
(1994) 06 MAD CK 0001
In the Madras High Court
Case No : H.C.P.No.9 of 1994

S.Gandhi

APPELLANT

Vs

State and another

RESPONDENT

Date of Decision : 30-06-1994

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22(5), 226
Madras Prohibition Act, 1937 — Section 4, 8, 9

Citation : (1994) 2 LW(Cri) 396

Hon'ble Judges : Thanikkachalam, J; Gulab C.Gupta, J

Bench : Division Bench

Advocate : B. Kalarani, for the Appellant; I. Subramanian, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Gulab C.Gupta, J.—The petitioner has been put under preventive detention by order dated 29.10.1903 passed by the first respondent in

exercise of powers under S. 3 of the Tamil Nadu Act 14 of 1982, hereinafter referred to as the "Act", after recording the satisfaction that the

petitioners was a boot-legger and engaged in activities prejudicial to the maintenance of public health. The legal and constitutional validity of this

order is under challenge in this writ petition filed under Art. 226 of the Constitution of India.

2. From the grounds of detention supplied to the petitioner it appears that on 20.10.1993 one Kaliappan lodged a report with the Inspector of

Police, Kurisilapet police station to the effect that he was in the habit of consuming liquor and on 19.10.1993 at 6 P.M. he purchased one tumbler

of I.D. arrack from the petitioner for Rs.5/-. After consuming the said liquor he felt burning sensation in the stomach and vomited twice. He also

felt burning sensation of his eyes and blurring of vision. He somehow reached his home and remained on bed. He also reported that he has been a regular consumer of liquor but never felt anything of the type in the past. He, therefore, suspected that the liquor contains some poisonous substance. The Inspector of Police and his party reached the spot and found the petitioner with 5 litre black colour plastic can. He also found the petitioner pouring liquor from the said can into a glass tumbler and giving to an unknown person for money. The police party seized the can and arrested the petitioner in the presence of two witnesses including the complainant. The petitioner gave confessional statements in which he allegedly admitted that he was engaged in regularly selling I.D. arrack. Two samples of I.D. arrack were prepared and properly sealed. The Chemical analysis of one of the samples indicated that it contained 165.0 mg. w/v of chloral hydrate which was a poisonous substance. Thereafter an offence under S. 4 of the Tamil Nadu Prohibition Act was registered against the petitioner and he was produced before the Judicial Magistrate No.III, Tiruppattur who remanded him to judicial custody in the sub-jail, Tiruppattur. Dr. Jaffar Sadhiq, Civil Assistant Surgeon, Government Hospital, Tiruppattur was also examined during investigation to ascertain the nature of the arrack. According to the doctor, chloral hydrate is a poisonous substance and if it is mixed even in a small dose would cause giddiness, irritation in eyes, vomiting and may affect liver, kidneys, heart and the nervous system. The material collected during the investigation was produced for consideration of the Detaining Authority and recording its subjective satisfaction about the grounds of preventive detention. The Detaining Authority was satisfied that the petitioner was a boot-legger within the meaning of the Act and also that his activities posed grave danger to the life of the complainant and were otherwise causing widespread danger to public health. That is how the impugned order has been passed and challenged in this writ petition under Art. 226 of the Constitution of India.

3. The impugned order has been challenged as illegal and unconstitutional on several grounds including the grounds that the petitioner's

representation did not receive fair and independent consideration by the respondents, and, therefore, the impugned order is illegal. A perusal of the

original file indicates that the matter was referred to the opinion of the Advisory Board, which met on 4.12.1993 and opined that there was

sufficient material to confirm the detention of the petitioner. The representation of the detenu had not reached the Government and could not for

that reason be placed before the Advisory Board. The Advisory Board, therefore, did not get an opportunity to consider the case in the context of

submissions of the petitioner. The representation was, however, received by the Government on 13.12.1993 and sent to the District Magistrate

and police authorities for their parawise remarks on 14.12.1993. In the meantime the opinion of the Advisory Board was received and hence the

respondents-Government confirmed the detention on 20.12.1993. It may be mentioned that on 20.12.1993 the representation of the petitioner

was with the Government but was not considered presumably because of the parawise remarks of the District Magistrate had not been received.

Apparently, therefore, the detention was confirmed without considering the representation of the petitioner. This, according to the learned counsel

for the petitioner, is the reason for the detention having become constitutionally invalid. The learned Public Prosecutor, however, submitted that

parawise remarks from the District Magistrate was received by the Government on 10-1-1991 and thereafter the matter was reconsidered and the

representation of the petitioner was rejected on 17.1.1994. It is also submitted that since the representation has been disposed of within about 26

days of its receipt by the Government, there is no delay in its consideration. It is, however, claimed that it was not necessary for the respondents-

Government to consider the representation of the petitioner at the time of confirmation of the detention order on 20.12.1993. The impugned order

is, therefore, claimed to be constitutionally valid.

