

(2009) 09 KL CK 0046

In the High Court Of Kerala

Case No : WP (Criminal) . No. 260 of 2009 (S)

P.K. Bose

APPELLANT

Vs

The Secretary to Government and Others

RESPONDENT

Date of Decision : 30-09-2009

Acts Referred:

Constitution of India, 1950 — Article 141, 21, 22, 22(5)
Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 —
Section 12, 20, 21
Penal Code, 1860 (IPC) — Section 188, 294, 324, 34, 379

Citation : (2010) 2 KLT 325

Hon'ble Judges : S.R. Bannurmath, C.J;C.T. Ravikumar, J;A.K. Basheer, J

Bench : Full Bench

Advocate : K. Ramakumar, for the Appellant; Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

S.R. Bannurmath, C.J.—This petition for issue of writ of habeas corpus has been referred by the Division Bench to decide the following question:

Whether non-specification of the period of detention in the order of detention passed u/s 3(1) and also the order of approval u/s 3(3) of the Kerala Anti-Social Activities (Prevention) Act, 2007 [hereinafter referred to as "KAAPA") vitiates the order of detention.

2. The brief facts necessary for our consideration are as follows: The brother of the petitioner is detained under the KAAPA by the order Exhibit P5 dated 20.04.2009. After his arrest on 28.04.2009, his detention was approved by the Government u/s 3(3) of KAAPA and after obtaining the opinion of the Advisory Board, the Government issued Exhibit P8 order confirming the order of detention. It is the case that the detenu is a known goonda, he having been involved in five cases, and hence the order of detention was passed and the grounds of detention thereto. The main contention raised by the detenu is that if as per Section 3(1)

of KAAPA the Authorised Officer passes an order of detention, which is subject to confirmation u/s 10(4), such order requires specification of time of detention and if such period is not mentioned, the entire detention order gets vitiated.

3. This very question was considered by a Division Bench of this Court in the case of *Sathi v. State of Kerala and Ors.* in W.P.(Crl.). No. 201 of 2009 [decided on 2.7.2009] and considering the decision of the apex Court in *Makhan Singh Tarsikka Vs. The State of Punjab*, and a decision of this Court in the case of *Anitha Bruse Vs. State of Kerala, The Superintendent of Police (Rural), The Circle Inspector of Police and The Sub Inspector of Police*, though rejected such contention of the detenu, felt necessary that such question requires reconsideration. The apex Court in the case of *Makhan Singh (supra)* has in clear terms held that the Detaining Authority is not expected to fix the period of detention under the Act. Similar is the law laid down in the case of *Anitha Bruse* by the Division Bench of this Court. It is to be noted that even in the later pronouncement of the apex Court in the case of *Mrs. T. Devaki Vs. Government of Tamil Nadu and others*, very identical situation arose and the apex Court observed this:

The Act nowhere requires the detaining authority to specify the period for which the detenu is required to be detained. The expression "the State Government are satisfied that it is necessary so to do, they may, by order in writing direct that during such period as may be specified in the order" occurring in Sub-section (2) of Section 3 relates to the period for which the order of delegation issued by the State Government is to remain in force and it has no relevance to the period of detention. The Legislature has taken care to entrust the power of detention to the State Government, as the detention without trial is a serious encroachment on the fundamental right of a citizen, it has taken further care to avoid a blanket delegation of power, to subordinate authorities for an indefinite period by providing that the delegation in the initial instance will not exceed for a period of three months and it shall be specified in the order of delegation. But if the State Government on consideration of the situation finds it necessary, it may again delegate the power of detention to the aforesaid authorities from time to time but at no time the delegation shall be for a period of more than three months. The period as mentioned in Section 3(2) of the Act refers to the period of delegation and it has no relevance at all to the period for which a person a person may be detained. Since the Act does not require the detaining authority to specify the period for which a detenu is required to be detained, order of detention is not rendered invalid or illegal in the absence of such specification.

