

(2016) 08 KL CK 0036

In the High Court Of Kerala

Case No : Writ Petition (Crl.).No. 138 of 2016 (S)

Priya Menon

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 19-08-2016

Acts Referred:

Constitution of India, 1950 — Article 22(5)

Citation : (2016) 4 KerLJ 236 : (2016) 4 KLT 574

Hon'ble Judges : Mr. Thottathil B. Radhakrishnan and Mrs. Anu Sivaraman, JJ.

Bench : Division Bench

Advocate : Sri. M. Ajay and Sri. V.P. Prasad, Advocates, for the Petitioner; Sri. N. Nagaresh, Assistant Solicitor General, for the Respondents; Sri. K.V. Sohan, State Attorney, for the Respondent Nos. 1 to 4; Sri. Manu. S, CGC, for the Respondent No. 3; Senior Gove

Final Decision : Allowed

Judgement

Mr. Thottathil B. Radhakrishnan, J. - This is a writ petition seeking writ of habeas corpus in re K.N.Venugopal, who is detained in the Central Prison, Thiruvananthapuram on the basis of Ext.P1 order of detention of which the grounds of detention are disclosed through Ext.P2. That has been confirmed by the Government as per Ext.P7 Government Order, pursuant to the report dated 19.01.2016 made by the COFEPOSA Advisory Board.

2. We have heard the learned counsel appearing for the petitioner who is the wife of the detenu, the learned State Attorney for the State of Kerala, the learned Central Government Counsel for the Union of India and the learned counsel appearing for the Directorate of Revenue Intelligence.

3. Ext.P1, order of detention, was issued on 07.11.2015. The detenu, who was earlier arrested, had already been released on bail. Therefore, on the basis of Ext.P1 preventive detention order dated 07.11.2015, he was again arrested on 09.11.2015 and was admitted to the Central Prison, Thiruvananthapuram on 10.11.2015. Ext.P2, grounds of detention, dated 07.11.2015 was served on him

on 11.11.2015. On 09.12.2015, the detenu made Ext.P3 representation to the State Government and Exts.P4 and P5 representations to the Union of India and the COFEPOSA Advisory Board respectively. Though all those representations were made on the same day, Ext.P3 representation to the State Government was in Malayalam and Exts.P4 and P5 were in English, also specifically stating in the opening portions of those representations that he is making those representations in English though he is not familiar with English language and having obtained aid and advice to draft and present those representations in English.

4. Following Ext.P1 detention order, the Government issued letter dated 03.12.2015 referring the case of the detenu to the COFEPOSA Advisory Board. The report of the Advisory Board was made on 19.01.2016 and it was thereafter that the confirmation order was issued on 23.01.2016 (Ext.P7).

5. Though the substantial contents of the statement of allegations elaborated in Ext.P2 were referred to by the learned counsel on both sides to buttress their respective arguments impeaching and in support of the preventive detention order respectively, it is not necessary or permissible for us in this jurisdiction to appreciate those matters as if we are sitting in appeal or making an objective judicial scrutiny of the allegations or defence.

6. Be that as it may, one of the crucial grounds raised and argued on behalf of the detenu is that Ext.P3 representation of the detenu was rejected by the State Government on 22.12.2015, i.e, after the case was referred for the opinion of the COFEPOSA Advisory Board on 03.12.2015 and before the COFEPOSA Advisory Board had given its opinion on 19.01.2016. We may also note in this context that the COFEPOSA Advisory Board convened on 07.01.2016 heard the detenu and his counsel on that day.

7. The learned counsel for the petitioner makes specific reference to and relied on the decision of the Honourable Supreme Court of India rendered by a Constitutional Bench in K.M. Abdulla Kunhi v. Union of India and others [(1991) 1 SCC 476] and followed by the Apex Court in order dated 03.06.2015 in CrI.A.No.829 of 2015 [Golam Biswas v. Union of India and another - 2015 SCC OnLine SC 1099] to argue for the position that if the representation against preventive detention is received before the case is referred to the Advisory Board and if that representation is not disposed before referring the case to the Advisory Board, the representation must also be forwarded to the Advisory Board along with the case of the detenu; however that, if the representation is received after the case of the detenu is referred to the Board, the representation should be forwarded to the Advisory Board provided the Board has not concluded the proceedings; and that, in both the situations, there is no question of consideration of representation before the receipt of the report of the Advisory Board. This is among the ratio decidendi of K.M. Abdulla Kunhi (supra), the substance of which has been followed in Golam Biswas (supra) which was a case where the representation pending before the Central Government was rejected

during the pendency of proceedings before the Advisory Board.

