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(2011) 12 MAD CK 0091

Madras High Court (Madurai Bench)

Case No: H.C.P. (MD) No. 937 of 2011

Kamalam		APPELLANT
	Vs	
The State of Tamil Nadu		RESPONDENT

Date of Decision: Dec. 14, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 167(2)
- Penal Code, 1860 (IPC) - Section 302, 395
- Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers, Act, 1982 - Section 3(1), 3(2)

Citation: (2011) 12 MAD CK 0091

Hon'ble Judges: S. Nagamuthu, J; M. Jaichandren, J

Bench: Division Bench

Advocate: R. Diwakaran, for the Appellant; T. Mohan, Additional Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

M. Jaichandren, J.
This Habeas Corpus Petition has been filed to call for the records relating to the order of the second respondent, dated 28.09.2011, made in H.S.(M) Confdl. No. 18 of 2011, and quash the same, and to produce the detenu, namely, Kutti @ Narasimmon, son of Malaiappa Nadar, aged about 34 years, confined in the Central Prison, Palayamkottai, before this Court and to set him at liberty.

2. The petitioner has stated that the second respondent had passed the impugned detention order, dated 28.09.2011, under sub-section (1) of Section 3 of the Tamil Nadu Prevention of Dangerous Activities of Boot-leggers, Drug-Offenders, Forest-Offenders,

Goondas, Immoral Traffic Offenders, Sand Offenders, Slum-Grabbers and Video Pirates Act, 1982. (Tamil Nadu Act 14 of 1982), read with the order issued by the State Government, in G.O.(D). No. 150, Home, Prohibition & Excuse (XVI) Department, dated 18.07.2011, under sub-section (2) of Section 3 of the said Act, directing the detention of Kutti @ Narasimmon, in the Central Prison, Palayamkottai, terming him as a "Goonda".

3. Even though various grounds had been raised in the Habeas Corpus Petition filed by the petitioner, the learned counsel appearing on behalf of the petitioner had placed emphasis on the grounds, mentioned hereunder, while stating that the impugned detention order passed by the Detaining Authority is bad in the eye of law. He had submitted that there was clear non-application of mind, on the part of the Detaining Authority, while passing the detention order against the detenu.

4. The learned counsel appearing for the petitioner had referred to Paragraph No. 4 of the grounds of detention, which reads as follows:

I am aware that Thiru Kutti @ Narasimmon has been remanded to Judicial custody by the Judicial Magistrate, Tiruchendur on 16.08.2011 till to 30.09.2011 in the ground case. He is a remand prisoner lodged in the Central Prison, Palayamkottai. I am aware that Thiru Kutti @ Narasimmon is in remand in Arumuganeri P.S. Cr. No. 223/11 and also in Kurumbur P.S. Cr. No. 131/11. He has filed bail application in both cases in the court of Principal Sessions, Thoothukudi in Cr.M.P. No. 2687/11 and 2822/11 which come for hearing on 29.09.2011 and 30.09.2011 respectively. Further the recourse of normal criminal law would not have the desired effect of effectively preventing him from indulging in such activities which are prejudicial to the maintenance of public order. On the materials placed before me, I am satisfied that the said Thiru Kutti @ Narasimmon is a "Goonda" and there is a compelling necessity to detain him in order to prevent him from indulging in such further activities in future which are prejudicial to the maintenance of public order under the provisions of Tamil Nadu Act 14 of 1982.

5. He had further submitted that it is clear, from the above paragraph, that the Detaining Authority was aware that the detenu had been remanded in custody, in the ground case. Thus, the statement of the Detaining Authority that the detention order was being passed, in order to prevent the detenu from indulging in activities prejudicial to the maintenance of public order, has been made, without any materials on record. As such, it is clear that it is an ipse dixit of the Detaining Authority. It clearly shows the non-application of mind, by the Detaining Authority, while passing the detention order.

6. The learned counsel had also submitted that the Detaining Authority has not made out a case against the detenu to show that there was an imminent or a real possibility of the detenu coming out on bail. In fact, the Detaining Authority had not even mentioned about the existence of an imminent possibility or a real possibility of the detenu being released on bail and that he would induge in activities prejudicial to the maintenance of public order, thereafter.

7. The learned counsel had further submitted that the Detaining Authority had not mentioned about similar cases, wherein, bail orders had been granted, by the Courts concerned.

8. The learned counsel for the petitioner had relied on the decision of the Supreme Court, in Rekha Vs. State of T. Nadu tr. Sec. to Govt. and Another, wherein, it has been held that, where a detention order is passed against a person already in custody, there should be a real possibility of his release on bail, if he has moved a bail application, and if it 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 a likelihood of the detenu being released on 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, without which, the bald statement of the authority cannot be believed.

9. The learned counsel had also submitted that, if a person is already in prison, unless a co-accused in the alleged offence had already been released, it cannot be concluded that there is an imminent possibility of the detenu coming out on bail, and that he would indulge in activities prejudicial to the maintenance of public order. Even in such a case, the co-accused ought to have been involved in the committing of the alleged offence, similar to that of the detenu, in all aspects. The learned counsel for the petitioner had also submitted that there were no cogent materials available before the Detaining Authority for the passing of the detention order, based on his subjective satisfaction.