4. In the present case also, it is to be noted that under the KAAPA also only the Government u/s 10(4), and not the Detaining Authority u/s 3(1) or the Government u/s 3(3) is bound to fix the period of detention. Section 3(2) does not oblige the Detaining Authority to fix any period of detention as that Sub-section only deals with the period during which the District Magistrate can exercise the delegated powers.

5. As such, in the light of the above precedents, it appears to us that it is not possible for this Court to hold that the omission to specify the period of detention must lead to invalidation of the order of detention. Though the Division Bench of this Court in Sathi's case (supra) followed the above said precedents, felt doubtful as to the correctness or otherwise of this law laid down by the apex Court and as such when such question once again raised in this case, referred the matter to the Full Bench.

6. Keeping in view the law of precedents, as this Court is bound by the law declared by the apex Court, there is no scope even for the Full Bench to take a contrary view. When the apex Court has in unequivocal terms laid down the proposition that the non-mentioning of the period of detention by the Detaining Authority is of no consequence in the light of the provisions of the Act, this Court cannot and should not go against such declaration of law and as such even if the Division Bench is doubtful as to the proposition laid down by the apex Court, it is bound by the law declared by the apex Court under Article 141 of the Constitution.

7. In view of the precedents by way of the decision of the apex Court referred to above, in our view, the decision of the Division Bench of this Court in the case of Anitha Bruse is just and proper conclusion and as such we answer the reference as follows: Non-specification of the period of detention in the order of detention passed u/s 3(1) as also the order of approval u/s 3(3) of KAAPA does not vitiate the order of detention.

8. In Sathi (supra), the Division Bench has expressed the view that it would have been ideal or desirable that a provision is made in Section 3(1) of the Act making it mandatory for the Detaining Authority, be it the Government or the Authorised Officer, to specify the period of detention in the order itself. According to the Division Bench, the detenu will have to inevitably undergo detention for at least 9 weeks or a little more, once the order is passed by the Detaining Authority, going by the scheme of the Act as it now stands.

9. In this context, it may be profitable to refer to Sub-section (3) of Section 3 of the Act, which postulates that the Authorised Officer who issues the order of detention shall forthwith report the fact to the Government and the Director General of Police, with a copy of the order and supporting records. It further postulates that the order of detention issued under that Section shall not remain in force for more than 12 days from the date of detention, excluding public holidays.

10. Section 9 of the Act mandates that the Government shall, within three weeks from the date of detention of a person, place before the Advisory Board, the grounds on which the order has been made and the representation, if any, made by the person affected. The Advisory Board in turn has to submit its opinion to the Government within 9 weeks from the date of detention of the person concerned. Thus, the provisions contained in the Act have provided inbuilt

safeguards against any kind of delay at any stage.

11. It is true that the order of confirmation as contemplated u/s 10(4) of the Act will have to be passed by the Government after obtaining the opinion of the Advisory Board to which reference has to be made by the Government as provided u/s 9 of the Act within three weeks from the date of detention. The Advisory Board is bound to render its opinion to the Government within 9 weeks from the date of detention of the person concerned. It is adverting to the above provision contained in Section 10(1) of the Act that the Division Bench has observed that the detenu will be compelled to undergo detention of at least 9 weeks once an order is passed by the Authorised Officer u/s 3(1) of the Act. The Division Bench further observed that detention of a detenu for a period of 9 weeks will be unjust even though the Detaining Authority may be of the view that the detention in a particular case for such a long period may not be warranted.

12. In this context it may be noticed that the Government can refuse to approve the order of detention u/s 3(3) of the Act if, after considering the report of the Authorised Officer along with the records, it considers that such detention is not warranted. If the Government grants approval for detention, it has to necessarily place the matter before the Advisory Board within 3 weeks. Therefore, the anxiety expressed by the Division Bench that the detenu may have to undergo incarceration for at least 9 weeks even if the Authorised Officer may be of the view that such a long period of detention may not be warranted in a given case, is totally misplaced.

