**(2011) 09 MAD CK 0101**

**Madras High Court (Madurai Bench)**

**Case No:** HCP (MD) No. 489 of 2011

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| K. Lakshmi | APPELLANT |
| Vs | |
| The Secretary to Government, Home, Prohibition and Excise Department, Secretariat, Chennai-9 and The District Collector and District Magistrate Tuticorin District | RESPONDENT |

**Date of Decision:** Sept. 6, 2011

**Acts Referred:**

- Constitution of India, 1950 - Article 21, 22, 22(5)

**Hon'ble Judges:** P.P.S. Janarthana Raja, J; Aruna Jagadeesan, J

**Bench:** Division Bench

**Advocate:** M. Vinoth Singh Misra, for the Appellant; P. Jyothi, for the Respondent

**Final Decision:** Allowed

**Judgement**

@JUDGMENTTAG-ORDER

The Honourable Mrs. Justice Aruna Jagadeesan, J.
The Petitioner is the wife of the detenu. The Petitioner has come forward with this Habeas Corpus Petition, seeking for the relief of quashing the impugned detention order dated 24.05.2011, slapped on her husband as "Goonda" as contemplated under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Slum-Grabbers and Video Pirates Act, 1982 (Tamil Nadu Act 14/1982)

2. Mr. M. Vinoth Singh Misra, the Learned Counsel for the Petitioner challenged the impugned detention order on three grounds, viz. (i) the impugned order of detention was passed even without mentioning that there is "imminent possibility" or "real possibility" or "very likely" or "most likely" for the detenu to come out on bail

and without any subjective satisfaction and without cogent material available on record, the detaining authority has arrived at the conclusion that the detenu is likely to indulge in such activities, which are prejudicial to the maintenance of public order, the impugned detention order was passed and hence, the same is vitiated, (ii) as seen from the Proforma filed by the Respondents, there is totally unexplained delay of twenty three days in considering and disposing of the representation of the detenu by the Government, which would vitiate the impugned detention order and (iii) there is non application of mind by the detaining authority, inasmuch as the detaining authority has stated in the grounds of detention that the detenu has not filed any bail application in any of the court, whereas the Petitioner has already filed a bail application in Cr. No. 105/2011 before the learned Principal Judge, Tuticorin in Cr.MP. No. 1177/2011 on 18.05.2011 and the same is pending.

3. Per contra, Mr. P. Jyothi, the learned Additional Public Prosecutor would submit that there is no illegality or infirmity in the impugned order of detention. It is contended that the detaining authority has observed that there is a compelling necessity to detain the detenu in order to prevent him from indulging in such activities, which are prejudicial to the maintenance of public order under the provisions of the Tamil Nadu Act 14 of 1982 and as such, the detaining authority has rightly passed the impugned detention order.

4. The learned Additional Public Prosecutor would submit that ten intermittent holidays intervened which has resulted in the delay in considering the representation and that there was no deliberate delay on the part of the authorities concerned to consider and dispose of the representation of the detenu. It is contended that such a delay is not fatal to the impugned detention order, as the authorities concerned are dealing with the file right from the date of receipt of the remarks.

5. We have given our careful and anxious consideration to the rival submissions put forward by the Learned Counsel on either side and thoroughly scanned through the impugned detention order and the entire materials available on record.

6. The perusal of the impugned order of detention would reveal that there is absolutely no specific mentioning to the effect that there is "imminent possibility" or "real possibility" or "very likely" or "most likely" for the detenu to come out on bail. It is also relevant to note that the detaining authority has stated in paragraph No. 4 of the detention order as hereunder:

I am aware that Thiru.Kasirajan @ Kundu Kasi has been remanded to judical custody by Judicial Magistrate, Srivaikundam on 7.5.2011 and his remand was extended up to 27.05.2011. He is a remand prisoner lodged in the District Jail, Srivaikundam. I am also aware that he has not filed any bail application in any court. There is a compelling necessity to detain him in order to prevent him from indulging i such further activities, which are prejudicial to the maintenance of public order under the

provisions of the Tamil Nadu Act 14 of 1982.

7. The above finding of the detaining authority is based on mere surmises and conjectures. The detaining authority without any subjective satisfaction and without any cogent material available on record has arrived at the conclusion that the detenu is likely to indulge in such activities which are prejudicial to the maintenance of public order. In the absence of any materials on record, on the basis of which, the detaining authority could be satisfied that the detenu is likely to indulge in such activities which are prejudicial to the maintenance of public order, the mere ipse-dixit of the detaining authority is not sufficient to sustain the order of detention.

