
(2009) 06 KL CK 0117
In the High Court Of Kerala
Case No : WP (Criminal) . No. 183 of 2009

Sulaiman P.A.

APPELLANT

Vs

Additional Chief Secretary to Govt. and Others

RESPONDENT

Date of Decision : 16-06-2009

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Criminal Procedure Code, 1973 (CrPC) — Section 110

Citation : (2009) 3 ILR (Ker) 83 : (2009) 16 KLJ 861

Hon'ble Judges : R. Basant, J; M.C. Hari Rani, J

Bench : Division Bench

Advocate : K.A. Jaleel and C. Anilkumar, Kallesseril, for the Appellant; K.J. Mohammed Anzar, G.P., for the Respondent

Final Decision : Allowed

Judgement

R. Basant, J.—Is the omission to furnish a report on the basis of which the detaining authority entertains the requisite satisfaction u/s 3(1) of the Kerala Anti-Social Activities (Prevention;) A at 2007 (hereinafter referred to as KAAPA) fatal as to invalidate the preventive detention of the detenu? This is the only question that we propose to consider in this petition filed by the petitioner, the father of the detenu, for issue of a writ of habeas corpus to produce his son, the detenu and release him from custody.

2. Elias aged 22 years is the detenu. The petitioner is the father of the detenu. Altogether five cases were registered against him. One was pending investigation, in the other four, final reports have been filed. Incidents in relation to those five cases took place on 23/11/2004, 11/2/2007, 10/06/2007, 05/01/2008 and 20/5/2008. There is no contention that going by the definition of the expression "known rowdy" in Section 2(p) of the KAAPA, the detenu will not be a known rowdy. The local Sub Inspector of Police, that is the 5th respondent submitted Ext.PI report to the 3rd respondent, the Superintendent of Police. That report is dated 09/07/2008. Whatever be the reasons, the report

evoked action of the Superintendent of Police only much later aird-he submitted Ext.P2 report dated 11/12/2008 to the 2nd respondent, the detaining authority, that is the District Magistrate. The 2nd respondent, after receipt of Ext.P2 considered the matter and a further report dated 31/3/2009 was obtained from the 3rd respondent. Thereupon, the 2nd respondent passed Ext.P3 order of detention dated 04/04/2009 u/s 3(2) of the KAAPA. The detenu was arrested under Ext.P4 on 23/4/2009. The order of detention Ext.P3 was approved by the Government later u/s 3(3) of the KAAPA. it is submitted that a representation has been made to the Advisory Board. The decision of the Advisory Board is awaited and the order of detention has not been confirmed by the Government yet.

3. We have heard the learned Counsel for the appellant and the learned Additional Director General of Prosecutions. The learned Counsel for the appellant assails the impugned order of detention and the consequent detention on various grounds. Though we propose to consider only the first ground in detail, we may mention that the following are the grounds urged by the learned Counsel for the appellant.

i) Report dated 31/3/2009 submitted by the Superintendent of Police to the detaining authority u/s 3(1) of the KAAP was not furnished to the detenu thereby impairing his right under Article 22(5) of the Constitution of India and Section 7(2) of the KAAPA to make an effective representation against the order of detention.

ii) There is no live link between the alleged acts of the detenu (the last of which was on 20/5/2008) and the order of detention dated 04/04/2009. The nexus/link had been snapped and the order of detention suffers from the vice of non application of mind properly, alertly and diligently.

iii) The impugned order of detention is bad for the reason that Ext.PS bail order under which the detenu was granted bail for the last offence allegedly committed on 20/5/2008 was not considered at all by respondents 2 and 3 in breach of the dictum in Chonari Sulekha Vs. State of Kerala, The Union of India (UOI) and The Superintendent of Central Prison, .

iv) Ext.P3 document furnished to the detenu who is incompetent to comprehend the English language is in English and no translation has been furnished to him offending the dictum in Smt. Rekhaben Virendra Kapadia Vs. State of Gujarat and Others, .

v) The detaining authority did not peruse all relevant documents in that the F.I.R. in Guruvayoor crime No. 439/2005 registered u/s 110(e) Cr.P.C. referred to in Ext.P1, Ext.P2 and Ext.P3 was not perused by him and copy thereof has not been furnished to the detenu. This offends the dictum in Elizebath George v. State of Kerala 2008(4) KLT 425.

vi) The order of detention is vitiated by mala fides, political animosity and

political rivalry as the detenu is a Congress I activist and the alleged victim in the last of the five crimes referred above is an activist owing allegiance to the ruling party.