13. This takes us to the other points raised in the writ petition before the Division Bench. Though we note from the decision under reference that all the points raised by the detenu have been held against him by individual consideration, the Division Bench has, at paragraph 13, observed this:

We are, in these circumstances, satisfied that the matter, including the question of law raised as ground No. 6 - i.e. whether non-specification of the period of detention in the order of detention passed u/s 3(1) as also the order of approval u/s 3(3) of the KAAPA vitiates the order of detention, deserves to be considered by the Full Bench.

It is to be noted that though the referring Division Bench has considered all the points raised, it was not necessary to refer all the points raised once again except the question of law required to be considered by the Full Bench.

14. There is much controversy between the learned Counsel for the detenu vis-a-vis the Additional Director General of Prosecutions as to whether it is open for this Full Bench to reconsider the entire arguments, to give a final quietus to the entire case instead of sending back to the Division Bench. We have considered and reheard both the learned Counsel and for the reasons to be recorded below, as the detention order vitiates on one main issue, proceed to pass the following order once again.

15. It is to be noted that the learned Counsel for the detenu assailed the detention on the following points:

(a) The order of detention is bad for the reason that reliance has been placed on non-existent and unrevealed secret and confidential information which was allegedly available with the Detaining Authority.

(b) The order of detention is not sustainable as there is snapping of the live link between the past events relied on and the impugned order directing future detention.

(c) Some of the documents relied on by the authority are not in Malayalam, the language known to the detenu, and as translations are not provided, the detention order gets vitiated.

(d) Recommendation of the Sponsoring Authority is that the detenu is a "known Rowdy". However, the detention is on the ground of he being a goonda. As the requirement for fulfilling the definitions of "known Rowdy" and "goonda" are different, there is no application of mind, vitiating the detention order.

(e) Non-furnishing of recommendation of Advisory Board vitiates the principles of natural justice.

16. On these grounds, the detention order of the detenu is challenged before us. We do not propose to deal with all the points except (a) and (c), since we are of the view that the case can be decided even without considering the other points enumerated above, and also since we propose to give benefit to the detenu and quash the detention order.

17. It is vehemently contended, so far as the point is concerned, that in the order of preventive detention one of the main grounds for passing the detention order is that as per secret/confidential information received from the Superintendent of Police, the detenu has been involving in criminal activities so as to be a threat to the society and his presence creates fear among the peace loving people of Kollam District and especially those belonging to the jurisdiction of Sasthamcottah Police Station and therefore it is necessary to invoke the provisions of KAAPA to detain the said detenu.

18. It is to be noted that the information received from the Superintendent of Police u/s 3(1) of KAAPA is the very foundation for the Detaining Authority to consider whether this is a fit case for detention or not. Admittedly and undisputedly what this confidential report is not forthcoming. No doubt, certain criminal cases booked against the detenu have been mentioned, but by that itself it would not be sufficient to hold that there is some additional material against the detenu. These offences, as can be seen from the detention orders, relate to certain criminal cases registered against the detenu, but do not in any way indicate that because of these offences named therein it creates a threat to the society and the very presence of the detenu creates fear psychosis amongst the people of Kollam District. The first offence registered against the petitioner is in

