

(1995) 12 KL CK 0026

High Court Of Kerala

Case No: O.P. (Habeas Corpus) No. 16639 of 1995-6

Mohammed Sali

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision: Dec. 15, 1995

Acts Referred:

- Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Section 11, 3(1)
- Constitution of India, 1950 - Article 22(5)
- National Security Act, 1980 - Section 3

Citation: (1996) 2 ALT(Cri) 80 : (1996) CriLJ 1225 : (1996) 2 ILR (Ker) 109 : (1996) 1 RCR(Criminal) 556

Hon'ble Judges: P.V. Narayanan Nambiar, J; B.M. Thulasidas, J

Bench: Division Bench

Advocate: M.N.S. Nayar, for the Appellant; Lal George, G.P. for Respondent Nos. 1 and 3 and M.V.S. Nampoorthiri, ACGSC, for the Respondent

Final Decision: Allowed

Judgement

P.V. Narayanan Nambiar, J.

The father of detenu Mohammed Sali Ansar, who has been, detained under Sections 3(1)(i) and 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the COFEPOSA Act"), seeks a Writ of Habeas Corpus to set his son at liberty.

2. On 11-8-1994, an unaccompanied baggage was cleared by the detenu from the Trivandrum Airport on payment of duty. While the goods were taken to a metador pick-up van, it was intercepted by the Senior Intelligence Officer, Directorate of Revenue Intelligence, Trivandrum and a few of his subordinates. As the Officers have entertained a reasonable belief that the unaccompanied baggage contained contraband goods which are not declared, the entire goods were taken to the

Customs House where the baggage was opened and inspected. On inspection, it was found that the baggage contained undeclared articles, the total market value of which was estimated at Rs. 26,22,220/-. But, the detenu had only declared articles valued at Rs. 11,150/- for which. he paid Rs. 12,750/- as customs duty. On questioning, the detenu had said that the goods did not belong to him, but those were only sent in his name. He also added that he did not possess any document to show that the excess goods suffered customs duly. The articles were seized as the same had been smuggled to India without valid import licence. The detenu was arrested. On questioning him, it was revealed that he was in Riyadh and had returned to India a week prior to 11-8-1994. He was produced before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam and was released on bail on 23-8-1994. The entire goods seized were later confiscated. The detenu did not stake his claim for the goods.

3. While so, on 19-4-1995, the first respondent, State of Kerala, passed an order under Sections 3(1)(i) and 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, directing the detention of the detenu. The order was executed on 24-4-1995. Grounds of detention as well as the copies of the documents which formed the basis thereof were furnished to the detenu subsequently. The detenu is being detained in the Central Prison, Trivandrum. The petitioner made Ext. P3 representation of the Chairman of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. Advisory Board on 26-6-1995 in which he prayed for revocation of the order of detention passed against his son. Though the representation is addressed to the Chairman of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, Advisory Board, it was sent to the State Government by the Jail authorities, who, in turn, forwarded a copy to the Advisory Board. Another copy of the representation was forwarded to the Central Government by the State Government, and copy was retained by the State Government. The Advisory Board considered the representation and rejected the same. The State Government also considered and rejected it and later chose to confirm the order of detention.

4. Though several points were raised in the Original Petition, only one point was pressed before us and that was ; though a copy of Ext. P3 representation was forwarded by the State Government to the Central Government, it was not considered by it in the proper perspective. The second respondent, Union of India, has failed in its constitutional obligation and thereby violated Article 22(5) of the Constitution of India and Section 11 of the COFEPOSA Act. We are of the view that there is considerable force in this contention.

5. Ext. P1 is the order of detention in which it is slated that if the detenu desires to make a representation to the Central Government or to the Advisory Board, the same may be addressed to the Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi or to the Chairman of the

COFEPOSA Advisory Board, High Court of Kerala, Ernakulam, as the case may be and the same may be forwarded through the Superintendent of Central Prison, Trivandrum. It is admitted that the petitioner made a representation addressed to the Chairman of the COFEPOSA Advisory Board with sufficient number of copies which he handed over to the Superintendent of the Central Prison, Trivandrum. The representations were rightly forwarded by the Superintendent, Central Prison, Trivandrum to the State Government, who in turn, forwarded a copy to the second respondent, Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi. The representation forwarded to the second respondent was rejected as per order dated 7-8-1995. Though copy of the order is not exhibited, the File containing the reply was produced before us. We quote the reply hereunder :

"F. No. 686/64/95-CUS-VIII

Government of India

Ministry of Finance

Department of Revenue

Central Economic Intelligence Bureau

6th Floor, B-Wing, Janpath Bhawan

New Delhi, August 7, 1995.

To:

Commissioner & Secretary to Government (Home), Government of Kerala, Thiruvananthapuram.

Sub : Representations from the Cofeposa detenu Shri Mohd. Salih Ansar.

Sir,

Please, refer to your letter No. 8424/SSA1195/ Home dated 6-7-95 on the above subject and to state that the representations dated 26-6-95 from Shri Mohd. Salih Ansar and his father Shri Mohd. Salih are addressed to the Chairman, State Advisory Board (COFEPOSA), High Court of Kerala and there is no point made by the detenu or by his father concerning the Central Government. In view of this, it is requested that the State Government may please consider these representation and dispose of them accordingly and reply sent to this Ministry.

Yours faithfully,

Sd/-

(JAMNA DASS)

Under Secretary to the Govt of India"

It is clear from the above that there was no proper consideration of the representation by the Central Government and the same was rejected not on merits, but on a technical ground that "there is no point made by the detenu or by his

father concerning the Central Government" and what the Central Government has done is directing the State Government to dispose of the representation.

