

(2009) 03 MAD CK 0094

In the Madras High Court

Case No : Habeas Corpus Petition No. 142 of 2008

S. Sengkodi

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 18-03-2009

Acts Referred:

Advocates Act, 1961 — Section 30, 7
Arms Act, 1959 — Section 25, 25(1), 3
Bar Council of India Rules, 1975 — Rule 18, 36, 6, 9
Constitution of India, 1950 — Article 21, 22(1), 226
Criminal Procedure Code, 1973 (CrPC) — Section 78, 79, 80, 81
Penal Code, 1860 (IPC) — Section 109, 120(B), 147, 148, 149

Citation : (2009) 2 LW 598 : (2009) 1 LW(Cri) 495 : (2009) WritLR 318

Hon'ble Judges : R. Subbiah, J; Elipe Dharma Rao, J

Bench : Division Bench

Advocate : R. Sankarasubbu, for the Appellant; N.R. Elango, Addl. P.P., for the Respondent

Final Decision : Dismissed

Judgement

Elipe Dharma Rao, J.—The petitioner is the practising advocate and she has filed this petition seeking the release of her client

Sundaramoorthy, S/o.Vediyappan, who is alleged to have been illegally detained by the respondents.

2. On behalf of the respondents, a strong objection regarding the maintainability of this petition has been raised on the ground that the Advocate

engaged by the detenu, since cannot be called as a "friend or relative" of the detenu and that the Advocate being the Officer of the Court, the

petitioner, a practising Advocate, cannot enter into the shoes of her client and she cannot be a substitute for her client. It has further been submitted

on the part of the respondents that the detenu is an under trial prisoner and he

is in judicial custody in the cases, wherein he is an accused and there is no illegal detention, as has been submitted on the part of the petitioner and would pray to dismiss this petition.

3. Prior to entering into discussion of other aspects of the case, the legal question put forth on the part of the respondents, regarding the very maintainability of this petition, filed by the petitioner, a practising advocate, on behalf of her client, needs to be discussed.

4. The learned Counsel for the petitioner would argue that the powers of the Court in matters of detention are very wide and anybody, who has a concern for the detenu, can file a Habeas Corpus Petition. Much has been argued and emphasised on the part of the petitioner that in the matters

of Habeas Corpus, strict rules of pleading should not be followed and that such Habeas Corpus petition can be filed by anybody and therefore,

this Habeas Corpus Petition filed by the petitioner, a practising advocate, for the release of her client, is very well maintainable. In support of his

arguments, the learned Counsel for the petitioner would rely on a judgment of the Honourable Supreme Court in Smt. Icchu Devi Choraria Vs.

Union of India (UOI) and Others, , wherein it has been held as follows:

In case of an application for a writ of habeas corpus, the practice evolved by Supreme Court is not to follow strict rules of pleading nor place

undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detenu from jail has been sufficient to

activate the Court into examining the legality of detention. The Supreme Court has consistently shown great anxiety for personal liberty and refused

to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. Whenever a petition for

a writ of habeas corpus has come up before the Supreme Court it has almost invariably issued a rule calling upon the detaining authority to justify

the detention. Once the rule is issued it is the bounden duty of the Court to satisfy itself that all the safeguards by the law have been scrupulously

observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law. Where large masses of people are poor,

illiterate and ignorant and access to the courts is not easy on account of lack of financial resources, it would be most unreasonable to insist that the

petitioner should set out clearly and specifically the grounds on which he

challenges the order of detention and make out a prima facie case in support of those grounds before a rule is issued or to hold that the detaining authority should not be liable to do anything more than just meet the specific grounds of challenge put forward by the petitioner in the petition. The burden of showing that the detention is in accordance with the procedure established by law has always been placed by the Court on the detaining authority because Article 21 of the Constitution provides in clear and explicit terms that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law.

5. There cannot be any doubt regarding the above proposition laid down by the Honourable Apex Court. It is no doubt a legal principle that not only the detenu but any friend or relative of the detenu can knock the doors of the Court under Article 226 of the Constitution, challenging his detention. In these circumstances, a question would arise as to "whether an Advocate engaged by a client for some legal redressal, can enter into the shoes of the client substituting himself for the client and file a petition for the release of the client".

6. In *Pravin C. Shah Vs. K.A. Mohd. Ali and Another*, , the Honourable Apex Court has held:

The right to practise, is the genus of which the right to appear and conduct cases in the court may be a specie. But the right to appear and conduct cases in the court is a matter on which the court must have the major supervisory power. Hence the court cannot be divested of the control or supervision of the court merely because it may involve the right of an advocate.

