

(2003) 12 MAD CK 0057
In the Madras High Court
Case No : W.A. No. 4065 of 2003

The State of Tamil Nadu

APPELLANT

Vs

VAIKO

RESPONDENT

Date of Decision : 15-12-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Defence of India Rules, 1962 — Rule 30(1), 30(4)
Prevention of Terrorism Act, 2002 — Section 21(3)

Citation : (2004) 1 LW 385 : (2004) 1 LW(Cri) 100

Hon'ble Judges : V.S. Sirpurkar, J;N. Kannadasan, J

Bench : Division Bench

Advocate : N.R. Chandran, General/Sr. Counsel and I. Subramanian, Public Prosecutor/Sr, for the Appellant; K. Chandru for Devadoss, for the Respondent

Final Decision : Allowed

Judgement

V.S. Sirpurkar, J.—Rule returnable forthwith. Shri K. Chandru, learned senior counsel for the respondent takes notice. Heard the main

appeal itself with the consent of both the parties.

2. This appeal has been heard, under unusual circumstances, at our residence, as, if no orders are passed on this appeal now either way, the matter would become in fructuous.

3. Learned single Judge of this Court allowed the writ petition (W.P. No.36680 of 2003) wherein, a prayer was made for a Writ of Mandamus, directing the State Government to permit the writ-petitioner to attend the Winter Session'03 of the Parliament, participate in the debate on the Prevention of Terrorism (Amendment) Bill 2003 and to take part in its voting.

4. This writ petition came to be filed by the Member of Parliament, Thiru VAIKO.

It is an admitted position that Thiru VAIKO is an elected

Member of Parliament and has a right, therefore, to attend the Parliamentary proceedings otherwise. He was arrested for the offences under Sec.

21(3) of the Prevention of Terrorism Act (in short "POTA") on 11-07-2002 and ever since then, he is in the judicial custody. The matter against

him is proceeding before the Special Judge, Poonamallee, who has been appointed under Sec. 6 of POTA to try the cases under the said Act. The

petitioner had filed an application before the Special Judge for being permitted to remain present in the Parliament to take part in the deliberations

and discussions and to vote on the Bill for amending POTA tomorrow, i.e. on 16-12-2003.

5. Shri K. Chandru, learned senior counsel appearing on behalf of the respondent herein, on notice, has pointed out to us that the said Bill is to be

discussed and considered by the Lok Sabha tomorrow (16-12-2003) and that the respondent is the leader of the Parliamentary party called

"Marumalarchi Dravida Munnetra Kazagham" (MMDK). On the similar issues, an application came to be made before the Special Judge and the

Special Judge has rejected the application by a detailed order. It seems, as the sequence to that, the respondent herein has come up before the

learned single Judge by way of a writ petition.

6. Learned single Judge has granted an order, directing the State Government to take the writ-petitioner from Central Prison, Vellore, where he is

presently lodged, tonight i.e. on 15-12-2003 straightaway to Meenambakkam Airport, Chennai so as to facilitate him to be taken to New Delhi by

the first flight on 16-12-2003 and then the writ-petitioner should be handed over to the appropriate staff of the Lok Sabha Secretariat so that the

writ-petitioner could attend the debate relating to the said Bill and cast his vote on 16-12-2003. It is against this order that the State Government

has preferred this appeal and it was contended by the learned Advocate General that unless the orders are passed now, the writ-petitioner would

have to be taken to New Delhi by the first flight on 16-12-2003, which is scheduled to take-off at 6.40 Hrs. It is because of this that the appeal

was entertained and heard.

7. Before we take up the arguments for consideration, learned senior counsel Shri K. Chandru raised a question that the order, which has been

filed by the appellants for being challenged, does not have the reasons by the learned single Judge and that what has been produced before us is

only the "operative portion" of the order, which is described as "an advance order". Learned counsel, therefore, says that the appeal itself would

not be maintainable in view of the fact that the Court does not have the advantage of the order which presumably has already been passed. It is

pointed out by the learned senior counsel that this matter was taken up today (15-12-2003) at 3.00 p.m. in the Court and the learned single Judge

heard the matter almost up to 6.30 p.m. to pass the orders and that the learned single Judge did not have the time to pass the "reasoned order"

and, therefore, the learned single Judge went on to pass the "advance order". Learned senior counsel, therefore, says that we should not entertain

such an appeal, which is in the nature of a "defective appeal".

