
(2002) 07 KL CK 0029
In the High Court Of Kerala
Case No : O.P. No. 7571 of 2002

Mymoona

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 26-07-2002

Acts Referred:

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

Citation : (2002) 2 ALT(Cri) 435 : (2003) 85 ECC 262 : (2002) 3 ILR (Ker) 275 :
(2002) 4 RCR(Criminal) 293

Hon'ble Judges : K.S. Radhakrishnan, J;K.A. Mohamed Shafi, J

Bench : Division Bench

Advocate : B. Raman Pillai and George Jacob, for the Appellant; P.S. Sreedharan Pillai, S.C.G.S.C. and K.G. Bhaskaran, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K.S. Radhakrishnan, J.—This writ of Habeas Corpus has been preferred by the wife of the detenu who was detained under Sections 3(1)(iii) and 3(1)(iv) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called "the Act"). Ext. P1 order of detention dated 4.10.2001 and the subsequent order, Ext. P6, dated 21.1.2002 confirming the order of detention are under challenge in this writ petition.

2. Detenu by name P. Kunhimohammed was intercepted on 18.8.2001 by the Customs Authorities while he was travelling in a passenger train bound for Coimbatore. Detenu was searched by the Special Customs Preventive Unit, Kannur in the presence of two witnesses. During the search 31 gold biscuits of foreign origin weighing 3,611 grams and valued at Rs. 16,28,786/- along with Indian currency of Rs. 11,800/- were recovered from his person. Gold was found concealed around his waist. Statement u/s 108 of the Customs Act was taken wherein detenu stated that he along with one Usman introduced by one Mohammed Ali went to Bombay and on 17.8.2001 he had contacted a person

over telephone and later went to V.T. station and handed over the money to a person and got gold biscuits. Detenu was arrested by the Customs Authorities on 19.8.2001 he was produced before the Magistrate and the detenu was remanded to judicial custody till 29.8.2001. Later he was produced before the Additional Chief Judicial Magistrate (Economic Offence) Ernakulam on 29.8.2001. The order of detention dated 4.10.2001 was later passed and the detenu was apprehended by the police on 7.11.2001. Detenu made a representation on 6.12.2001 and requested for various documents. He was later produced before the COFEPOSA Advisory Board and Board recommended continued detention.

3. Counsel for the petitioner urged only two contentions. Counsel contended that the Advisory Board has committed an error in not granting his prayer for legal assistance by a next friend. According to counsel, this has vitiated the order of the Advisory Board. Counsel also submitted that the detaining authority has also committed a mistake in not referring to the bail application as well as the order passed by the Additional Chief Judicial Magistrate (Economic Offences) Ernakulam granting bail.

4. Detailed counter affidavit has been filed on behalf of the respondents 1 and 3. Learned Government Pleader submitted that the bail application or the bail order was not referred to the ground of detention which was passed on 4.10.2001. Learned Government Pleader however submitted that since the detenu failed to abide by the conditions stipulated in the bail order, bail was cancelled and non-bailable warrant was issued against the detenu. It is further stated that before the cancellation of the bail detenu was absconding. Therefore, the contention that there was no consideration of the bail application and the bail order is of no consequence. With regard to the contention that the detenu was not heard through a next friend by the Advisory Board it was stated that detenu is not entitled to get the assistance of a legal practitioner as envisaged u/s 8 of the Act. The second respondent has also filed counter affidavit supporting the State.

5. We must first examine the first contention raised by the counsel for the detenu that detenu was not given the assistance of the legal practitioner or a next friend. It is true Section 8(e) of the Act states that 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 manner connected with reference to the Advisory Board. Even though legal practitioner is not permitted, if a request is made by the detenu, the Advisory Board cannot refuse the assistance of a next friend. This question earlier came up for consideration before the Apex Court in *A.K. Roy and Others Vs. Union of India (UOI) and Others*, . The Court examined the issue under the National Security Act, 1980 vis-a-vis Article 22(5) of the Constitution of India and held as follows:

"The embargo on the appearance of legal practitioners, however, does not extend to preventing the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. A detenu, taken straight from his cell to the Board's room, may lack the ease and composure to present his point of

view. The friend would assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts disbelieved. So whenever demanded the Advisory Board must grant this facility."

A.K. Roy's case, supra later came up for consideration before the Apex Court in P. Murugesan v. State and Anr. (1999 SCC 1022). The apex court was dealing with the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slums Grabbers Act, 1982. The Court held as follows:

"The very fact that the detenu did not succeed in convincing the Advisory Board of his points of view would prima facie indicate that the competence of the detenu to drive his points home was not as satisfactory as it was pictured by the Advisory Board. Secondly the Advisory Board did not even test the competence of the friend who was standing next door as to whether the presentation of the facts could have been done in a better way by him".

The apex court concluded on refusal of the request made by the detenu to have assistance of the friend who was present at the same place, Article 22(5) of the Constitution has been violated and the detention order was vitiated. In view of the abovementioned position, the view of the counsel for the petitioner is right in his contention that the order of detention is vitiated because of the refusal to accede to the request to have the assistance of a next friend.

6. We may examine the next contention whether non-consideration of the bail order has vitiated the detention order. An identical question came up for consideration before the apex court in M. Ahamedkutty Vs. Union of India (UOI) and Another, . After examining the question the apex court held as follows:

"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 been 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 ground 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."

This question again came up for consideration before the apex court in Abdul Sathar Ibrahim Manik Vs. Union of India and others, . After analysing the various decisions, the apex court laid down several propositions of which we are concerned in this case with proposition No. 6, which is extracted below:

"In a case where detenu is released on bail and is at liberty at the time of

passing the order of detention then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies; should also be supplied to the detenu."

A Bench of this Court in *Ashra v. State of Kerala* (2001 (1) KLJ 684) followed the abovementioned decision and held that bail application and the order of bail are all vital documents and the detaining authority is bound to consider the same. The Court also held that the contents of the bail application and the manner in which bail application was considered by the Magistrate and the ground on which he was satisfied of granting bail would also have a bearing in the formation of the subjective satisfaction of the detaining authority in passing the detention order since those documents are vital documents.

7. In this connection we may also refer to the recent decision of the apex court in *Chowdarapu Raghunadan v. State of Tamil Nadu and Ors.*, (2002 SCC CrL 714). In that case apex court was considering the provisions of the COFEPOSA Act and emphasised the necessity of advertent to vital documents and held as follows:

"Though the courts exercising powers of judicial review do not consider the challenge to an order of detention, as if on an appeal reappreciating the materials, yet since an order of detention in prison involves the fundamental rights of a citizen, freedom of movement and pursuit of normal life and liberty, no absolute immunity can be claimed by the respondents as to the decision arrived at and it is open to the courts to see whether there has been due and proper application of mind and that all the relevant and vital materials for the purpose have been noticed, advertent to and considered."

We have indicated that when a competent court grants bail on the basis of an application filed by the detenu, grounds urged in the bail application as well as the order granting bail are vital documents to be examined by the detaining authority. It is always open to the detaining authority to come to its own subjective satisfaction on the basis of those materials. We have already indicated those are all vital materials to be considered by the detaining authority. In this case the bail application and the order granting bail are vital documents since the competent court has granted bail on certain grounds and hence those documents are to be advertent to and considered. In such circumstances we are inclined to hold that both the contentions raised by the counsel for the petitioner are sustainable. Consequently the order of detention is vitiated. We therefore allow this Writ Petition. Let the detenu be released forthwith unless he is wanted in connection with any other case.