7. In *Lingappa Pochanna Appelwar Vs. State of Maharashtra and Another*, , a Three Judge Bench of the Honourable Apex Court has held as

follows:

The only fundamental right recognised by the Constitution is that under Article 22(1) by which an accused who is arrested and detained in custody is entitled to consult and be defended by a legal practitioner of his choice. In all other matters i.e. in suits or other proceedings in which the accused is not arrested and detained on a criminal charge, the litigant has no fundamental right to be represented by a legal practitioner. The Legislature in this case feels for good reasons that for the implementation of the legislation, it would not subserve the public interest if lawyers were allowed to

appear, plead or act on behalf of the non-tribal transferees....

Thus, a conjoint reading of the above judgments of the Honourable Supreme Court would make it clear that the machinery for dispensation of

justice, according to law, is operated by the court. Proceedings inside the courts are always expected to be held in a dignified and orderly manner.

The advocate, indeed, is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and

statements of the principal i.e. the party who engaged him. Every legal practitioner is an officer of the court and aids in the cause of justice.

8. At this juncture, we feel it apt to extract the observations of the Honourable Apex Court in its Three Judge Bench judgment in *Indian Council of*

Legal Aid and Advice, etc. etc. Vs. Bar Council of India and another, , regarding the duties of the Bar Councils, which read as follows:

The Bar Councils are enjoined with the duty to act as sentinels of professional conduct and must ensure that the dignity and purity of the profession

are in no way undermined. Its job is to uphold the standards of professional conduct and etiquette. Thus every State Bar Council and the Bar

Council of India has a public duty to perform, namely, to ensure that the monopoly of practice granted under the Act is not misused or abused by a

person who is enrolled as an advocate. Since the duty of a lawyer is to assist the court in the administration of justice, the practice of law has a

public utility flavour and, therefore, he must strictly and scrupulously abide by the Code of Conduct behoving the noble profession and must not

indulge in any activity which may tend to lower the image of the profession in society.

9. Thus, the Bar Councils are enjoined with the duty to ensure the dignity and purity of the noble profession. The Advocates Act, 1961 has been

enacted to amend and consolidate the law relating to legal practitioners and to provide for the constitution of Bar Councils and an All India Bar. u/s

7 of the Advocates Act, the functions of the Bar Council of India are mandated, which includes to lay down standards of professional conduct and

etiquette for advocates. With the power flowing from the Advocates Act, the Bar Council of India has framed the Bar Council of India Rules.

Part-VI of the Bar Council of India Rules deal with "Rules Governing Advocates". Chapter-II of Part-VI prescribes "standards of professional

conduct and etiquette", wherein Rule 6 mandates:

An Advocate shall not enter appearance, act, plead or practise in any way before a court, tribunal or Authority mentioned in Section 30 of the Act,

if the sole of any member thereof is related to the Advocate as father, grandfather, son, grand son, uncle, brother, nephew, first cousin, husband,

wife, mother, daughter, sister, aunt, niece, father-in-law, mother-in-law, son-in-law, brother-in-law, daughter-in-law or sister-in-law.

10. Rule 9 mandates that "an Advocate should not act or plead in any manner in which he is himself peculiarly interested". Rule 18 mandates that

"an advocate shall not, at any time, be a party to fomenting litigation".

11. Therefore, according to the above provisions of law, an Advocate is barred from entering into appearance, act, plead or practise if the sole of

any member thereof is related to him and wherein he is peculiarly interested. When, to maintain the decorum of the noble profession of advocacy,

such a bar is created on an Advocate, by operation of law, to appear, plead and act on behalf of the blood relatives of the Advocate, we are

unable to accept the contention of the petitioner that she can file this petition for the release of her client, thus acting herself as the client. In the

absence of any provision of law, permitting the Advocates to enter into the shoes of their clients as a "party interested" and further in the absence

of any pleading made on the part of the petitioner as to what necessitated her to enter into the shoes of her client, when, admittedly, the detenu is

having blood relatives, like wife, to champion his cause, we are not in a position to accept the plea of the petitioner that she can very well maintain

this petition. Further more, Section 30 of the Advocates Act, 1961 permits the Advocates only to practise the noble profession of law and not to

substitute themselves for their clients. When the Bar Council of India Rules, prescribing the standards of professional conduct and etiquette do not

permit such an action on the part of a legal practitioner and in the absence of any reason -- leave alone a justifiable reason -- for the petitioner to

file this petition on behalf of her client, it is to be held in no uncertain terms that this petition, filed by the petitioner, a practising advocate, for the

release of her client, is not maintainable.

