
(2011) 12 MAD CK 0184
In the Madras High Court
Case No : H.C.P No. 937 of 2011

Subramanian

APPELLANT

Vs

State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Penal Code, 1860 (IPC) — Section 147, 294, 323, 324, 341
Tamil Nadu Public Property (Prevention of Damages and Loss) Act, 1992 — Section 147, 3(1), 3(2), 323, 324

Citation : (2012) MLJ(Cri) 580

Hon'ble Judges : T. Sudanthiram, J;C. Nagappan, J

Bench : Division Bench

Advocate : N.R. Eiang, C. Ramkumar, for the Appellant; Subramanian Senior Counsel and Public Prosecutor assisted by M. Maharaja Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

T. Sudanthiram, J.—The petitioner herein who is the father of the detenu by name Kajamalai viji @ Vijay has filed this habeas corpus petition challenging the correctness and validity of the detention order passed by the second respondent against the detenu under the Tamil Nadu Act 14, 1982, detaining him as "Goonda" and directing the detenu to be detained at the Central Prison, Trichirapalli, in order to preventing him from indulging in the act which is prejudicial to the maintenance of public order. In the grounds of detention, three adverse cases were shown against the detenu, viz., (i) Crime No. 223 of 2008, on the file of K.K. Nagar police Station, Chennai, for the offences under Sections 353, 294 (b), 323 and 506(H) IPC (ii) Crime No. 109 of 2010, on the file of K.K. Nagar Police Station for the offences under Sections 147, 323 and 506(i) IPC (iii) Crime No. 727 of 2010, on the file of Airport police station, for the offences under Sections 147, 341, 294(b), 427, 323, 324 IPC and Section 3 of TNPPDL Act, 1992. The detaining authority also relied on the ground case concerned in

Crime No. 361 of 2011 on the file of the K.K. Nagar Police Station for the offences under Sections 147, 148, 447, 448, 427, 294(b), 323, 506(H) IPC and Section 3 of PPD Act. On the basis of the aforementioned cases, the detaining authority concluded that the detenu was habitually committing crimes and he is a "Goonda" and also observed that he was acting in the manner prejudicial to the maintenance of public order.

2. Mr. N.R. Ilango, learned Senior Counsel assailed the validity of the detention order on various grounds and submitted that the observation made by the detaining authority is contrary to the records, and there was non-application of mind on the part of the detaining authority. The detenu was prevented from making effective representation and further the representation made by the detenu to the detaining authority has not been considered.

(i) The learned Senior Counsel submitted that the detaining authority has relied on three adverse cases to come to the conclusion that the detenu was habitually committing the offences, but all those three cases are stale in point of time, as such they had no nexus to the order of detention. The learned counsel also relied on the decision of this Honourable Court *Saraswathi v. State of Tamil Nadu*, represented by the Commissioner of Police 1985 LW (Crl) 170 and the decision of the Honourable Supreme Court in *Anil Dey Vs. State of West Bengal*,

(ii) The learned Senior counsel submitted that as per the ground case incident, there was land dispute only between the detenu and the defacto complainant. It is only a law and order problem and Public Order was not disturbed. The observation of the detaining authority that the public were threatened by the detenu and the nearby shop keepers stopped their work and left the place is not supported by the statements of witnesses.

(iii) The learned Senior Counsel submitted that in paragraph-5 of the grounds of detention, that the detenu filed anticipatory bail petition for the cases in Crime No. 223 of 2008 and Crime No. 109 of 2010, on the file of K.K. Nagar Police Station and for the case in Crime No. 727 of 2010, on the file of Airport Police Station, Chennai, and obtained anticipatory bail order. This observation of the detaining authority is erroneous and the detenu was not released on anticipatory bail in the Airport Police Station Crime No. 727 of 2010, but he was released by the learned Judicial Magistrate-VI, Trichy, as the alleged offences are only bailable in nature and the copy of the bail order is available at page-68 of the booklet supplied to the detenu. This erroneous observation of the detaining authority caused confusion in the mind of the detenu and he was prevented from making effective representation.

3. The learned Senior Counsel also added that in respect of the same Crime No. 727 of 2010 on the file of Airport Police Station, Chennai, as per the bail order, the offences shown are only under Sections 147, 341, 294(b), 427, 323 and 324 IPC which are only bailable in nature, but the final report in that case dated 15.5.2011 shows an additional offence u/s 3 of TNPPDL Act. The final report

being filed, the learned Magistrate granting bail to the detenu subsequently, the detaining authority ought to have applied his mind with regard to this variation and called for an explanation. The failure on the part of the detaining authority shows his non-application of mind.

4. The learned Senior Counsel appearing for the petitioner relying on the decision of the Honourable Supreme Court in Kamalesh Kumar Ishwardas Patel v. Union of India and Others (1995) SCC (Cr) 643 submitted that detenu sent a representation to the detaining authority on 24.7.2011 and it was received by him on 28.7.2011 within 12 days of the detention order. But the detaining authority has failed to consider the representation which violated the fundamental right guaranteed to the detenu under Article 22(5) of the Constitution of India.