Crime No. 396 of 2006 of Sooranadu Police Station for the offences under Sections 452, 294(b) and 324 read with Section 34 of Indian Penal Code and the allegation was that the detenu and his associates physically assaulted the complainant and his wife in their house. The second offence is in Crime No. 277 of 2007 of Sasthamcotta Police Station under Sections 379 and 188 read with Section 34 IPC and also Section 12 read with Sections 20 and 21 of Kerala Protection of River Bank and Regulation of Removal of Sand Act, 2001; the allegation being that the detenu and his associates illegally collected seven loads of sand. The next offence is in Crime No. 421 of 2007 of Sasthamcottah Police Station, registered u/s 188 read with Section 34 IPC and also the provisions of Kerala Protection of River Bank and Regulation of Removal of Sand Act, 2001 in respect of illegal sand collection. Similar is the offence in Crime No. 15 of 2008 and Crime No. 135 of 2008 of Sasthamcottah Police Station. No doubt, on perusal of these offences, it indicates that the detenu is involved in illegal removal of sand; but by that itself does not make him a "known goonda" or "known Rowdy". It is undisputed that these offences for which criminal cases have been registered against the detenu have to be considered by the criminal Courts and if found guilty, appropriate punishment has to be given. However, keeping in view the aims and objects of the KAAPA, which is something more serious than the normal commission of crime and unless and until it is shown that the proposed detenu involved in anti-social activity is "known goonda" or "known Rowdy", the provisions of this Preventive Detention Act (KAAPA) cannot be invoked. It is well settled that the provisions of Preventive Detention Act are very serious and exceptional in nature. Merely because a person is a criminal, by that itself will not permit the Detaining Authority to invoke the provisions unless something more serious is required. As seen from the recommendation of the Superintendent of Police and the Detaining Authority, apart from these normal registration of criminal cases, there appears to be some information which is stated to be confidential and available with the Superintendent of Police, the recommending Authority has brought the detenu under the category of "known Rowdy" or "known goonda". What is this material? That is not placed or disclosed before the Detaining Authority or the Advisory Board or before this Court. At this stage, we hasten to add that it is not necessary to disclose to the detained person each and every secret or confidential material, if the same affects the interest of internal security or national security or the facts, if disclosed, would reveal the identity of any confidential source. In the present case, it is not the case of the Detaining Authority that such disclosure of the alleged secret/confidential material would disclose or reveal the very identity of any confidential source or the disclosure of which will be against the interest of internal security or national security and as such there was no inhibition for the authorities to disclose the same to the detenu or refer to the same in detail in the detention order. As such, we find that the non-disclosure of this alleged confidential or secret material seriously affects the defence of the detenu. It is also not in dispute that the Detaining Authority has except stating that it has considered all the materials placed by the recommending Authority, has not given attention to

the alleged secret or confidential material available with the Superintendent of Police. In view of the same, as the foundation for the recommendation u/s 3(1) of KAAPA is also based on certain secret or confidential information, non-furnishing of the same either to the detenu or to the Detaining Authority, in our view, vitiates the entire detention order. In our view, the referral Division Bench has lightly brushed aside this aspect and has held against the detenu. As such, this ground itself is sufficient to hold that non-furnishing of the alleged secret/confidential information by the recommending Authority to the detenu and to the Detaining Authority would initiate the entire proceedings and the detention order becomes illegal and unsustainable one.

19. Yet another ground on which the order of detention is assailed, pertains to non-communication or non-supply of translated copies of some of the documents relied on by the Detaining Authority while issuing the order of detention. The Division Bench while referring to the above contention has indicated in the order of reference that in view of the dictum laid down in *Sathi* (supra) the non-furnishing of translated version of all relevant documents will not vitiate the order of detention particularly in view of the provisions contained in Section 7(3) of the Act.

20. Learned Senior Counsel submits that the law laid down by the Division Bench in this regard in *Sathi* (supra) requires reconsideration by the Full Bench, particularly, since some of the sweeping observations made by the Division Bench will have far reaching legal implications adverse to the right of a citizen in preventive detention cases. Learned Senior Counsel invites our attention to para 17 to 21 in this context.

21. Admittedly, Malayalam translation of some of the documents like the report of the sponsoring authority as well as the report of his subordinate officer had not been furnished to the detenu in *Sathi*'s case. The contention raised by the detenu was that he could not understand the contents of those documents, since they were in English and therefore there was clear breach of the mandate contained under Article 22(5) of the Constitution and also the statutory obligation prescribed u/s 7(2) of the Act. The Division Bench proceeded to hold that Section 7(3) of the Act would take care of such situations and safeguard and protect the rights of the detenu.

22. Section 7(3) reads thus:

The Superintendent of the Jail where such person is detained shall afford him reasonable opportunity to consult a lawyer and reasonable assistance in making a representation against the detention order to the Government or to the Advisory Board.