12. Even by assuming, without accepting, that a practising Advocate can be permitted to enter into the shoes of his client, we have to keep in mind

the consequences that will follow the suit if such acts are permitted to be performed by a practising Advocate. If such a situation is permitted, then, there may not be any client-Advocate relation but only a client and defacto client relationship between the party and his counsel, resulting in adversely affecting the dignity and decorum of the noble profession and further running contrary to the Standards of Professional conduct and etiquette, prescribed under the Bar Council of India Rules, wherein Rule 9 contemplated that "an Advocate should not act or plead in any manner in which he is himself peculiarly interested" and Rule 18 mandated that "an advocate shall not, at any time, be a party to fomenting litigation". If an Advocate is permitted to enter into the shoes of his client, definitely, he would become a person of "peculiarly interested" and there is every possibility of his fomenting the litigation, which is against Rules 9 and 18 of the Bar Council of India Rules. Thus, viewing this legal aspect from this angle also, we are not in a position to accept the plea urged on the part of the petitioner that she can enter into the shoes of her client.

13. In arriving at this decision, we garner support from a judgment of the Honourable Apex Court in Vinoy Kumar v. State of U.P. and Ors. 2001

SCC (Cri) 806. In the said case, aggrieved by the orders passed by the District and Sessions Judge, Varanasi, dated 13.2.2001, transferring a

number of criminal cases for disposal to the Additional District and Sessions Judge/Special Judge, the petitioner, Advocate, representing the

accused persons in three of such transferred cases, filed a writ petition in the High Court praying for quashing of the said order. It was contended

that by the transfer of the cases, the speedy trial of the accused has been hampered and that the order has been passed in a casual manner. The

said writ petition was dismissed by the High Court, holding that the petitioner being an Advocate had no locus standi to challenge the legality of the

order by way of a writ petition. Aggrieved, the said petitioner/Advocate approached the Supreme Court and the Supreme Court has held as

follows:

Generally speaking, a person shall have no locus standi to file a writ petition if he is not personally affected by the impugned order or his

fundamental rights have neither been directly or substantially invaded nor is there any imminent danger of such rights being invaded or his acquired

interests have been violated ignoring the applicable rules. The relief under Article 226 of the Constitution is based on the existence of a right in

favour of the person invoking the jurisdiction. The exception to the general rule is only in cases where the writ applied for is a writ of habeas corpus

or quo warranto or filed in public interest. It is a matter of prudence, that the court confines the exercise of writ jurisdiction to cases where legal

wrong or legal injuries are caused to a particular person or his fundamental rights are violated, and not to entertain cases of individual wrong or

injury at the instance of third party where there is an effective legal aid organisation which can take care of such cases. Even in cases filed in public

interest, the court can exercise the writ jurisdiction at the instance of a third party only when it is shown that the legal wrong or legal injury or illegal

burden is threatened and such person or determined class of persons is, by reason of poverty, helplessness or disability or socially or economically

disadvantaged position, unable to approach the court for relief.

In the instant case the petitioner had not filed the petition in public interest and did not disclose the circumstances which prevented the affected

persons from approaching the court. In the discharge of his professional obligations, the petitioner Advocate is not obliged to file the writ petition

on behalf of his clients. No circumstance was mentioned in the petition which allegedly incapacitated the affected persons from filing the writ

petition. Section 30 of the Advocates Act only entitles an advocate to practise the profession of law and not to substitute himself for his client. The

filing of the writ petition in his own name, being not a part of the professional obligation of the advocate, the High Court was justified in dismissing

the writ petition holding that the petitioner had no locus standi.

14. Similar is the position with regard to the case on hand also. It is not a case filed in the interest of the public and no circumstances which

prevented the affected party or his friend or relative from filing this petition have been explained by the petitioner. At this juncture, it is also to be

pointed out that in the petition filed by the petitioner, no reason whatsoever has been offered on the part of the petitioner to justify her action in

filing this petition for the release of her client. When we pointed out the same, she has come out with a written statement stating that she is a public

spirited lawyer and duty counsel to the detenu Sundaramurthy and therefore,

she has filed this petition. The detenu himself has also filed a supportive affidavit. When such is the position that the detenu is in a position to file an affidavit before this Court, what prevented either himself or his blood relatives or even his friends from invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, has not at all been explained, throughout, on the part of the petitioner. Therefore, for all the above reasons and discussions, we have no hesitation to hold that the petitioner, a practising Advocate, has no locus standi to file this petition, substituting herself for her client and entering into the shoes of her client. Thus deciding this issue of maintainability in favour of the respondents and holding that this petition filed by a practising Advocate for the release of her client is not maintainable, we shall now proceed to discuss and decide the other aspects of the case urged and argued on either side, so as to give a quietus to the entire issue on hand.

