

(1997) 02 KL CK 0015

In the High Court Of Kerala

Case No : OP (Hebeas Corpus) No. 14602 of 1996

Smt. Hajara

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 27-02-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 3(1)

Citation : (1997) CriLJ 2196 : (1997) 2 ILR (Ker) 695

Hon'ble Judges : U.P. Singh, C.J;S. Sankarasubban, J

Bench : Division Bench

Advocate : P.K. Aboobacker, for the Appellant; K.K. Raveendranath, Govt. Pleader (for No. 1) and George Poonthottam, Addl. Central Govt. Standing Counsel (for No. 2), for the Respondent

Final Decision : Allowed

Judgement

S. Sankarasubban, J.—This Original Petition is filed for a direction to the respondents to produce the corpus of the petitioner's husband Sri. Abdul Razak Kodoor, who has been detained in Central Prison, Trivandrum, u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter called as "the COFEPOSA Act") and set him at liberty by issuing a writ of habeas corpus or any other appropriate writ. Husband of the petitioner (hereinafter called as "the detenu") was employed in Saudi Arabia. On 2-2-1996, he came to Kerala from Siyadh and on reaching the Airport at Calicut, Customs Officers detained him and on search of his body 69 gold biscuits weighing 8043.33 gms. were seized. The gold biscuits were concealed inside some electrical appliances brought by him. Prosecution steps were taken under the Customs Act. He was arrested and produced before the Additional Chief Judicial Magistrate (Economic Offences) Court, Ernakulam on 3-2-1996 and was remanded to judicial custody till 16-2-1996. An application for bail was moved before the learned Magistrate, which was opposed by the Superintendent (Intelligence), Air Customs, Calicut Airport. The learned Magistrate rejected the

bail application by his order dated 15-2-1996. Thereafter, another application for bail was moved on behalf of the detenu before the Court of the Sessions Judge, Ernakulam, which was rejected. Subsequently, a second application was moved before the Sessions Court, Ernakulam. The learned Sessions Judge, as per order dated 26-3-1996 ordered release of the detenu overruling the objections of the Superintendent, Air Customs (Intelligence), Karipur Airport, Calicut. The bail was granted with the following conditions.

"(i) On release, detenu will report before the Investigating Officer once in two weeks on all alternate Mondays until further orders.

(ii) The detenu will surrender his passport before the Investigating Officer or the Additional Chief Judicial Magistrate (E.O.), Ernakulam, if not already done.

(iii) The detenu will not leave Kozhikode and Malappuram without permission of the Additional Chief Judicial Magistrate Court (E.O.), Ernakulam, except for appearing before the Investigating Officer or in Court".

2. On 1 -4-1996 a detention order was issued by the first respondent, u/s 3(1)(i) of the COFEPOSA Act. The detenu was issued grounds of detention and he was apprehended and detained in the Central Prison, Trivandrum on 5-4-1996. The grounds of detention are produced as Ext. P1 in the case. The detenu filed Ext. P5 representation wherein the detenu has clearly stated that he was granted bail by the Sessions Court, Ernakulam in CrI. M.P. No. 490/96. He has further stated that the bail application and the order were not placed before the detaining authority. The representation was rejected by the first respondent by Ext. P6 dated 23-5-1996 and by the Central Government by Ext. P7 dated 7-6-1996. The detention order was confirmed by the first respondent by Ext. P8 dated 18 6-1996 and the detenu was ordered to be detained for a period of one year from 5-4-1996.

3. Learned counsel for the petitioner urged two grounds. (1) The bail application and the bail order were not placed before the detaining authority and the detaining authority had no opportunity to consider the same. (2) The grounds of detention were in English and they were not translated into Malayalam and hence the detenu has not given a proper explanation.

4. Counter affidavits have been filed by the first and second respondents. According to the first respondent, the detaining authority has considered the circumstances of the case and the materials on record and the detention order was legal in as much as it was issued with due application of mind and after considering all evidence on record. With regard to the contention of non-placement of the bail application and the bail order, in paragraph 13 of the counter affidavit of the first respondent, it is stated as follows :

"It is to prevent the detenu from further smuggling. Prosecution proceedings are part of measures adopted under the Customs Act which had no bearing on preventive detention under COFEPOSA Act. Granting of bail under Customs Act

has no bearing on preventive detention under COFEPOSA Act. All the relevant documents were produced before the Detaining Authority and only after consideration of all these documents detaining authority had issued detention order".

Thus, the counter affidavit does not say that the bail application and the bail order were placed before the detaining authority, since the authorities were of the view that they are irrelevant. The counter affidavit filed on behalf of the second respondent has also not adverted to this aspect.

5. The question regarding the relevancy of the bail application and the bail order has come up for consideration before the Supreme Court. In *Abdul Sathar Ibrahim Manik Vs. Union of India and others*, - Jayachandra Reddy, J. speaking on behalf of the Bench formulated six points with regard to the ordering of detention of a person who is already in prison. Under point No. 5, it was held that failure to supply bail application for order refusing bail will not cause any prejudice to the detenu. Under point No. 6, the Court held as follows: "In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu". The question was again considered in *Noor Salman Makani Vs. Union of India and others*, . In that case, when the detention order was passed, the detenu was already in jail. Subsequently, he was granted bail. In the detention proceedings the argument was that the order granting bail and the bail application were not considered by the detaining authority. Referring to the above contention, the Court held as follows :

"whether a particular document is vital or not again is an issue which depends on the facts in each case. The detention order itself was passed when the 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 the 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 a stronger ground showing that the detenu who is not in custody is likely to indulge in the prejudicial activities again".

Their Lordships further referred to the conditions of bail and said that the conditions imposed would show that the detenu could move about freely in the vast area of Calcutta Municipal Corporation and therefore the order of release on bail with conditions cannot be said to be a vital document. The decision of the Bombay High Court in *Dr. Hannah Gulam Husain Chougale v. Union of India*, Cri Writ Petition No. 1384 of 1991 was cited before the Court and then the Court held as follows :

"In *Dr. Hannan Gulam Hussain Chougale's* Case, the detenu was already on bail

and later certain conditions were imposed restricting the movements of the detenu. That would be a vital fact. But in the instant case, as stated above, the subsequent release cannot be a vital fact."

(Emphasis added)

Thus, the Supreme Court has made a distinction between the bail being granted before the order of detention and the bail being granted subsequent to the order of detention and has taken the view that when the detenu was already on bail before the detention order was passed, the bail order and the bail application are vital documents which are to be considered by the detaining authority. In the present case, the conditions of bail order show that the detenu has to surrender his passport before the Investigating Officer, he has to report before the Investigating Officer once in two weeks and he will not leave Kozhikode and Malappuram without permission of the Additional Chief Judicial Magistrate Court (E.O.), Ernakulam.

6. In the light of the above decisions, we are of the view that the bail application and the order granting bail were relevant documents, which were to be placed before the detaining authority. The order of detention was passed on 1-4-1996, whereas the bail was granted on 26-3-1996. The detaining authority was of the view that the order granting bail has no relevance. This is not the correct legal position in view of the above decisions. Hence according to us, the order of detention is bad and it is hereby set aside.

7. In view of the fact that this Original Petition is being allowed on the first ground, we are not considering the second ground raised by the petitioner. Hence the detenu, Abdul Razak Kodoor, S/o. Abdul Rahiman, Kodoor House, Koduvally P.O., Kozhikore, who is detained under the COFEPOSA Act as per detention order No. 7206/ SSA4/96/Home dated 1-4-1996 is directed to be released forthwith, if he is not required in any other case.

Original Petition is allowed.