4. Before considering the submission, the provisions of the Act concerning the representation and its consideration by the Government may be

looked into. S. 8 of the Act requires the Government to serve on the detenu a copy of the detention order and the grounds of detention so as to

provide him a real and effective opportunity of making representation against his detention. If the detenu makes the representation without any

delay and before the matter has been sent to the Advisory Board constituted under S. 9 of the Act, the representation has to be sent to the

Advisory Board for consideration along with other material on record. In other words, if the detenu makes his representation before the matter has

received consideration of the Advisory Board, the Government is bound to send his representation to the Advisory Board for consideration and the Advisory Board is obliged to take the said representation into consideration. The opinion of the Advisory Board if the same be in favour of the detenu is final and binding on the Government and the detenu has to be released. But, if the opinion of the Advisory Board be that there are sufficient grounds for ordering detention of the detenu, the Government has the right to consider whether to confirm the detention or not. In other words, the opinion of the Advisory Board in such a situation is not binding on the Government, which is authorised under S. 12 to even take a different view of the matter and order release of the detenu. These provisions do not deal with a situation where the detenu's representation is not available for consideration of the Advisory Board, but, is available for consideration of the Government after the opinion of the Advisory Board has been received by it. Right of a detenu to make representation is not only guaranteed by S. 8 of the Act but is otherwise constitutionally guaranteed. Art. 22 of the Constitution further imposes the obligation on the Government to consider the said representation as early as possible and dispose of the same by passing a valid order in that behalf. A valid order is the order passed on relevant material justifying legitimate inference that all conditions necessary to keep a person under preventive detention are satisfied. Under the circumstances, it is obvious that the representation of the detenu must receive consideration of the Government and failure of the Government to do so would render the detention invalid.

5. The question for consideration, however, is whether the representation required consideration at the time of confirmation or its consideration subsequent to the confirmation based on Advisory Board's opinion would also be in accordance with law. The matter seems to have received consideration of the Supreme Court in *Vimalchand Jawantraj Jain Vs. Shri Pradhan and Others*, . It was a case where the detention was confirmed without considering the representation of detenu. The Court therefore held as under:

It is now settled law that the power to preventively detain a person cannot be exercised except in accordance with the constitutional safeguards

provided in clauses (4) and (5) of Art. 22 and if any order of detention is made in violation of such safeguards, it would be liable to be struck down

as invalid. It is immaterial whether these constitutional safeguards are incorporated in the law authorising preventive detention, because even if they

are not, they would be deemed to be part of the law as a super-imposition of the Constitution which is the supreme law of the land and they must

be obeyed on pain of invalidation of the order of detention.

Then the Court further held as under:

One of the basic requirements of clause (5) of Art. 22 is that the authority making the order of detention must afford the detenu the earliest

opportunity of making a representation against the order of detention. Now this requirement would become illusory unless there is a corresponding

obligation on the detaining authority to consider the representation of the detenu as early as possible. It could never have been the intention of the

constitution-makers that the detenu should be given the earliest opportunity of making a representation against the order of detention but the

detaining authority should be free not to consider the representation before confirming the order of detention. That would render the safeguard

enacted by the constitution-makers meaningless and futile.

This was, however, a case where the representation of the detenu has been received by the Government in time and sent to the Advisory Board.

The Advisory Board had on consideration of the representation reported that there was sufficient cause for detention. The Government thereafter

confirmed the detention order with considering the representation. The Court, therefore, held that the detaining authority was bound to consider the

representation on its own and keeping in view of the facts and circumstances relating to the case, come to its own conclusion whereby to confirm

the order of detention or to release the detenu. This appears to have been considered as holding that the representation must be considered, in all

circumstances by the Government while confirming the order of detention. This appeared little too broadly stated and therefore required

reconsideration of the Constitution Bench of the Supreme Court in K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and

Others and State of Karnataka and Others, . The Court on examination of the Constitutional provisions held that there was no constitutional

mandate under Art. 22(5) to consider the representation of the detenu before confirming the order of detention. As long as the Government

without delay considers the representation with an unbiased mind, there is no basis for concluding that the absence of independent consideration is

the obvious result if the representation is not considered before the confirmation of detention. The Court, therefore, held that the proposition of law

as laid down in Vimal Chand's case is too broadly stated and for that reason cannot be accepted. The following passage from this judgment being

of substance is reproduced for ready reference:

It is necessary to mention that with regard to liberty of citizens the Court stands guard over the facts and requirements of law, but Court cannot

draw presumption against any authority without material. It may be borne in mind that the confirmation of detention does not preclude the

Government from revoking the order of detention upon considering the representation. Secondly, there may be cases where the Government has

to consider the representation only after confirmation of detention. Clause (5) of Art. 22 suggests that the representation could be received even

after confirmation of the order of detention. The words "shall afford him the earliest opportunity of making a representation against the order in

clause (5) of Art. 22 suggest that the obligation of the Government is to offer the detenu an opportunity of making a representation against the

order, before it is confirmed according to the procedure laid down under S. 8 of the Act. But if the detenu does not exercise his right to make

representation at that stage, but presents it to the Government after the Government has confirmed the order of detention, the Government still has

to consider such representation and release the detenu if the detention is not within the power conferred under the statute. The confirmation of the

order of detention is not conclusive as against the detenu. It can be revoked suo motu under S. 11 or upon a representation of the detenu. It seems

to us therefore, that so long as the representation is independently considered by the Government and if there is no delay in considering the

representation, the fact that it is considered after the confirmation of detention makes little difference on the validity of the detention or confirmation

of the detention. Nor it could be presumed that such consideration is not an independent consideration. With all respect, we are not inclined to

subscribe to the views expressed in V.J. Jain, Om Prakash Bahal and Khairul Haque cases. They cannot be considered to be good law and hence stand overruled.