4. Ground No. I: We have heard the learned Counsel for the petitioner and the learned A.D.G.P. in detail-on-this issue. The order of detention Ext.P3 clearly shows that credible information was received by the detaining authority (2nd respondent) from the Superintendent of Police (3rd respondent) vide two letters/reports dated 11/12/2008 and 31/3/2009. The grievance raised by the petitioner on behalf of the detenu is that copy of this report dated 31/3/2009 has not been furnished to the detenu at any time and thereby his right to make an effective representation under Article 22(5) of the Constitution of India and Section 7(2) of the KAAPA had been offended and breached. The detenu was totally in the dark as to what this report dated 31/3/2009 was and what it contains. In the absence of such vital information, the detenu was disabled to make a proper representation to the Government and the Advisory Board and in these circumstances this breach of the fundamental duty to furnish the relevant documents must lead to invalidation of the order of detention.

5. We deem it necessary to analyse the provisions of Section 3 and Section 7 of the KAAPA to appreciate the significance of a report submitted by the Superintendent of Police to the detaining authority. We extract Section 3 and Section 7 below:

3. Power to make orders for detaining known Goondas and known Rowdies:

(1) The Government or an officer authorised under Sub-section (2), may, if satisfied on information received from a Police Officer not below the rank of a Superintendent of Police with regard to the activities of any Known Goonda or Known Rowdy, that with a view to prevent such person from committing any anti-social activity within the State of Kerala in any manner, it is necessary so to do, make an order directing that such person be detained.

(Section 7(2) and 7(3) are omitted as irrelevant in this context.)

7. Grounds of order of detention to be disclosed;-(1) When a person is arrested in pursuance of a detention order, the officer arresting him shall read out the detention order to him and give him a copy of such order.

(2) The grounds of detention specifying the instances of offences with copies of relevant documents, as far as practicable, on the basis of which he is considered as a "known goonda" or "known rowdy" and giving such materials relating to his activities on the basis of which his detention has been found necessary shall be furnished to him as soon as possible, nevertheless, in any case, within five days of detention and he shall also be informed in writing, under acknowledgment, of his right to represent to the Government and before the Advisory Board against his detention;

Provided that nothing in this section shall require any authority to disclose to the

detained person any fact, the disclosure of which will reveal the identity of any confidential source or the disclosure of which will be against the interests of internal security or national security.

(3) The Superintendent of the Jail where such person is detained shall afford him reasonable opportunity to consult a lawyer and reasonable assistance in making representation against the detention order to the Government or to the Advisory Board.

6. To us it appears that the language of Section 3(1) is crucially relevant, The detaining authority - be it the Government or the District Magistrate u/s 3(2), must be satisfied about the need for preventive detention of the detenu. He must be so satisfied on information received by him. Such information has to be received not from any source; but only from a specified source, that is from a police officer not below the rank of the Superintendent of Police. Such information would normally be received only in writing by the detaining authority and the information in such report in writing must be sufficient to induce the requisite satisfaction in the mind of the detaining authority not only that the proposed detenu is either a known goonda or a known rowdy; but also that his detention u/s 3 is necessary to prevent such person from committing any anti social activity.

7. What is of importance and what distinguishes provisions of Section 3 from the identical provisions in the COFEPOSA is that the requisite satisfaction is to be reached not on the basis of any material; but only on the basis of information furnished by a specified officer - a police officer not below the rank of a Superintendent of Police. That is the material on the basis of which the requisite satisfaction has to be entertained by the Government or the detaining authority. What we intend to take note is that such report conveying the information on the basis of which the requisite satisfaction is entertained by the detaining authority is of crucial and vital significance while considering the validity of the order of detention. For the right to make a representation under Article 22(5) of the Constitution of India and Section 7(2) of the KAAPA to be effective and real, we are definitely of the opinion that such information - we mean the reports containing such information, must be made available to the detenu. In the instant case, the requisite satisfaction is entertained as revealed from Ext.P3 on the basis of two such reports - one dated 11/12/2008 and the other dated 31/3/2009, The learned Counsel laments that the petitioner and the detenu were not given any information about the contents of the report dated 31/3/2009 and were not furnished a copy thereof.

8. The learned A.D.G.P does not make a concession that the said report has not been furnished to the detenu. But called upon to place materials before the court to show that copy of such report has been furnished to the detenu, no authentic material is placed before court to conclude that copy of the report dated 31-3-2009 had actually served on the detenu.