5. I. Subramaniam, learned Public Prosecutor vehemently replied to the contentions raised by the learned senior counsel appearing for the petitioner stating that the detention order passed by the detaining authority is valid and it cannot be assailed on any ground. The learned Public Prosecutor pointed out that the ground case relates to the occurrence dated 18.7.2011 and prior to that, the detenu was involved in two cases in the year 2010 and in one case in the year 2008. The adverse case Nos. 2 and 3 relates to the year 2010 and the ground case in Crime No. 361 of 2011 is during the year 2011. There was no difficulty for the detaining authority to come to the conclusion that the detenu was a habitual offender and as such the instances shown are not state.

6. The learned Public Prosecutor submitted that the facts of the case clearly show that the detenu armed with aruval along with his associates apart from threatening the de facto complainant Kaliamurthy caused damage to the STD booth by damaging the glasses and chairs and also threatening the public who gathered there thereby created a panic in the mind of the public. The learned Public prosecutor also drew the attention of the Court to the statement" of some of the witnesses recorded by the police revealing those facts. The Public Prosecutor submitted that the observation of the detaining authority in paragraph-5 of the order of detention that the detenu already got anticipatory bail in three adverse cases and bail application in respect of ground case was pending before the Sessions Court does not affect the order of detention since only in the third adverse case, the detenu had come out on bail and not by an anticipatory bail order. The detenu surrendered before the learned Magistrate and got bail and the detenu had also obtained anticipatory bail in respect of the said case. 7. The learned Public Prosecutor also added that the Magistrate had released the detenu on bail for bailable offences only which are mentioned in the first information report. Though the final report was filed adding the offences u/s 3 of TNPPDL Act also, it was not taken on file by the learned Magistrate and as such, it was not brought to the notice of the learned Magistrate.

8. The learned Public Prosecutor submitted that there is no dispute with regard to the question of law that the detenu has got right to send representation to the

detaining authority and it should be considered prior to the approval by the Government, but in this case, the representation from the detenu was received on 28.7.2011 and the detaining authority called for remarks from the sponsoring authority. But in the mean time, the detention order was approved by the government on 29.8.2011 itself. The representation sent to the government was considered and it was disposed of.

9. We considered the rival submission made by both parties and perused the materials available on record.

10. With regard to the first contention, it is to be seen whether the three adverse cases shown against the accused are stale and the observation of the detaining authority that the detenu was habitual offender is without materials. The first adverse case relates to the occurrence dated 27.8.2008, the second adverse case relates to the occurrence dated 8.2.2010 and the third adverse case relates to occurrence dated 18.7.2011. The ground case relates to an incident occurred on 18.7.2011. The detenu was indulged in one case in the year 2008 and had two cases in the year 2010 and the ground case in the year 2011. In the year 2010, the detenu had indulged in two cases within a short span of six months and again he had indulged in the ground case in the year 2011. Therefore the incident Nos. 2 and 3 cannot be said to be stale and the occurrence in ground case has taken place in the year 2011. Even though the case relates to the year 2008 is shown, two cases of the year 2010 being shown and the ground case being in the year 2011, the conclusion of the detaining authority that the detenu was habitual offender cannot be said to be based on stale instances.

11. The decisions cited by the learned senior counsel for the petitioner in respect of the said contention are not applicable to the facts of this case. In the case *Saraswathi v. State of Tamil Nadu*, represented by the Commissioner of Police (*supra*), there was a long gap of four years between the ground case and the adverse cases. As per the facts relating to the case cited in *Anil Dey v. State of West Bengal* (*supra*), the detention order was passed under maintenance of Internal Security Act based on single incident. The case was related to the year 1972. There was a time gap between the period of incident and the date of detention order. Therefore the first contention of the learned senior counsel for the petitioner is unsustainable.

12. The detaining authority has come to the conclusion that the detenue acted in the manner prejudicial to the maintenance of public order related on the incidents that occurred on 18.7.2011. The detaining authority has observed as follows:

The accused Kajamalai Viji @ Vijay abused Kaliyamoorthy in a filthy language, threatened to murder him with aruval by saying vernacular matter omitted" His associates threatened him with their respective kattans. Thereafter, the accused Kajamalai Viji @ Vijay caused damage to the glasses, chair and stool available in the shop. While Kaliyamoorthy questioned them, the accused Kajamalai Viji @

Vijay slapped him on the face. Kaliyamoorthy raised alarm for rescue. The general public came there and they were threatened by the accused Kajamalai Viji @ Vijay and his associates by saying "vernacular matter omitted" The nearby shop-keepers closed their shops out of fear. Auto drivers took their autos from the stand and left the place.

13. The observation made by the detaining authority is based on the subjective satisfaction. Normally, the Court cannot go into the subjective satisfaction of the detaining authority. But it was contended by the learned senior counsel for the petitioner that there was no material in support of those observations. On a perusal of the records, we find that some of the witnesses had referred to the acts of the detenu. It is improper for the Court to observe that one witness had given such statement to the police and another witness had not given such statement to the police. It is not a matter of appreciation by the Court and it is purely for the subjective satisfaction of the detaining authority. Therefore, on reading paragraph-3 of the grounds of detention, the observation made by the detaining authority in paragraph-4 of the grounds of detention that the detenu was acting in a manner prejudicial to the maintenance of public order cannot be assailed. The second contention of the learned senior counsel for the petitioner is also rejected.

