It is emphatically submitted that the first respondent has not considered the fact, that the atropine substance found in the alleged I.D. arrack was not fatal and could not have, therefore, affected either the public health or public order under the Act. It is also submitted that there was undue and unexplained delay in disposing of the representation of the detenu, which introduces an illegality in the impugned order. Learned Public Prosecutor, however, submitted that the impugned order was passed after consideration of all facts and circumstances in the context of law on the subject and hence there is no justification for the criticism that there has been no application of mind. As regards the atropine contained in the I.D. liquor it is

submitted that its being fatal is not the requirement of law. The quantity found is high enough for causing danger to public health and justifying detenu's detention under the Act, As regards delay in disposal of representation it is submitted that there has been no delay as such and the representation was processed according to the established office procedure as soon as it was received and final order thereupon passed and communicated without any delay. In any case, it is submitted that the delay if any is properly explained. It is, therefore, prayed that there is no substance in the writ petition, which deserves to be dismissed.

4. S. 3(l) of the Act, under which the impugned order has been passed reads as under:

The State Government may, if satisfied with respect to any bootlegger or drug-offender or forest-offender or goonda or immoral traffic offender or slum-grabber that with a view to prevent him from acting in any manner prejudicial to the maintenance of public order, it is necessary so to do, make an order directing that such person be detained.

A bare reading of this provision would show that there are two basic requirements of making an order of preventive detention under this provision viz., (1) the detenu is a bootlegger or drug offender or forest offender or a goonda or an immoral traffic offender or a slum grabber and (2) the detenu is acting in a manner prejudicial to the maintenance of public order. In the context of detention of a boot-legger under this provision, the Detaining Authority is bound to record his satisfaction that the detenu is (1) a boot-legger, and (2) his activities are prejudicial to maintenance of public order. Apparently therefore the fact that the detenu is a boot-legger is not by itself enough to justify his detention under this provision. The words "maintenance of public order" are defined in S. 2 of the Act and its meaning in relation to the activities of a boot-legger are mentioned in clause (a) (i) thereof which reads as under:

(a) acting in any manner prejudicial to the maintenance of public order" means-

(i) in the case of a bootlegger, when he is engaged, or is making preparations for engaging, in any of his activities as bootlegger, which affect adversely, or are likely to affect adversely, the maintenance of public order.

* * * *

This definition has to be read with the explanation attached to the Section which reads as under:

Explanation:- For the purpose of this clause, (a), public order shall be deemed to have been affected adversely, or shall be deemed likely to be affected adversely, inter alia, if any of the activities of any of the persons referred to in this clause (a) directly or indirectly is causing or calculated to cause any harm danger or alarm or a feeling of insecurity, among the general public or any Section thereof or a grave or widespread danger to life or public health or ecological system.

(b)"bootlegger" means a person, who distills, manufactures, stores, transports, imports, exports, sells or distributes any liquor, intoxicating drug or other intoxicant in contravention of any of the provisions of the Tamil Nadu Prohibition Act, 1937 (Tamil Nadu Act X of 1937) and the rules, notifications and orders made thereunder, or in contravention of any other law for the time being in force, or who knowingly expends or applies any money or supplies any animal, vehicle, vessel or other conveyance or any receptacle or any other material whatsoever in furtherance of support of the doing of any of the above mentioned things by or through any other person, or who abets in any other person, or who abets in any other manner the doing of any such thing:"

The Explanation, as its fair reading would show gives extended meaning to the words "Public Order" by creating a legal fiction in that behalf. A combined reading of clause (a) and the Explanation would therefore, justify the conclusion that the activity of a bootlegger, if it creates widespread danger to life or public health would be deemed to be the activity prejudicial to the maintenance of public order. Under the circumstances it is obligatory on the part of the Detaining Authority to record its satisfaction that (1) the detenu is a bootlegger and (2) his activities are posing a grave threat to life or widespread danger to public health. These provisions do not, in term, require the authority to hold that arrack sold by a bootlegger contains fatal dose of poisonous substance or that only a fatal dose of poisonous substance can cause grave danger to life or widespread danger to public health. These provisions must be read and interpreted in the context of Art. 21 of the Constitution which guarantees "life" and "liberty" of every person in the country and Art. 22 which provides for preventive detention in accordance with a valid law on the subject. It has to be appreciated that the detention of an individual without trial is wholly inconsistent with the basic ideas of our Government and the gravity of the evil to the community resulting from antisocial, activities can never furnish adequate reason for invading the personal liberty except in accordance with the procedure established by law. It has been the consistent view of courts in the country that where the life and liberty of a citizen was involved, the Government will ensure that the constitutional safeguards embedded in Art. 22(5) are strictly observed. The power of preventive detention by the Government under the Act must, therefore, be held to be subject to the limitations under Art. 22(5) of the Constitution. This is also the view of the Supreme Court in *Omprakash Vs. Commissioner of Police and Others*, and *Rashidmiya @ Chhava Ahmedmiya Shaik Vs. Police Commissioner, Ahmedabad and Another*,