In the earlier part of the judgment while dealing with the right of the detenu to make the representation and its consideration in the context of Art.

22(5) of the Constitution the Court held as under:-

The representation relates to the liberty of the individual the highly cherished right enshrined in Art. 21 of our Constitution. Clause (5) of Art. 22

therefore, cast a legal obligation on the Government to consider the representation as early as possible. It is a constitutional mandate commanding

the concerned authority to whom the detenu submits his representation and dispose of the same as expeditiously as possible. The words ""as soon

as may be"" occurring in clause (5) of Art. 22 reflects the concern of the Framers that the representation should be expeditiously considered and

disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the

facts and circumstances of each case. There is no period prescribed either under the constitution or under the concerned detention law, within

which the representation should be dealt with. The requirement however, is that there should not be supine indifference slackness or callous attitude

in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it

would render the continued detention impermissible and illegal. This has been emphasised and reemphasised by a series of decisions of this Court.

(See: Jayanarayan Sukul Vs. State of West Bengal, Frances Coralie Mullin Vs. W.C. Khambra and Others, Rama Dhondu Borade Vs. V.K.

Saraf, Commissioner of Police and Others, and Aslam Ahmed Zaire Ahmed Shaik Vs. Union of India and Others,

The aforesaid would indicate that though consideration of representation of a detenu as soon as may be is constitutionally mandated, the conclusion

whether this constitutional obligation has been properly discharged in a given case would depend on the facts of the said case. It can also be

inferred that though the Court is jealous to protect the liberty of the citizens, it cannot assume an impossible situation only for that reason. The

Court, therefore, narrated the circumstances in which it may not be possible by

the Government to consider the representation before confirmation and, therefore, the principle in Vimal Chand's case was held to be broadly stated and hence not valid. In this connection it is necessary to remember that it is the obligation of the Government to give the detenu an opportunity to make his representation and consider the representation if made as soon as it may be. There is no law compelling the detenu to make the representation. The detenu has the choice of making the representation whenever he finds it convenient to do so. It is not unlikely that in some cases the detenu may not be able to file his representation before passing the order of confirmation. To invalidate the detention in such circumstance would amount to leaving the matter to the goodwill of the detenu and make the mockery of the law of preventive detention. This decision is, therefore, the authority for the proposition that though the representation of a detenu should be considered without any undue delay, it need not always be considered at the time of confirmation. This decision cannot therefore be used to support the submission that the representation must not be considered at the time of confirmation. This decision cannot also support a situation where consideration of the representation is reduced to a mere formality only because the detenu has not been able to send his representation before the matter was referred to the Advisory Board. Since the Advisory Board consists of eminent persons like the Judges of High Court, it is reasonable to assume that the Advisory Board gives its serious consideration to the statements in the representation, before recording its opinion. But, if the representation is not made before the matter is referred to the Advisory Board, the detenu would lose the benefit of its consideration by an important and independent body like the Advisory Board. This would, without anything more, cause prejudice to the detenu. But since he is himself responsible for it, he cannot make any complaint. Must the detenu for this reason alone be subjected to some further disability? The answer of this Court on consideration of the law on the subject including the basic constitutional safeguards in this behalf is that the detenu cannot and should not be put to any further disadvantageous position for this reason. Then, this Court has read the decision in Abdul Kunhi's case only to mean that the representation of the detenu need not always be considered by the Government

at the time of passing the confirmation order particularly when the representation is not available with it and could not for that reason be considered at the time of confirmation. This decision does not authorise the Government to postpone consideration even in a case where it could be done at the time of confirmation. This decision, in our opinion, does not authorise the Government to divide the process of consideration into two and thereby subject the representation to a confirmed preventive detention order. In the context of the facts of this case, the legal position might have been different if the Government was not in a position to consider the representation at the time of confirmation. The representation in this case has been received on 13.12.1993. Seven days available with the Government were, in the opinion of this Court, sufficient for processing the representation and considering the same on 20.12.1993 itself. The non-consideration at that time obviously caused a serious prejudice to the petitioner/detenu inasmuch as the weight of the opinion of the Advisory Board was added to the subjective satisfaction of the Authority. If however the representation had received consideration at the time of confirmation the opinion of the Advisory Board may not have been of any consequence inasmuch as the same had not taken into consideration the representation of the detenu. Under the circumstances, the procedure adopted by the respondents, in the context of the facts and circumstances of the case, is highly prejudicial to the detenu, besides being violative of as soon as may be"" constitutional directive. This in our opinion is sufficient to vitiate the impugned order.

6. The petition consequently succeeds and allowed by quashing the impugned order of detention. The petitioner is directed to be set at liberty forthwith if not required in connection with any other case.