15. It has been argued on the part of the petitioner that the procedure contemplated under the Criminal Procedure Code has not been followed, rather violated, by the respondents and thus, this petition is entitled to be allowed.

16. From the materials placed on record it is seen that the detenu Sundaramurthy was admitted into the Central Prison, Puzhal, Chennai on

11.7.2007, on the orders passed by the Judicial Magistrate No. 1, Dharmapuri, in P.R.C. No. 17/2001 for the offences punishable u/s 25(1-b)(a)

r/w. Section 3 of the Arms Act. The detenu was also remanded in eleven more cases under various Sections of law, including two cases u/s 302

IPC and two cases of Section 307 IPC. While this being the position, a Prisoners Production Warrant in G.R. No. 117-A/2004, dated

19.12.2007 was issued by the Sub Divisional Magistrate, Korapet, Orissa State in connection with Korapet Town P.S. Crime No. 117-A/2004

for offences under Sections 147, 148, 302, 342, 396, 450, 427, 120(B), 109 and 149 IPC r/w. Section 25(a) of the Arms Act based on which,

the detenu was taken to Korapet, Orissa and was also produced him before the concerned Court and thereafter, he was again handed over to the

Central Prison No. 1, Puzhal, Chennai on 27.7.2008. Thereafter, heeding to his request to permit him to visit his mother, who is not in a position to

come over to Chennai from the native place to call on him, the learned Special

Judge, TADA Court, Chennai, by his order in CrI.M.P. No.

32/2008 in C.C. No. 6/1993 has permitted him to visit his native place on any one of the days between 17.10.2008 and 24.10.2008.

Accordingly, the detenu was taken to his village namely Ramiyampatti village, Palakode Taluk, Dharmapuri District on 18.10.2008 and was

admitted at Central Prison, Vellore for night halt on 18.10.2008 and on 19.10.2008, he was taken to his native village and he met his mother and

again on the night of 19.10.2008, he was halted at Central Prison, Vellore and later, he was re-admitted at Central Prison No. 1, Puzhal, Chennai

on 20.10.2008.

17. In this entire process, we are unable to find any legal flaw committed on the part of the respondents, so as to brand his arrest and production

before the concerned Court as an illegal one. Further, all the procedures contemplated under Sections 78, 79, 80 and 81 of the Code of Criminal

Procedure, 1973, have been scrupulously followed by the respondents. The detenu being a notorious criminal, having been involved in many cases,

including two murder cases, is being produced before various courts under warrants issued by such courts, which is quite in conformity with the

legal provisions of law, provided under the Criminal Procedure Code. On a scrupulous scrutiny of the entire materials placed on record, we are

not able to find any material to affix our seal of approval to the contention of the petitioner that the detenu was illegally taken into custody.

Therefore, even on merits, this petition fails and the same deserves only to be dismissed.

18. Before parting with, we feel it apt to quote Rule 36 of the Chapter-II of Part-VI of the Bar Council of India Rules, which reads as follows:

36. An advocate shall not solicit work or advertise, either directly or indirectly whether by circulars, advertisements, touts, personal

communications, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or producing his photograph to be

published in connection with cases in which he has been engaged or concerned. His sign-board or name plate should be reasonable size. The sign-

board or name plate or stationery should not indicate that he is or has been associated with any person or organisation or with any particular cause

or matter or that he specialises in any particular type of work or that he has

been a Judge or an Advocate General.

19. But, practically day in and day out we are able to see that the said Rule is being given a simple go-bye by some legal practitioners. When Rule

36 mandates that the sign-board or nameplate or stationery of the Advocate should not indicate that he is or has been associated with any person

or organisation or with any particular cause or matter etc., it is rather paining to note that some members of the noble profession are printing their

photographs in the huge hoardings of the political leaders, virtually at the feet of such political leaders, thus indicating that they are associated with

such political leaders, further more amounting to publicity, which is prohibited under Rule 36. This violation of the mandatory provisions of the Bar

Council of India Rules should be viewed seriously and the State Bar Councils should not allow such practices to be carried and should come out

with strict action against such advocates, so as to maintain the dignity and decorum of the noble profession. Therefore, the Chairman, Bar Council

of Tamil Nadu, is directed to take all steps to implement the Bar Council of India Rules strictly, in their true letter and spirit, so as to uphold the

dignity and decorum of the noble profession of advocacy.

For all the above reasons, this Habeas Corpus petition is dismissed.