5. The application of mind must in the context of aforesaid law be held to be the basic and mandatory requirement of exercise of power under the Act. Learned counsel for the petitioner submits that the Authority has assumed that presence of atropine in I.D. arrack is fatal to human health and has consequently assumed that sale of such arrack adversely affects the public order. The assumption according to the learned counsel is not correct and as long as atropine percentage in I.D. arrack is not fatal, no lawful conclusion that there is any

danger to public health can be drawn. It is, therefore, submitted that the impugned order is not only constitutionally invalid but otherwise violative of S. 3 of the Act. Attention of this Court is drawn to a Division Bench judgment in H.C.P.No. 1567 of 1993 decided on 14.2.1994 (Aatukaran alias Mart v. District Magistrate & The Collector of Dharmapuri) wherein it was held that presence of 4.05 mg. of atropine in I.D. arrack was not fatal and, therefore, not dangerous to life. On the aforesaid view, the detention of the petitioner in the said case was quashed. The judgment is based on two earlier judgments in WP.No.6737 of 1988 decided on 15.2.1989 and WP.No.9179 decided on 9.11.1990 wherein it was held that mere extensive activity as a boot-legger was not dangerous to life or public health and it was possible to take the view that danger to life or public health, which is the requirement of the provision, would not exist unless the activity of a boot-legger has posed a grave danger to the life. This decision does not take into consideration the explanation to S. 2(a) of the Act which gives extended meaning to the word "public order" by creating a fiction that anything that poses danger to life or public health would be deemed to be affecting public order. This decision does not also take into consideration earlier decisions of this Court taking a contrary view. The other decisions taking this view are Thangam v. Secretary, Government of Tamil Nadu (1989 L.W.(CrI.) 173), Cherian v. State of Tamil Nadu (1989 L.W. (CrI.) 527) and P. Shanmugham v. District Magistrate (1990 L.W. (CrI.) 355). None of them discuss S. 2(a) of the Act and the explanation attached to it and can be said to have been rendered per incuriam. These decisions however lay down that presence of atropine in quantity less than 10 mg% was not fatal and hence public order was not adversely affected. In T. Lakshmi v. The District Magistrate and Collector, Pudukottai District and another (W.P.No.2706 of 1990) decided on 30.8.1990 this Court, on detailed examination of the aforesaid controversy held that the requirement of the provisions was "grave or widespread danger to life or public health" and, therefore, it was not necessary, that the dose of poisonous substance in the arrack should be fatal. The following passage from the said judgment being relevant deserves notice:-

Now, elaborating the first point it was argued by Mr. B. Kumar, learned counsel for the petitioner, relying on a book of H.M.V. Cox's Medical Jurisprudence and Toxicology at page 662, that for chloral hydrate to be fatal it must be 5.00 grams and therefore the percentage of chloralhydrate found in the I.D. arrack seized from the detenu being 0.23 for a fatal dose of 5 grams one must consume as much as 2174 ml. of I.D. arrack which is humanly impossible. Therefore according to the learned counsel the I.D. arrack sold by the detenu cannot be said to be dangerous to human life and hence no question of the activities of the detenu being prejudicial to the maintenance of public order arises and hence the detention order is illegal. We are unable to accept this. First of all in the said book the minimum fatal dose also is mentioned and the five grams is only average and the minimum is 200 mg. for children and 2.00 grams for adults.