8. The learned State Attorney argued that absolutely no case of prejudice has been made out by the rejection of Ext.P3 as per Ext.P6 on 22.12.2015 for reasons more than one. He argued that notwithstanding Ext.P6, the subsequent decision of the COFEPOSA Advisory Board which was rendered after hearing the detenu and counsel as also the subsequent consideration of the detenu's case by the Central Government arrived at conclusions which were nothing but confirming the order of detention. The second and the more important argument is that Ext.P3 was actually never a representation as could be understood in law inasmuch as all that was stated therein is that the detenu has not been served with the Malayalam version of the grounds of detention though he is not familiar with English language. Reference was made by the learned State Attorney to the decision of the Apex Court in *Kirti Kumar Nirula v. State of Maharashtra* [(2005) 9 SCC 65] where the Apex Court approved the rejection of a representation which did not amount to a representation within the meaning of Article 22 (5) of the Constitution of India. That was a principle which dealt with the representation which had neither his signature nor the date and the Apex Court was satisfied from the pleadings that the detenu in that case did not set any representation immediately on receipt of the detention order and deliberately tried to mislead the authorities by filing an undated and unsigned representation, simultaneously to the State Government, the Union Government and the detaining authority and that it was he who was therefore responsible for the resultant delay, if at all there was any. In so far as the case in hand is concerned, Ext.P3 is admittedly received by the State Government through the Superintendent of the Central Prison. That material was signed by the detenu and it was dated 09.12.2015. In Malayalam, the contents of that specifically state that it is illegal that the detenu has not been served the Malayalam version of the grounds of detention and that because the Malayalam version of the grounds of detention has not been served on the detenu, he is unable to respond to the grounds of detention which are attempted to be made out against him and therefore, he is deprived of properly responding to the grounds of detention. He accordingly concludes Ext.P3 by stating that he should be released from detention.

9. We are unable to hold that Ext.P3 is not a representation for the purpose of Article 22(5) of the Constitution of India. It is a representation the detenu has represented for releasing him from preventive detention. He has stated that he is unable to respond to the grounds of detention. He has stated the reason for his inability to do so; it being that he has not been served with the Malayalam version of the grounds of detention. Contemporaneous with Ext.P3, on the same day, the detenu has made two representations one to the Union of India and the another to the COFEPOSA Advisory Board. The opening paragraph of those representations states that he has with aid and advice prepared those representations in English language with which he is not familiar and that those representations are being sent through his brother. We say this at this point of

time because adequacy or sufficiency of the grounds taken in a representation made for the purpose of Article 22(5) is not a matter which is justiciable on judicial scrutiny, unless of course there may be an extreme case of inexcusable perversity resulting in arbitrariness and breach of the constitutional guarantees.

10. While making Ext.P6, the State of Kerala has apparently arrived at the conclusion that the detenu is conversant with English language and that he has a degree in political science. It is seen that the statements made by him under Section 108 of the Customs Act were made in English and under his signature acknowledging its contents in English. We think that this reason having been stated in Ext.P6, it by itself is insufficient to confirm the order of preventive detention by rejecting the representation. The fact of the matter remains that going by the records, the statements recorded under Section 108 of the Customs Act have also been retracted by the detenu. Those are matters which may go for attention in appropriate jurisdiction in accordance with law. It would be unwise for us to step into that arena and make any assessment, either way.

11. On the principle of prejudice, submissions have been made by the learned State Attorney that the detenu has not demonstrated that any prejudice has been caused by rejection of his representation by the State Government when the matter was pending before the COFEPOSA Advisory Board. Per contra, the learned counsel appearing for the detenu argued that it is the settled position of law that the doctrine of prejudice is not one that would be pressed in such cases where liberty issues are involved and the scales of justice would not swing on its basis. We think that it is not necessary for us to dilate on that issue at all. This is because Article 22(5) of the Constitution of India, going by a plain reading of its words, says, among other things, that the person who is detained in pursuance of an order of preventive detention shall be afforded the earliest opportunity of "making a representation against the order. The phrase "making a representation" and the term "representation" in Sub-Article 5 of Article 22 of the Constitution have grown to gain life and blood through Judge made law, including the precedents we have quoted above. Where declaration of law has been made by the Supreme Court of India it is the law of the land in terms of Article 141 of the Constitution of India. Therefore, the very many principles which apply on terms of the judgments of the Supreme Court are to govern the effectuation of the protective covenant available to the detenu under the preventive detention laws in terms of Sub-Article 5 of Article 22 of the Constitution of India. It is in this context that the overwhelming importance of the ratio of the decision of the Apex Court in *Abdulla Kunhi* (supra) applies in favour of the detenu. Admittedly, the case relating to the detenu was pending with the Advisory Board on the date when Ext.P6 was issued. It is the law laid down by the Apex Court that representation received but not disposed before the case is referred to the COFEPOSA Advisory Board has necessarily to be placed before the Advisory Board and cannot be independently disposed of by the detaining authority during the pendency of the matter with the Advisory Board. We do not find our way but to apply the said ratio of *Abdulla Kunhi* (supra). With

this, we see that the learned Central Government Counsel has made reference to the counter affidavit submitted by the Directorate stating clearly that the decision of the Union of India on the representation of the detenu was taken only after the opinion was rendered by the COFEPOSA Advisory Board. That is well in conformity with the ratio of Abdulla Kunhi and Golam Biswas (supra). Unfortunately, the rejection of the representation by the detaining authority has been made in infraction with the law laid by this Court in Abdulla Kunhi and Golam Biswas (supra). Under such circumstances, the continued detention of the person covered by Ext.P1 order becomes impermissible on the basis of the provisions of the Constitution and the laws. Resultantly, Ext.P1 is hereby declared as null and void.

12. In the result, this writ petition is allowed ordering release of Sri. K.N. Venugopal, S/o. Sri. A.N.L. Narayana Menon, IX/285-A, Alappatt House, Col.Viswanathan Road, Eroor West, Tripunithura, Ernakulam District, detained on the basis of Exhibit P1 order No. 60398/SS A4/2015/Home dated 07.11.2015 of the Government of Kerala, forthwith, however that, the same will be subject to other proceedings, if any, against him otherwise.