8. As against this, Shri N.R. Chandran, learned Advocate General points out that it is not the fault of the State Government that it could not press

before the Court the "reasoned order" because those reasons have not been made available. He points out that, in any case, if the Government

wait for those reasons, then, by that time, the order passed by the learned single Judge would work itself and in that case, the filing of the appeal

and the challenge of the order would itself be without any consequences and the appeal would be rendered in fruituous even before it is filed.

9. Considering the overall situation, we feel that this is a peculiar situation where one of the parties to the writ petition would be put in the

predicament position were this appeal to be rejected on this technical ground. In our opinion, merely on the basis that the reasons are not there

before us, we would not be justified in refusing to hear the appeal more particularly because if the appeal is not heard, the order itself would work

to the prejudice of the one of the parties, that is the State. Since the reasons are not available, we went into the writ petition ourselves and we have

allowed the parties to address us freely. The parties have also availed of that opportunity.

10. Learned Advocate General in his address pointed out that firstly the writ petition itself was not maintainable particularly because the respondent

had not challenged the order passed by the Special Judge under the POTA. It is then contended that even if the petition is entertainable by this

Court, this Court will desist from doing that particularly because the order by the Special Judge has firstly not been challenged in the writ petition

and secondly, it cannot be said that this is a petition in the nature of a habeas corpus petition.

11. Learned senior counsel appearing for the respondent, Shri K. Chandru very fairly suggested that this was not a petition in the nature of a

habeas corpus petition but, was only to put into effect the democratic rights of the Member of Parliament, who was an elected representative of the

Parliament.

12. Learned Advocate General, however, goes on further and suggests that there is no "inherent right" in any elected people's representative to

insist upon to take part in the deliberations and discussions on the floor of the House and to cast his vote merely because of that person's position

as a Member of Parliament. Learned Advocate General takes his argument further and points out that even this question came up for consideration

in the decision in re ANANDAN NAMBIAR AIR (39) Mad 117 where, the Division Bench of this Court clearly found that an elected

representative, if he is in the legal custody, could not insist upon being allowed to attend the Parliamentary proceedings or as the case may be

Legislative Assembly proceedings and to vote therein. The second decision on which the learned Advocate General relied is the Supreme Court's

decision in K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others, wherein again, coincidentally, the same

person was the petitioner challenging the dismissal of his petition by the Madras High Court, again practically on the same ground. In the

aforementioned Supreme Court's decision, an order had been passed under Rule 30(1)(b) and (4) of the Defense of India Rules, 1962 under

which, the said petitioner was detained in Central Jail, Tiruchirappalli. He was later on transferred to Central Prison, Cuddalore and in effect he

had filed the writ petition challenging the validity of the order of detention. It was incidentally prayed that since the order detaining him were the

illegal orders, he would have every right to attend the Legislative Assembly as also to vote therein. This contention did not find favour with the

Supreme Court and the Supreme Court held that there were no rights in the nature of the Fundamental Rights or any other right to insist upon the

voting and attending the Legislative Assembly particularly where the detention was legal. Learned Advocate General says that the situation is no different in the present case.

13. Per contra, Shri K. Chandru, learned senior counsel for the respondent argues that there is a precedent in respect of this very respondent

where this respondent was allowed to vote in the elections of the President and Vice President held few months back when he was in custody.

Learned senior counsel points out that while the respondent was allowed to cast his vote in the Presidential election held in January, in so far as the

Vice President election was concerned, he was taken to New Delhi for enabling him to cast his vote. He points out that even at that time, writ

petitions came to be filed and it was under the orders of this Court that the respondent was allowed to proceed. Learned counsel further urges that

there is a further very strong precedence in *Rajesh Ranjan v. State of Bihar and Anr.*, (2000) 9 SCC 222 wherein a Member of Parliament, while

in custody, was not only allowed to go to Delhi to take oath as a Member of Parliament but was also allowed to attend that day's business in the

Parliament.

14. Considering the rival submissions, in so far as the argument regarding the tenability of the writ petition is concerned, it cannot be said that the

writ petition is not maintainable. The tenability of the writ petition would naturally depend upon the powers of this Court and this Court would

always have the power to entertain a writ petition not only for preserving the Fundamental Rights or any other rights but for any other purpose also

as is clear from the language of Article 226 of the Constitution. We, therefore, do not accept the argument of learned Advocate General that the

writ petition is not maintainable. The question is, however, as to whether under the writ petition what would be the extent of our jurisdiction.