Further, chloral hydrate content in the I.D. arrack need not necessarily be so high that would cause death to a consumer of arrack. Nowhere in the Act 14 of 1982

it is stated so. What is to be seen is that as stated in S. 2(a) of the Act, whether the detenu as a boot-legger was acting in any manner prejudicial to the maintenance of public order. Then as given in the explanation in S. 2(a) public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely inter alia, if the activity of the bootlegger is causing or calculated to cause any harm, danger or alarm or a feeling of insecurity, among the general public or any section thereof or a grave or widespread danger to life or public health. Therefore there is absolutely no point in saying that only if the I.D. arrack sold by the detenu, because of its contents of chloral hydrate, is fatal to life then only his activity can be said to be prejudicial to the maintenance of public order. Even if the detenu's activity directly or indirectly is causing or calculated to cause any harm, danger or alarm or feeling of insecurity public order shall be deemed to have been affected adversely. To say "grave or widespread danger to life or public health" does not necessarily mean causing death. Now, according to the Chemical examiner's report chloral hydrate is a poisonous substance. The doctor who has been examined by the investigating officer has given his opinion that chloral hydrate is an intoxicating poisonous substance and consumption of I.D. arrack mixed with chloral hydrate causes irritation in eyes, dryness in tongue, vomitiation and giddiness and danger to liver, kidney and heart and it may cause death. Hence there is no gainsaying that consumption of I.D. Arrack containing chloral hydrate, a poisonous substance, whatever may be its percentage is dangerous to life or public health.

When the percentage of chloral hydrate content is low it may not cause immediate death, but repetition of consumption will certainly cause danger to life. I.D. arrack being sold to the public, most of the consumers being poor and illiterate, it can definitely be said that sale of I.D. arrack with chloral hydrate content is at least likely to cause grave or widespread danger to life or public health, therefore the abovesaid contention raised by the learned counsel for the petitioner cannot be accepted. He has cited in support of his contention two decisions of this Court viz., *Thangam v. The Commissioner and Secretary to Government of Tamilnadu and others* (1989 L.W.(CrI.) 173) and *Cherian v. The State of Tamilnadu and another* (1989 L.W.(CrI.) 527) both rendered by the same Bench. These decisions do not lay down any proposition of law, and on consideration of the facts of the case the detenu was ordered to be released. The facts in those case are different from the facts in our case. For instance in the first case the chloral hydrate content was 0.05 mg. and in the second case the chloral hydrate content was 0.033 mg. whereas in our case it is 0.23 mg. which is much more than in the said two cases. Each case has to be decided on the merits of its own peculiar fact.

The Division Bench in this case has noticed the Explanation to S. 2(a) of the Act and has recorded detailed reasons for its view that the poisonous substance mixed with arrack does not have to be fatal to life in order to justify an action under this provision and its requirements would be fully satisfied if poisonous substance in the arrack justifies the inference that the arrack is dangerous to life

and public health. The Division Bench has chosen not to follow the decision in Thangam's and Cheriyan's cases as according to the Bench, both these do not lay down any proposition of law and relief given through them because of the peculiar facts of the case. This judgment deserved notice by subsequent Benches of this Court either to be followed or for referring the matter to a larger Bench for authoritative determination, which, unfortunately has not been done. It must be regretted that without noticing this judgment subsequent Benches have taken a view different than the aforesaid, which has the effect of compounding the confusion on the subject. Then the subsequent Benches have not followed any consistent view. The approach in Attukaran's case seems to have been given up and a new approach developed in Palanisami v. The Secretary to The Government, Prohibition & Excise Department (ILR 1994 II Mad 493). Reference to S. 2 of the Act in the context of Arts. 21 and 22 of the Constitution of India, the Division Bench has held that the Detaining Authority cannot afford to be casual in its approach while considering the case for ordering preventive detention and cautioned that the Authorities should realise that "he will have the power to detain only when he is satisfied with the grounds made available leading to a reasonable deduction that the person sought to be detained has indulged in one or the other such activity or more than one such activity, which cannot be prevented, except by an order of detention. A casual approach without there being any definite deduction, noticed in the detention order in many cases may be a ground in itself, to interfere with the detention order, as one can legitimately suggest that no legitimate deduction has been drawn by the Detaining authority from the grounds and his satisfaction is not reflected in what is stated by him in the order". In other words, the Division Bench wanted the detaining Authority to order detention only when the grounds for the purpose are made out on the facts on record and advised it to avoid conjectures for the purpose. In spite of it, the Division Bench has followed the decision in Attukaran's case without noticing the difference in its approach in the decision in T. Lakshmi's case. The Division Bench while deciding Attukaran's case had noticed observations in Pambukaran v. The State of Tamil Nadu (W.P.NOS.11773 and 11774 of 1990 decided on 10.2.1990) to the effect that the view of the Court will require reconsideration in some suitable case. Attukaran's and Palanisamy's cases were not considered suitable for the purpose. In spite of it, it would be reasonable to hold that the view in these cases is not the final verdict of this Court. Since the question is now arising almost every day in this Court and is of considerable public importance, the controversy has to be authoritatively settled without any delay. Since this case has been argued by both the parties at length, this Court considers it to be fit case for re-examining the matter. What then is the correct interpretation of law on the subject?