14. Thirdly, it is to be analyzed that how far the observation made by the detaining authority relating to Crime No. 727 of 2010 on the file of Airport Police station (third adverse case) that the detenu got anticipatory bail order wherein, the detenu got bail from the concerned Magistrate affects the detention order. First of all, it is very clear that the detenu was in remand only in connection with Crime No. 361 of 2011 on the file of K.K. Nagar Police station. In the other three adverse cases, whether he was on bail or had obtained anticipatory bail order does not matter as far as the fact remains that he was not in remand in those cases. The compelling necessity that arises to pass detention order against the detenu while he is in remand is the matter for consideration for the detaining authority. That being so, the detaining authority has to consider whether there was any real possibility of the detenu coming out on bail concerned with case in which he was in remand. The detaining authority has rightly observed that the bail petition in respect of the ground case was pending before the learned Sessions Judge, Tiruchirappalli, and he was very likely to be released on bail and If he comes out on bail would indulge in future activities which will be prejudicial to the maintenance of public order. Though according to the learned Public Prosecutor, the detenu got an anticipatory bail order even in respect of the Crime No. 727 of 2010 and the fact remaining the detenu was on bail in respect of Crime No. 727 of 2010 also, no prejudice is caused to the detenu and the detenu is in no manner affected from making any effective representation, and as such, the detention order is not vitiated. Furthermore, the FIR contained only the IPC offences and it did not contain the offence u/s 3(1) of TNPPDL Act, and the final report was filed including the said section. In the bail order granted subsequently by the Court, the said section was not mentioned, but it is not a matter for

consideration in this petition. Though the final report was filed on 15.5.2011, as it was not taken on file by the learned Magistrate, the bail was granted on 24.5.2011 only in respect of the offences relating to the Indian Penal Code. The case relating to the Crime No. 721 of 2011 is taken into consideration only for the limited purpose to show that the detenu is a habitual offender indulging in committing offences. Therefore, there was no necessity for the detaining authority to seek for any clarification or to go in detail with regard to non-mentioning of the offence u/s 3 of TNPPDL Act in the bail order granted by the learned Magistrate.

15. Finally it is to be considered whether the representation sent by the detenu dated 25.7.2011 received by the detaining authority on 28.7.2011 should have been disposed of by the detaining authority. Of course the Honourable Supreme Court has held in the decision in *Kamalesh Kumar Ishwardas Patel v. Union of India and Others* (supra), as follows:

14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding; obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.

31. Construing the provisions of Article 22(5) we have explained that the right of the person detained to make a representation against the order of detention comprehends the right to make such a representation to the authority which can grant such relief i.e., the authority which can revoke the order of detention and set him at liberty and since the officer who has made the order of detention is competent to revoke it, the person detained has the right to make a representation to the officer who made the order of detention. The first premise that such right does not flow from Article 22(5) cannot, therefore, be accepted.

16. Subsequently the Honourable Supreme Court has held in the decision in *State of Maharashtra and Others Vs. Santosh Shankar Acharya*, as follows:

This being the position, non-communication of the fact to the detenu that he could make a representation to the detaining authority so long as the order of detention has not been approved by the State Government in a case where an order of detention is issued by an officer other than the State Government under sub-section (2) of Section 3 of the Maharashtra Act would constitute an infraction of a valuable right of the detenu under Article 22(5) of the Constitution and the ratio of the Constitution Bench decision of this Court in *Kamalesh Kumar*

Ishwardas Patel v. Union of India and Others (supra) would apply notwithstanding the fact that in Kamaleshkumar case, the Court was dealing with an order of detention issued under the provisions of the COFEPOSA Act.

17. Following the above, we also held with regard to Tamil Nadu Act 14 of 1982, in the order dated 17.11.2011 passed in H.C.P. No. 910 of 2011, as follows:

12. In view of the judicial dictum of the Constitutional Bench in the decision in Kamalesh Kumar Ishwardas Patel v. Union of India and Others (supra), the detaining authority that has made the order of detention, is competent to give immediate relief by revoking the said order and it is bound to consider the representation of the detenu till the detention order is approved by the State Government.

18. We are now to consider whether there was sufficient time gap from the date of receipt of the representation from the detenu and the date of approval by the State Government. In this case, the representation sent by the detenu was received by the detaining authority on 28.7.2011 and the approval of the detention order was made on 29.7.2011. It was rightly contended by the learned Public Prosecutor that once the approval of the detention order is made by the Government, there is no obligation on the part of the detaining authority to consider the representation and it is only for the government to consider the said representation. The representation being received on 28.7.2011 by the detaining authority and the approval of the detention order being made on 29.7.2011 and there being not even a single day gap between these two dates, we are to hold that there is no violation of the Article 22(5) of the Constitution of India. For the above said reasons, the impugned order of detention clamped on the detenu is not liable to be set aside and the habeas corpus petition is dismissed accordingly.