15. We cannot forget one fact that the respondent herein is under legal custody. He has steadfastly refused to apply for bail, perhaps, on the

principles. He is undergoing a trial for which a charge-sheet has been filed and that there is no order directing him to be released on bail. On the

other hand, his specific application in that behalf has been rejected by the Court. There can, therefore, be no dispute the respondent being in the

legal custody of the court. The question is as to whether during the pendency of

these proceedings, he should be specifically allowed to go for taking part in the deliberations and discussions of the Parliament and to cast his vote on the Bill. Now, unless there was any such right - statutory or otherwise - there will be no question of permitting the respondent to take part in the Parliamentary proceedings and to cast his vote. There is a discussion in the earlier mentioned cases relied upon by the learned Advocate General that even as per the May's Parliamentary practice, there is no such privilege available to the Members of the Parliament in England. Undoubtedly, Mr. Chandru does not claim it as respondent's privileges but, he merely reiterates that the Bill, which is being sought to be introduced tomorrow (16-12-2003), is of extreme importance to the respondent in his own personal matter because he himself is facing the incarceration on account of his being involved in the offences under POTA. Now, if that is so, merely because the respondent himself is an aggrieved person in that sense, that by itself will not create a right in him to attend the Parliamentary proceedings and to cast his vote. There is no such provision and we do not think that we should use our discretion in the matter particularly where all that is going to happen is the respondent will not be allowed to vote or voice his opinions in the Lok Sabha. Unless the respondent is armed with any such right, we do not think, it will be possible to entertain the request of the respondent.

16. The reliance of the learned senior counsel on the reported decision in Rajesh Ranjan case, cited supra, is also of no consequence because we find that the Supreme Court in that case had allowed the said Member of Parliament obviously to save his membership because he was not able to take oath and that would have resulted in his losing his seat in the Parliament. It is obviously in that view, that order came to be passed. Learned counsel tries to justify that by allowing the Member to take part in the proceedings of the Parliament, the Supreme Court has laid down a precedent of allowing such Members of the Parliament to attend the Parliamentary proceedings and to cast their votes. We do not think that that is the ratio of the Supreme Court judgment. This is apart from the fact that the Supreme Court in Ananda case, cited supra, had clearly found that where there is no question of the custody being illegal then, there cannot be the assertion of any such rights. Learned counsel suggests that both the

cases would not be applicable because they were the cases under the preventive detention whereas, in the present case, the respondent herein is facing the trial and is in the judicial custody and is in that sense in the loco parents of the Court of Law. We do not think that any difference could be made merely because in those cases the petitioner was under the preventive custody and in this case, the respondent is under the judicial custody. The question is only about the legality of his custody. If the custody is lawful then, he cannot assert his rights as a Member of Parliament to attend the proceedings whenever there is a session or whenever there is an occasion for him to do so.

17. Shri Chandru, by way of his last submission, relied on the ruling of the Supreme Court in *State of Maharashtra Vs. Prabhakar Pandurang*

Sangzgiri and Another, . The petitioner therein was under the preventive detention and while in jail, he had authored a book which he wanted to

send out of jail for its publication and the State Government had refused the permission. The petitioner moved the High Court by way of a writ

petition wherein, the High Court allowed the writ petition, which was challenged by the State before the Supreme Court. The Supreme Court had

also dismissed the appeal. Learned senior counsel tries to rely on this decision to suggest that there could not be rules for anything and everything

and, therefore, merely because the rules were not there in the present case, it should not by itself desist us from using our discretion in favour of the

respondent.

18. There is no dispute regarding the principle laid down in the said ruling but, in our opinion, the ruling is not applicable to the present set of facts.

It must be clarified that it is not because there is a complete absence of the rule that the respondent is not being sent for attending the Parliamentary

proceedings and to cast his vote. In fact, we are convinced that there would be no question of entertaining the petition on account of the absence

of the right on the part of the respondent herein to have the relief. It is for this reason that we are not in agreement with the learned single Judge.

19. For the reasons stated above, we do not think that the learned single Judge was right in giving the directions as he did. The "advance order"

passed by the learned single Judge shall stand set aside. The writ petition shall stand dismissed. The appeal is allowed. Connected C.M.P.

No.6700 of 2003 is closed. No costs.