6. The learned Public Prosecutor has brought to our notice the decision of the Supreme Court in Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, to submit that the view taken by this Court in T. Lakshmi's case is the only correct view of the provisions of the Act, and deserves to be followed. The

Supreme Court in this case considered S. 3 of Gujarat Prevention of Anti-social Activities Act, 1985, which also deals with bootlegging and permits preventive detention of a boot-legger if his activities are likely to cause widespread danger to the public health. The petitioner in the said case was a broker and involved in importation in bulk of Indian made foreign liquor from the State of Rajasthan to the State of Gujarat. There was total prohibition in Gujarat and hence this importation was illegal.

The preventive detention of the petitioner was claimed to be illegal because his activity was not in any manner prejudicial to the maintenance of public order. Referring to the explanation attached to sub-Section(4) of S. 3 of the said Act, the Supreme Court opined that "it gives an enlarged meaning to the words "acting in any manner prejudicial to the maintenance of public order", and, therefore, held that "illicit liquor traffic on brokerage" was by itself sufficient to hold that the petitioner was acting in a manner prejudicial to the maintenance of public order. This case is, therefore, the authority for the proposition that even illicit liquor traffic which is covered by the definition of bootlegger is enough to justify an order of preventive detention under the Gujarat Act. The Supreme Court was not, in this case, faced with the question whether the atropine content of I.D. arrack was required to be fatal to make the activity prejudicial to the maintenance of public order. The decision, however, clarifies that boot-legging activity has to be considered in the context of explanation attached to the provision and presumed to be causing widespread danger to the public health and the public order. The Explanation under Gujarat law, is similar to explanations under S. 2 of the Act and hence there is no reason why it should not receive same meaning. This is also the view taken by the Division Bench of this Court in Lakshmi's case. In this view of the matter, Lakshmi's case has the backing of the Supreme Court's decision as aforesaid and to be preferred to the decision as aforesaid and to be preferred to the decision in Attukaran's case. In this connection, the decision of this Court in Reetha v. The Government of Tamil Nadu (H.C.P. NO. 1591 OF 1993 dated 24-2-1994) deserved notice as it gives the explanation a meaning given to it in Lakshmi's case though without mentioning it. Para 5 of this judgment being relevant is reproduced as under;-

It is, thus, not every boot-legger who can be detained in the name of acting prejudicial to the maintenance of public order, if his activities are confined to that of a boot-legger only. He can be detained if his activities are found causing or calculated to cause any harm, danger or alarm or a feeling of insecurity among the general public or any section thereof or grave or widespread danger to life or public health or ecological system. Directly or indirectly causing or calculated to cause harm, danger or alarm or a feeling of insecurity among the general public or any section thereof, directly or indirectly causing or calculated to cause a grave or widespread danger to life or public health or ecological system are words of expressions of wide amplitude. A bootlegger's activities thus, can be found to have caused or to have been calculated to cause harm, danger or alarm or a feeling of insecurity in the general public or any Section thereof and once