9. We must hence conclude that the report dated 31/3/2009 has not been furnished to the detenu. We have already noted that under the scheme of the KAAPA and in the light of the specific provisions u/s 3(1), the report containing the requisite information on the basis of which the requisite satisfaction was entertained by the detaining authority is vital and crucial to enable the detenu to make an effective representation under Article 22(5) of the Constitution of India and Section 7(2) of the KAAPA. It is such a document, of which copy has not been furnished.

10. The learned A.D.G.P submits that the contents of the said document dated 31/3/2009 are not very crucial or relevant, in that it contains only information of the stage of the five cases referred above. A copy of the same has not been produced formally before this Court; but the learned A.D.G.P has shown to us the file and we have perused that report dated 31/3/2009. We agree readily with the learned A.D.G.P that the information furnished therein is not crucial. It only refers to the stage of the five cases referred earlier in the report dated 11/12/2008. It confirms that four of them have already been charge sheeted whereas the 5th was pending investigation. Today, when we look into the said report dated 31/3/2009, it is evident that it does not contain any vital or relevant information having a bearing on the order of detention. It only confirms that the cases continue at the same stage and there is no change in the status of the cases.

11. The learned A.D.G.P submits with the help of the decisions in State of Tamil Nadu and Anr. v. Abdullah Kadher Batcha and Anr. JT 2008(12) SC 23 and B. Sundar Rao and Others Vs. State of Orissa, that in such a situation where the information omitted to be furnished is not vital or crucial, the detenu cannot take advantage of such inadequacy/imperfection to found a plea for invalidation of the order of detention. The learned A.D.G.P relies on paragraphs 7 and 8 of the decision in Abdullah Kadher (Supra) to contend that the omission to furnish a copy of the report dated 31/12/2009 is not crucial. We extract paragraphs 7 and 8 below.

7. The court has a duty to see whether the non supply of any document is in any way prejudicial to the case of the detenu. The High Court has not examined as to how the non supply of the documents called for had any effect on the detenu and/or whether non supply was prejudicial to the detenu. Merely because copies of some documents have been supplied they cannot by any stretch of imagination be called as relied upon documents.

8. While examining whether non supply of a document would prejudice a detenu the Court has to examine whether the detenu would be deprived of making an effective representation in the absence of a document. Primarily, the copies which form the ground for detention are to be supplied and non supply thereof would prejudice to the detenu. But documents which are merely referred to for the purpose of narration of facts in that sense cannot be termed to be documents without the supply of which the detenu is prejudiced.

12. The learned Counsel for the petitioner, on the contrary, contends that the question is not whether actual prejudice has resulted or not; but whether the non furnishing of the copy of such a vital document has effected, the constitutional and statutory right of the detenu to make an effective representation against the order of detention. If the non (furnishing of the copy of the document has resulted in impairment of the right of the detenu to make an effective representation, then it must be held, notwithstanding the absence of proof of actual prejudice that the detention is bad and the same has to be invalidated.

13. The learned Counsel for the petitioner contends that the detenu was left in the dark as to what the report dated 31/3/2009 was. Did it contain only materials to show that the detenu was a known, rowdy? Or did it show that the Superintendent of Police had perceived facts and reported the same to justify the conclusion that the detention of the detenu was necessary? The learned Counsel contends that this has to be read along with the other ground raised that there is no nexus between the last of the prejudicial acts referred to in Ext.P3 and the order of detention. At the time when the detenu had the light to make a representation under Article 22(5) of the Constitution of India and Section 7(2) of the KAAPA the detenu did not know what this report was and what the contents of the report was. It might have contained materials against him. It may not have contained relevant materials against him. In either cases, what the detenu is deprived of is his a right to make a representation against his detention. Effective representation against an order of detention cannot be made when a detenu is deprived of the opportunity to know the contents of one of the two crucial documents on which reliance is said to be placed by the detaining authority - even when it is later shown in proceedings before the Habeas Corpus Court that that document did not contain any vital information. Denial of opportunity arises from the fact that he was kept in the dark guessing about the contents of such document. His right to make an effective representation against the contents of the other document is also impaired as he has no idea as to whether the contents of the undisclosed document would confirm and are in tandem with the one disclosed.