8. At this juncture, it is relevant to refer to the decision of the Hon''ble Apex Court in T.V. Saravanan alias S.A.R. Prasanna Venkatachariar Chaturvedi v. State, through Secretary and Anr. reported in 2006 (1) MLJ (Cri) 539. The Hon''ble Apex court in the said decision held as hereunder:

The Courts had rejected the bail applications moved by the Appellant and there was no material whatsoever to apprehend that he was likely to move a bail application or that there was imminent possibility of the prayer for bail being granted. The "imminent possibility" of the Appellant coming out on bail is mere ipse dixit of the detaining authority unsupported by any material whatsoever. There was no cogent material before the detaining authority on the basis of which the detaining authority could be satisfied that the detenu was likely to be released on bail. The inference has to be drawn from the available material on record. In the absence of such material on record the mere ipse dixit of the detaining authority is not sufficient to sustain the order of detention.

9. In Abdul Sathar Ibrahim Manik Vs. Union of India and others, , it is held as follows:

Where the detenu was in custody at the time of passing an order of detention what is strictly required is whether the detaining authority was aware of the fact that the detenu was in custody, and if so was there any material to show that there were compelling reasons to order detention in spite of his being in custody. These aspects assume importance because of the fact that a person who is already in custody is disabled from indulging in any prejudicial activities and as such the detention order may not normally be necessary. Therefore, the law requires that these two tests have to be satisfied in the case of such detention of a person in custody.

10. In yet another decision of the Honourable Supreme Court reported in Ramesh Yadav Vs. District Magistrate, Etah and Others, , the Honourable Supreme Court has observed as follows:

Where the order of detention was passed because the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area, the same was not proper. If the apprehension of

the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail, an order of detention under the Act should not ordinarily be passed.

11. In a recent decision of the Honourable Supreme Court reported in 2011 3 MLJ Crl 422 SCC (Rekha v. State of Tamil Nadu, through Secretary to Government and Anr. the Honourable Supreme Court has held that the detention order under the preventive detention law on the ground that in similar case, the bail has been granted is illegal, when there is no pendency of any bail application filed by the detenu. It is held as follows:

7. In the opinion of this Court, if details are given by the Respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the Petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the Petitioner, then the Petitioner is ordinarily granted bail. However, the Respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipso dixit statement in the grounds of detention cannot sustain the detention order and has to be ignored.

24. In the opinion of this Court, there is a real possibility of release of a person on bail, who is already in custody provided that he has moved a bail application, which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail and hence, the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released o bail even though no bail application of his is pending, since most Courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed.

12. The principles laid down in the decisions cited supra are squarely applicable to the facts of the present case. In this case also, the detaining authority, in the absence of any cogent material available on record, has come to the conclusion that the detenu will indulge in such activities, which are prejudicial to the maintenance of public order under the provisions of the Tamil Nadu Act 14 of 1982 and there is a compelling necessity to detain him in order to prevent him from indulging in such activities which are prejudicial to the maintenance of public peace and order. The

inference must be drawn from the available material on record and must not be the ipse-dixit of the officer passing the order of detention. Hence, the impugned order of detention is vitiated.

13. In so far as the contention raised by the Learned Counsel for the Petitioner as regards the delay in considering and disposing of the representation of the detenu by the authorities is concerned, it is seen from the Proforma filed by the Respondents that there is an unexplained delay in considering and disposing of the representation of the detenu at two different stages. The perusal of the proforma would reveal that the detenu sent his representation dated 21.06.2011 and the same was received by the Government on 22.06.2011 and remarks were called for on 23.06.2011 and reminders were sent on 30.06.2011 and 08.07.2011 and remarks have been received on 12.07.2011. Therefore, it is evident that at the first stage, after deducting six intermittent holidays, there is a delay of fourteen days. There is absolutely no explanation whatsoever forthcoming from the authorities concerned for such a delay.

14. It is also pertinent to note that at the second stage, the file was submitted on 12.07.2011 and the authorities concerned, after the receipt of the remarks, dealt with the remarks on 13.07.2011 and the Hon''ble Minister for (Electricity and Prohibition and Excise) dealt with the remarks on 21.07.2011 and the rejection letter was prepared on 22.07.2011 and the rejection letter was sent to the detenu on 25.07.2011 and ultimately the same was served on the detenu on 26.07.2011. Therefore, it is evident that there is a further delay of nine days in considering and disposing of the representation of the detenu and there is, totally, twenty three days delay in considering the representation of the detenu. But, there is absolutely no explanation whatsoever forthcoming from the authorities concerned for such a delay.

15. At this Stage, it is relevant to refer to a few decisions of the Honourable Supreme Court and the same are extracted as follows:

(i) The Hon''ble Apex Court in Rashid Sk. Vs. State of West Bengal, has held as follows:

The ultimate objective of this provision can only be the most speedy consideration of his representation by the authorities concerned, for, without its expeditious consideration with a sense of urgency the basic purpose of affording earliest opportunity of making the representation is likely to be defeated. This right to represent and to have the representation considered at the earliest flows from the constitutional guarantee of the right to personal liberty - the right which is highly cherished in our Republic and its protection against arbitrary and unlawful invasion.

(ii) The Honb''le Apex Court in Sri Ram Skukrya Mhatre Vs. R.D. Tyagi and Others, held that the right to representation under Article 22(5) of the Constitution of India includes right to expeditious disposal by the State Government. Expedition is the

rule and delay defeats mandate of Article 22(5) of the Constitution of India.