6. On a combined reading of Article 22(5) of the Constitution of India and Section 11 of the COFEPOSA Act, it is clear that the detenu is entitled to make a representation to the Central Government also and it is bound to consider the same and pass orders thereon. Consideration should be made of all relevant particulars. The points raised in the representation, copy of which is Ext. P3, should have been specifically referred to and answered. The order should show that the representation had been considered after proper application of mind. In the counter affidavit filed by the second respondent, the stand taken is that "since the representation from the father of the detenu was not addressed to the Central Government nor any request was made for consideration of the representation by the Central Government, no need was felt to inform the detenu about disposal of his representation."

7. From the reply to the representation passed by the Central Government and also the stand taken in the counter affidavit, it is clear that there was no proper application of mind by the second respondent with regard to the matters contained in Ext. P3 representation. None of the points raised there were touched and a speaking order was not passed. The reasons for rejecting the representation are thoroughly vague and unsatisfactory.

8. The stand taken by the Central Government that they are not bound to consider the representation as the same was not addressed to it cannot be countenanced. It is admitted that a copy of Ext. P3 representation was received by the Central Government as forwarded by the State Government. The purpose for which the representation was forwarded by the State Government is for the consideration by the Central Government. When the Central Government received the representation seeking release of the detenu, it is bound to consider the same irrespective of the fact that the representation was addressed to it or not. It must be borne in mind that the State Government forwarded a copy of the representation to the Central Government for its consideration and not merely for the sake of information. In matter which involves the liberty of a citizen, technicalities should not have weighed with the Central Government. On the other hand, they were obliged to consider the representation on its merits.

9. The question whether the Central Government is obliged to consider the representation of a detenu only when it is addressed to it came up for consideration of the Supreme Court on more than one occasion. In [Smt. Gracy Vs. State of Kerala and another](#), it was held that irrespective of the question whether it was addressed to the authority who is bound to consider the representation under Article 22(5) of the Constitution of India or not, it must be considered on its merits and orders passed thereon. Whether a representation is addressed to it or not is insignificant. The mode of address is only a matter of form which cannot whittle down the requirement of the constitutional mandate in Article 22(5) enacted as one of the

safeguards provided to the detenu in case of preventive detention.

10. A similar question was again considered in *Jai Parkash v. District Magistrate* (1993 (1) SCC (Supp) 392). A representation was handed over to the Superintendent of Jail by the detenu addressed to the "Home Secretary" without further indicating whether he meant Home Secretary to the State Government or the Central Government. It was forwarded to the State Government and not to the Central Government. The State Government rejected the representation. The detenu challenged his detention in which he inter alia contended that his representation was not considered by the Central Government. The stand taken by the authorities was that no representation was addressed to the Central Government. But the Supreme Court held that despite the fact that it was received by the State Government, the State Government was obliged to send a copy to the Central Government when sufficient number of copies were furnished by the detenu. The Supreme Court further held that "in that view of the matter, the detenu was denied his right to make an effective representation and on that short ground his detention is liable to be quashed."

11. The right of the State to detain a person who is indulging in smuggling activities is recognised by law. At the same time, the right of the citizen to make representation against his detention is also guaranteed by the Constitution. When the purpose for making representation is to bring to the notice of the authorities constituted under the COFEPOSA Act the grounds in which he seeks his release, this right of a citizen will be real, effective and meaningful only when there is proper consideration of the representation by the prescribed authorities. Law does not envisage disposal of the representation on a technical ground or in a clumsy way. Law expects and justice demands that every representation should be considered in the right perspective and every point raised therein should be considered by the authorities. Application of mind is a sine qua non of consideration of the representation. In the instant case, we are satisfied that the right guaranteed under Article 22(5) of the Constitution is violated by the Central Government and so the order of detention is bad in law; hence, liable to be quashed.

12. As we are quashing the order of detention and ordering release of the detenu on a technical ground, naturally, a question may arise whether it is possible for the detaining authority to pass fresh orders of detention.

13. We heard counsel appearing on either side on this point. After hearing counsel and having bestowed attention on the various decisions cited by either side, we are of the view that it is not illegal on the part of the detaining authority to pass fresh order of detention, if it chooses to do so, on the basis of the materials available which will warrant an order of detention. The decision reported in *Distt. Magistrate v. R. Kumaravel* (1994 SCC (Cri) 229), comes to our rescue. The Supreme Court, while quashing the order of detention, held in the operative portion of the judgment that "it would, however, be open for the detaining authority to consider afresh keeping

in view the present circumstances and activities of the respondents, the question of detention in accordance with law."

14. In *State of Maharashtra v. Manik* (1994 (2) SCC (Supp) 565), which is a case coming under the National Security Act, 1980, it was held while quashing the order of detention, that "however, it is always open to the State if it is satisfied that either of the two conditions enumerated under Sections 3(a) or (b) still prevailing, to pass an order".

15. Accordingly, we quash Ext. P1 order of detention. The detenu, Mohammed Salih Ansar, Detenu No. 1379, Central Prison, Trivandrum, will be released from Jail forthwith. His continued detention is declared to be illegal. However, we make it clear that we did not consider the grounds of detention while quashing the order and it will be open to the appropriate authority to consider afresh, keeping in view the present circumstances and activities of the detenu, the question of detention in accordance with law.

The Original Petition is allowed.