14. Courts have consistently -taken-a-zealous-attitude to insist on the compliance of all the procedural formalities when the validity of an order of preventive detention is challenged. Proof of actual prejudice is not always insisted upon. The anxiety of the court to protect personal liberty and freedom is reflected clearly in the attitude adopted by courts for literal compliance of procedural formalities in cases of preventive detention.-After all the deprivation of liability is not for an act already committed but on the basis of anticipations and suspicions of possible future culpable conduct. In the battle for freedom and liberty, procedural safeguards have been the strongest weapons available. We do note that the detenu was totally in dark as to what the report dated 31/3/2009 was. He did not know and could not understand what it contained. He was not apprised of the same. He was left in the dark about the same. We have no hesitation to agree that this has affected the right of the detenu to make an

effective representation against the order of detention. The helplessness of a person who is not able to know the material against him admittedly relied upon by the detaining authority when he has to make a representation against his detention must be alertly perceived by a compassionate court,

15. The crucial, vital and important right (constitutional as well as statutory) of a person detained under preventive detention laws to make a representation to the detaining authority/Government/advisory board has been accepted and recognised by many binding precedents by the Supreme Court and this Court. It is unnecessary to advert to specific precedents in detail. The principle of law has now come to be entrenched in our system that in a case of preventive detention all procedural safeguards must be complied with strictly. The right of a person to make a representation against his preventive detention and his related right to know the materials on the basis of which such preventive detention is ordered is recognised under Article 22(5) of the Constitution of India. Section 7(2) of the KAAPA reiterates these rights. Even if in the relevant statute, such a provision is not there, the constitutional provision under Article 22(5) of the constitution of India gets superimposed -on-all statutes and such rights shall have to be recognised. In the instant case, it is not necessary to go into that aspect in detail as Section 7(2) of the KAAPA in terms recognises the constitutional right under Article 22(5) of the Constitution of India. We extract Article 22(5) of the Constitution and Section 7(2) of the KAAPA.

Article 22(5): When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(2) The grounds of detention specifying the instances of offences with copies of relevant documents, as far as practicable; on the basis of which he is considered as a "known goonda", or "known rowdy" and giving such materials relating to his activities on the basis of which his detention has been found necessary, shall be furnished to him as soon as possible, nevertheless, in any ; case, within five days of detention and he shall also be informed in writing, under acknowledgment, of his right to represent to the Government and before the Advisory Board against his detention;

Provided that nothing in this section shall require any authority to disclose to the detained person any fact, the disclosure of which will reveal the identity of any confidential source or the disclosure of which will be against the interests of internal security or national security.

16. The order of detention u/s 3 can be passed by the Detaining Authority only on the basis of a report submitted by the superior police officer. In such report relevant information must be furnished, Plurality of reports can be submitted to furnish information, Clarification can be sought by the detaining authority and

further reports can be made by the superior officer. When the requisite satisfaction is entertained by the detaining authority on the basis of more than one report and it is expressly stated so in the order of detention, the omission to furnish such report must necessarily be held to fatally affect the right of the detenu to know the grounds of detention and also to make an effective representation. The question is not whether the said report contains crucial information or not. The consequence is what matters. The detenu is told that reliance is placed on two reports. He is kept in the dark about one of them. He gropes in the dark, not knowing whether the document relied on which is not revealed to him does or does not contain relevant inputs against him. His right to make a representation against the order of detention and even the first report copy of which is furnished to him is put in peril" and jeopardised by such vital omission. Having stated in the order of detention that i reliance is placed on such a report, omission to furnish the same is crucial and fatal. We have no hesitation to hold that the report/reports u/s 3(1) received by the detaining authority from the superior police official is a document copy of which must be furnished to the detenu. No reasons justifying the withholding of such a document occurs to us now. If there be any it must be referred to in the order of detention and such reason must be established to the satisfaction of the court in proceedings before it. The detenu cannot be left groping in the dark speculating about such a vital document.

17. We are, in the facts and circumstances of this case, eminently satisfied that non furnishing of the crucial report dated-31/12/2009 to the detenu has affected his-right to make a representation- This in turn has led to deprivation of the constitutional right under Article 22(5) of the Constitution of India and the statutory right u/s 7(2) of the KAAPA. We are hence left with no alternative but to hold the detention to be invalid. The learned A.D.G.P wants this Court to make it clear that the right of the detaining authority/Government u/s 13(2) shall remain unfettered by this order, We need not reiterate the same. If there be such a right u/s 13, this order will not in any way fetter those rights.

18. In the light of our finding under Ground No. I, we find it unnecessary to go into other grounds raised.

19. In the result,

- a) This W.P.(CrI) is allowed.
- b) The order of detention Ext.P3 and the consequent detention of the detenu is set aside.
- c) If the detention of the detenu is not required in any other case, he shall forthwith be released from custody.

20. The registry shall communicate this judgment to the respondents including the 4th respondent forthwith.