(iii) In Aslam Ahmed Zahire Ahmed Shaik v. union of India and Ors. reported in 1989 SCC (Cri) 554 has held:

The supine indifference, slackness and callous attitude on the part of the Jail Superintendent who had unreasonably delayed in transmitting the representation as an intermediary, had ultimately caused undue delay in the disposal of the Appellant''s representation by the government which received the representation 11 days after it was handed over to the jail Superintendent by the detenu. This avoidable and unexplained delay has resulted in rendering the continued detention of the Appellant illegal and constitutionally impermissible.

...

When it is emphasised and re-emphasised by a series of decisions of the Supreme Court that a representation should be considered with reasonable expedition, it is imperative on the part of every authority, whether in merely transmitting or dealing with it, to discharge that obligation with all reasonable promptness and diligence without giving room for any complaint of remissness, indifference or avoidable delay because the delay, caused by slackness on the part of any authority, will ultimately result in the delay of the disposal of the representation which in turn may invalidate the order of detention as having infringed the mandate of Article 22(5).

(iv) In Tara Chand Vs. State of Rajasthan and Others, and Raghavendra Singh Vs. Superintendent, District Jail, Kanpur and Others, , the Apex Court held that any inordinate and unexplained delay on the part of the Government in considering the representation

renders the detention illegal.

(v) In yet another decision of the Hon''ble Apex Court reported in Rajammal Vs. State of Tamil Nadu and Another, , it is held that it is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words "as soon as may be" in Clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is preempted from explaining any delay which would have occasioned in the disposal of the representation. The Court can certainly consider whether the delay was occasioned due to the permissible reasons or unavoidable causes. If delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but

how it is explained by the authority concerned. Even the reason that the Minister was on tour and hence there was a delay of five days in disposing of the representation was rejected by the Apex Court holding that when the liberty of a citizen guaranteed under Article 21 of the Constitution of India is involved, the absence of the Minister at head quarters is not sufficient to justify the delay, since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen.

(vi) In K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, , it is held as follows:

That part, it is settled law that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of the representation would be breach of the constitutional imperative and it would render the continued detention impermissible and illegal.

16. The right to make a representation against an order of detention is not only a constitutional right, but a statutory right as well. Since the Constitution as also the Act specifically provide that the detenu shall be given the earliest opportunity of making a representation against the order of detention, it is implicit that there is a corresponding duty on the authorities to whom the representation is made to dispose of the representation at the earliest or else the constitutional and the statutory obligation to provide the earliest opportunity of making a representation would lost both its purpose and meaning. The court in a large number of cases, has already laid down the principle in clear and specific terms that the representation has to be disposed of at the earliest and if there has been any delay in the disposal of the representation, the reasons for the delay must be indicated to the court or else the unexplained delay or unsatisfactory explanation in the disposal of the representation would totally affect the order of detention and in that situation, continued detention would become bad.

17. this Court has repeatedly held that even the unexplained delay of three days is construed to be fatal to the detention order in the decision reported in 2007 (2) MWN (Cr.) 145 (DB) Sumaiya v. The Secretary to Government, Prohibition and Excise Department, Government of Tamil Nadu, Fort St. George, Chennai-9 and Anr.. this Court has also held that the unexplained delay in the disposal of the representation would definitely amount to breach of the constitutional imperative and the same would render a continued detention impermissible and illegal. It is well settled that there should not be supine indifference, slackness or callous attitude in considering the representation. In the decisions cited supra, the unexplained delay of even three days is held to have vitiated the order of detention.

18. In so far as the case on hand is concerned, we have already pointed out that there is, totally, unexplained delay of twenty three days in considering and disposing of the representation of the detenu and as such, the same would vitiate

the impugned order of detention. It is needless to say that the guarantee of earliest disposal of the representation set out in Article 22(5) of the Constitution of India has been infringed.

19. Further, as rightly contended by the Learned Counsel for the Petitioner, the detaining authority had passed the impugned detention order mechanically and there is non application of mind by the detaining authority, inasmuch as the detaining authority has stated in the grounds of detention that the detenu has not filed any bail application in any of the court, whereas it is seen from the counter filed by the Respondents that +admittedly the Petitioner has already filed a bail application in Cr. No. 105/2011 before the learned Principal Judge, Tuticorin in Cr.MP. No. 1177/2011 on 18.05.2011 and the same is pending.

20. In the light of the above said principles laid down by the Honourable Supreme Court and for the reasons stated above, the impugned order of detention is vitiated and the same is liable to be quashed.

21. In the result, this Habeas Corpus Petition is allowed and the impugned detention order passed by the 2nd Respondent in HS(M).Confdl. No. 6/2011 dated 24.05.2011 is hereby quashed and the detenu Kasirajan @ Kundu Kasi is directed to be set at liberty forthwith, unless his detention is required in connection with any other case.