

(2000) 01 KL CK 0049
In the High Court Of Kerala
Case No : O.P. No. 21231 of 1999-B

Pathooty

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 27-01-2000

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1), 8
Constitution of India, 1950 — Article 21, 22, 22(5)

Citation : (2000) CriLJ 1189 : (2000) 2 ILR (Ker) 256

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

Bench : Division Bench

Advocate : Sunny Mathew, for the Appellant; K. Sasikumar, Govt. Pleader (for No. 1) and K. Ramakumar, SCGSC (for No. 2), for the Respondent

Final Decision : Allowed

Judgement

Arajit Pasayat, C.J.—Life without liberty is "lasting" but not living". As liberty is the life line of every human being, it is, therefore, not a matter of surprise that liberty is considered one of the most cherished and precious possession of every human being. No one likes fetters on his personal liberty.

2. Order of detention passed in respect of Koodathal Basheer (hereinafter referred to as "detenu") in terms of Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short "the Act") dated 7-4-1999 is challenged by his mother on the ground that procedural safeguards mandated by Article 22(5) of the Constitution of India, 1950 (in short. "Constitution") have been violated.

3. Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is device of this nature. Blackstone called it "the great and efficacious writ in all manner of illegal

confinement". The writ has been described as a writ of right which is grantable *ex debito justitiae*. Though a writ of right, it is not a writ of course. The applicant must show a *prima facie* case of his unlawful detention. Once, however, he shows such a case and the return is not good and sufficient he is entitled to this writ as of right.

4. Preventive detention is not a punitive but precautionary measure. The object is not to punish a person for having done something, but to prevent and intercept him before he does it again. No offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities, (see: *Rex v. Halliday*, 1917 AC 260 *Kubic Bhariusz v. Union of India* : AIR 1990 SC 605 : 1990 Cri LJ 796. But at the same time, a person's greatest of human freedoms, i.e. personal liberty is deprived, and, therefore the laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguards, however technical, is mandatory. The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty, would lose all their meanings, are the rule justifications for the laws of preventive detention. Sometimes the deprivation of personal liberty of individuals becomes imperative to protect the society from denigrating. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of (a) supplies of commodities necessary for the community, or (b) public order necessary for orderliness in the society, or (c) economic balance, stability and discipline, can provide ground for a satisfaction that similar propensities on the part of the person concerned are likely and there is a possible future manifestation. This jurisdiction has been described as a "jurisdiction of suspicion" and the compulsion to preserve the values of freedom of a democratic society and social order and economic stability and discipline sometimes merit the curtailment of the individual liberty, (see: *Ayya alias Ayub Vs. State of U.P. and Another*, . To lose our country by a scrupulous adherence to the written law, said Thomas Jefferson, would be to lose the law absurdly sacrificing the end of the means. No law is an end itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No carte blanche is given to any organ of the State to be the sole arbiter in such matters. A constitutional protection is given to every detenu which mandates the grant of liberty to the detenu to make a representation against the detention, as imperative in Article 22(5) of the Constitution. It also imperates the authority to whom the representation is addressed to deal with the same with utmost expedition. The representation is to be considered and in its right perspective keeping in view the fact that the detention of the detenu is based on subjective satisfaction of the authority concerned, and infringement of the constitutional right conferred under Article 22(5) invalidates the detention order.

Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The strait gency and concern of the judicial vigilaning that is needed was aptly described in the following words in Thomas Paeham Oalse's case 1881 (6) QBD 376:

Then comes the question upon the baheas corpus. It is a general rule, which has always been acted upon by the Court of England, that if any person procures the imprisonment of another he must take care to do sp by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to contine

Whenever there is executive invasion on personal liberty, the Court has to weigh in golden scales whether the personal liberty is to be placed at a high pedestal regardless of the social cost involved in the release of a possible renegade. Observations to similar effect were made by the Supreme Court in Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, Judged in this background, the question is whether the detention as directed in the instant case is one where the procedural sinews suffered from any weakness to warrant interference.

5. It will be seen that right to represent has been given not only by Article 22(5) of the Constitution, but also by Section 8 of the Act. The right provided under the Act has, therefore, to be treated as an extension of the constitutional right already available to a detenu under Article 22(5). The Legislature has, in fact, given effect to the constitutional right by providing in Section 8 of the Act that the detenu shall have the right of making a representation to the appropriate Government. In Amir Shad Khan and another Vs. L. Hmingliana and others, Apex Court, while" considering the provisions of the Act, observed as under (At p. 716 , Para 3 of Cri LJ):

Thus clause casts a dual obligation on the detaining authority, namely, (i) to communicate to the detenu the grounds on ehich the detention order has been made, and (ii) to afford to the detenu the earliest opportunity of making a representation against the detention order. Consequently the failure to communicate grounds property or to afford the detenu an opportunity making a representation against the order could clearly violate the constitution guartee afforded to the detenu by Clause (5) of Article 22 of the Constitution.

6. The main plank of petitioner's argument in support of the application is that there was non-application of mind while passing order of detention. In this context, it stated that a crime case was registered and detenu was arrested and produced before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam on 19-10-1998 and he was remanded to custody. On 26-10-1998, a bail application was filed wherein it was stated that alleged confession before Customs officials was not factually correct. Conditional bail was granted on 19-11-1998 by Sessions Judge, Ernakulam in Crl. M.P. No. 2880 of 1998. On

20-11-1998, detenu was released from judicial custody. Immediately thereafter, a representation was sent to Commissioner of Customs, Cochin stating that the statement given before Customs officials was not recorded correctly and under what circumstances said statement was given. On 23-12-1998 another communication was made to the Home Secretary, Government of Kerala reiterating the stand. On 3-3-1999 order of detention was passed and on 18-3-1999 same was served on detenu and he was taken into custody. The fact that detenu had been arrested, moved a bail application and bail has been granted do not find a place in the order of detention and connecting documents. According to petitioner, it is a case of non-application of mind vitiating order of detention. On the contrary, learned counsel for respondents submitted that the factum of arrest and release on bail was known to the authorities and non-mention of it in the grounds of detention or non supply of documents in connection thereto does not cause any prejudice to detenu and as a matter of fact since the fact of his arrest, subsequent release on the basis of bail order were within his knowledge, it cannot be said that detenu was prejudiced in any manner to affect order of detention.

7. Though several other points have been urged in support of the application, we do not think it necessary to go into them in view of the fact that the effect of non-mention about the bail order and non-apply of copies thereof would decide the fate of the case.

8. 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 material 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 the 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.

9. Stand of the respondents that detenu having knowledge about those orders is not prejudiced does not stand on firm footing. As was observed in *M. Ahamedkutty Vs. Union of India (UOI) and Another*, , it is immaterial whether detenu had knowledge about such order or not. In *Mehrunissa Vs. State of Maharashtra*, (1), 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 document 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 dated 19th April 1999 it cannot be held to be 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 affect his decision.

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 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.

Aforesaid being the position, order of detention is bad and has to be quashed and were direct so. Detenu shall be released forthwith unless required to be in custody in connection with any other case. The Original Petition is allowed.