23. The Division Bench held that since the legislature has imposed a statutory duty on the Superintendent of the Jail to afford the detenu reasonable opportunity to consult a lawyer apart from reasonable assistance to make a representation against the order of detention, the detenu cannot be heard to say,

in the absence of specific assertions to the contrary, that he did not know the grounds of detention or that he was disabled from making an effective representation to the Government, since the relevant documents were in English. According to the Division Bench, such a contention would be available only to a detenu who is "illiterate" since "he can only depend on someone else to read and explain the order, grounds and documents to him. If they are furnished to him and explained to him there can be no further grievance on the ground that they were in a language not known to him".

24. We are unable to agree with the above proposition of law laid down by the Division Bench. No doubt, Section 7(3) obligates the Superintendent of Jail to afford "reasonable opportunity" to the detenu to consult a lawyer and "reasonable assistance in making a representation against the detention order to the Government or to the Advisory Board". But, the short question is whether a detenu should be left at the mercy of a Jail Superintendent in his quest for liberty. On a plain reading of the provisions contained in Section 7(3), it is the Superintendent of the Jail to decide what is "reasonable opportunity" to be afforded to the detenu to consult a lawyer. Yet again, the said officer is given the authority to decide what is "reasonable assistance" that a detenu can be given to make a representation against the order of detention to the Government or to the Advisory Board. To hold that copies/translations of all the relevant documents need not be furnished to the detenu, since his rights are well protected u/s 7(3) of the Act will, in our view, make the right guaranteed to a detenu to make an effective representation to the Government or the Advisory Board, an illusory or meaningless exercise.

25. The Superintendent of Jail cannot be made the repository of the power to decide the "reasonableness" of the opportunity to seek legal assistance to make the representation to the Government. If the above interpretation given by the Division Bench to Section 7(3) is accepted, the Detaining Authority can take it as a safety route and refuse to comply with the statutory mandates in Section 7(2) as well as Article 22(5) of the Constitution of India, in their true letter and spirit. It will be preposterous to assume that the rights guaranteed to a detenu, not only under the Act but under the Constitution as well, will be safe in the hands of the Jail Superintendent, particularly, when we keep in view the fundamental and larger concepts of personal liberty of a citizen as enshrined in the Constitution of India. The observations made by the Division Bench in *Sathi* (supra) while dealing with the above issue, particularly, in paragraph 21 thereof, in our view, are not in accordance with the well settled principles of law as enunciated in a series of judicial precedents.

26. It has to be remembered that a detenu while he is undergoing preventive detention is obviously denuded of his fundamental right to freedom and liberty postulated under the Constitution. Undoubtedly the power to detain a person under the prevention detention laws is hedged in by various safeguards set out in Articles 21 and 22. The so-called "opportunity" that a detenu may be provided in

the jail to consult a lawyer while undergoing detention is easily imaginable. The Detaining Authority cannot refuse to give copies of the relevant documents or the translations thereof in vernacular to the detenu concerned, on the plea that the detenu's interest will be taken care of by the Superintendent of the Jail who is statutorily obliged to afford the detenu reasonable opportunity to consult a lawyer and reasonable assistance in making a representation against the detention order before the Government. However, we hasten to add that the question whether any prejudice has been caused to the detenu because of the non-supply of a document will entirely depend on the facts and circumstances of each case. Though it cannot be laid down as a general proposition of law that failure to provide the translated version of some of the documents will vitiate the order of detention, it can never be held that all relevant documents or translations therefore need not be furnished to the detenu, since he will get legal assistance in the jail through the Superintendent as provided u/s 7(3) of the Act. To that extent, the observations made by the Division Bench in *Sathi* (supra) in respect of Sections 7(2) and 7(3) of the Act of the KAAPA are held to be not good law.

27. Anyhow, we do not propose to deal with the merit of the contention raised by the learned Senior Counsel based on Section 7(2) and 7(3) in this case, since we have already found that the order of detention is liable to be quashed as indicated above.

In the result and for the reasons stated above, we allow the writ petition and set aside the order of detention. The detenu shall be set at liberty, if not required in any other case.