this is found to exist in the past activities and it is seen that he has the tendency to continue such activities and he is likely to repeat, he can be one who may be detained for his acts prejudicial to the maintenance of public order. Similarly for directly or indirectly causing or calculating to cause a grave or widespread danger to life or public health or the ecological system, a boot-legger can be found to have indulged in such activities which are prejudicial to maintenance of public order and he may, thus, be one who can be subjected to an order of detention under the Act. There has, however, been a tendency in the detaining authorities in the past, as evidenced in any number of order to put words out of the definition of a boot-legger and explanation to S. 2(a) of the Act without any effort to see, whether acts of the person sought to be detained are such that cause any harm danger or alarm or a feeling of insecurity among the general public or any Section thereof. The other part of the explanation which says about the grave or widespread danger to life or public health is invariably used, but without caring whether such acts as are sought to be prevented would fall under it or not. A proper approach, in our view is one in which the effect on the public order of the bootlegger's acts is examined with due care to the course it may adopt to cause harm danger or alarm or a feeling of insecurity among the general public or a section thereof as well as whether it has posed any grave or widespread danger to life or public health and one or the other effect is specified so that it is possible for a reviewing authority to know whether the detaining authority has applied his mind to the matter with care and caution or not.

This practical approach is different from the decision in Attukaran's case and since both are rendered by the same Bench, approach in Reetha's case being subsequent, commands more respect. Attukaran's approach must be deemed to have been given up. We are, therefore, of the view that there had been no mistake committed by the Authority in reaching the concluding that the activity of the petitioner was likely to cause widespread danger to the public health and consequently to public order. This view finds full support in the decisions of the Gujarat High Court in Bhikabhai Thakkebhai Patel v. Commissioner of Police, Surat (1909 Cri. L.L. 10) wherein on detailed examination of the law on the subject based on various Supreme Court decisions has been clarified as meaning that the detenu's business of dealing in country liquor by itself was prejudicial to the maintenance of public order and furnish valid ground to the detaining authority for ordering preventive detention. The decision of the Supreme Court in P.K. Mehta v. Commissioner of Police (1989 (Supp.) I SCC 322) relied upon by the petitioner does not deal with the explanation and has turned on its own facts. It does not therefore give any support to the petitioner's submission. The submission based on non-application of mind by the detaining authority is therefore held to be devoid of substance rejected.

7. As regards delay in disposal of representation it has been the view of this Court in K. Chelliah @ Sullt v. The Commissioner & Secretary to Govt. (1988 L.W. (Crl.) 238) that the representation received from a detenu must be disposed of with utmost expedition and it must receive active and continuous consideration

and the failure to do so would vitiate the detention order. In the said case the Court concluded that the delay of 28 days was not explained and, therefore, held that the same was fatal justifying the issue of a writ of habeas corpus. The matter has also received attention of the Supreme Court in Birendra Kumar Rai alias Virendra Kumar Rai Vs. Union of India (UOI) and Others, and Smt. Hawabi Sayed Arif Sayed Hanif Vs. L. Hmingliana and others, and also Sri Ram Skukrya Mhatre Vs. R.D. Tyagi and Others, . The Supreme Court has in these cases held that mere delay in disposal of representation is not fatal and the delay if adequately explained, showing absence of callousness or casual or leisurely treatment of representation will not give any benefit to the detenu. In Ram Sukrya's case, it was clarified that no time-frame for disposal of the representation can be prescribed and each case will have to be decided on its own fact. In Hawabi Syed's case the need to show prejudice because of the delay was also emphasised. These cases, therefore, lay down that though the representation should be decided as early as possible and without delay, no time frame for the said purpose can be prescribed. The delay caused because of inaction or leisurely treatment of the representation showing callous negligence on the part of the Authority would however vitiate the action. If the facts of the present case are considered in the light of the aforesaid principle, no benefit would accrue to the petitioner. The petitioner has addressed his representation to the Governor and not to the Secretary to the Government as required of him by para 7 of the grounds of detention. The file indicates that the said representation was received by the department on 11.3.1994 and finally decided on 27.4.1994. In between, the parawise reply of the representation was received from the District Magistrate, Trichy. There is neither any allegation of Callous indifference or negligence in dealing with the representation nor any such inference can be drawn from the facts on record. Under the circumstances, it is a case of mere delay caused because of the distance and the procedure required to be followed in dealing with the matter. Under the circumstances, delay in disposal of representation would not vitiate the impugned order.

8. In the result, the petition fails and is dismissed. No costs.