10. Per contra, the learned Additional Public Prosecutor appearing on behalf of the respondents had submitted that the Habeas Corpus Petition, filed on behalf of the detenu, is premature in nature. He had submitted that the Habeas Corpus Petition has been filed even before the order of detention, passed by the Detaining Authority, had been considered by the Advisory Board. Therefore, it is liable to be dismissed. He had relied on the decision of the Kerala High Court, in R.P. Goyal and Another Vs. The State of Kerala and Others, , wherein, it has been held that the protection envisaged by the Constitution of an Advisory Board, for looking into the defects in the passing of an order of detention, is a substantial protection. Normally, therefore, before the order has become final, on the application of mind relating to the question of existence or otherwise of the grounds justifying the detention, by the State Government, and the Advisory Board expressing its opinion, as to whether there is sufficient cause for such detention, it should not be interfered with by the High Court, as it should not deal with the question on insufficient material.

11. The learned counsel appearing on behalf of the respondents had relied on the decision of the Supreme Court, in A. Geetha Vs. State of Tamilnadu (CDJ 2006 SC 702),

wherein, it had been held that the only requirement is that the Detaining Authority should be aware that the detenu is already in custody and that he is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be ipse-dixit of the Detaining Authority. It would be sufficient if the Detaining Authority came to the conclusion, by his subjective satisfaction, based on the relevant materials. Normally, such satisfaction is not to be interfered with.

12. In view of the submissions made by the learned counsels appearing on behalf of the petitioner, as well as the respondents, and on a perusal of the records available, and in view of the decisions cited supra, this Court is of the considered view that there was no proper application of mind, by the Detaining Authority, in passing the impugned detention order against the detenu.

13. The Detaining Authority had not stated that there was an imminent or a real possibility of the detenu, who is in custody, coming out on bail and indulging in activities prejudicial to the maintenance of the public order. It is also noted that the Detaining Authority had not mentioned about the similar cases, wherein, bail orders had been granted, by the Courts concerned.

14. Even though the Detaining Authority had stated that there was a compelling necessity to detain the detenu, in order to prevent him from indulging in activities, which would be prejudicial to the maintenance of public order, no cogent materials were available on record to substantiate such a claim.

15. In a number of decisions this Court had held that cogent materials should be available for the Detaining Authority to arrive at his subjective satisfaction for the passing of the detention order. The materials available on record should be sufficient for the Detaining Authority to arrive at his decision that the detenu is likely to be enlarged on bail and that, in such a case, he would indulge in activities, which would be prejudicial to the maintenance of public order. Unless, such materials are available, the decision of the Detaining Authority to detain the detenu, by passing the detention order, would clearly be an indication of non-application of mind on the part of the Detaining Authority, in the passing of the detention order.

15.1) In Velumurugan @ Velu Vs. The Commissioner of Police and Another, , it had been held as follows:

3ï¿½ï¿½ unless there is a clear expression by the detaining authority in the grounds of detention with reference to the imminent possibility of the detenu being released on bail by filing bail application, the detaining authority would not choose to pass the detention order. In order to prevent the detenu from committing the acts, which would be disturbance to public order and public health, the detaining authority shall consider the materials and on the basis of subjective satisfaction that there is imminent possibility of the detenu coming out on bail or likelihood of the detenu being released on bail, the

detaining authority may pass such an order under Tamil Nadu Act 14 of 1982. When such an essential requirement, namely, the imminent possibility of the detenu coming out on bail, is absent, it has to be held that the order of detention is vitiated.

15.2) In Kasthuri Vs. The District Collector and D.M., Kancheepuram (2009 (1) MWN (Cr.) 418 (DB), this Court had set aside the detention order passed against the detenu stating that the Detaining Authority had not followed the guidelines prescribed by the Supreme Court, in D.K. Basu Vs. State of W.B., (1997 SCC (Cri) 92), and the other decisions of the Supreme Court, wherein, the following facts were considered as being violative of the orders of preventive detention passed by the Detaining Authorities concerned:

(a) Non-intimation of the detention order to any of the family members or friends within a reasonable time

(b) Delay in considering the representation made by the detenu or any other person interested, on behalf of the detenu.

(c) Non-supply of copies of material documents relied on by the Detaining Authority.

(d) Furnishing illegible copies of documents, so as to prevent detenu from making effective representation as contemplated under the Act.

(e) Non-furnishing of copies translated in the language known to the detenu for making effective representation.

(f) Non-application of mind by the Detaining Authority in having subjective satisfaction while passing the order.

15.3) In A. Murugesan Vs. Secretary to Government (2010 (1) MLJ (Crl.) 950), it had been held that, while no bail application had been filed on behalf of the detenu, before the Court concerned, it would be too early for the detaining authority to record his satisfaction that the detenu is likely to come out on bail or that, if he is let to remain at large, he would indulge in such activities, in future, which would be prejudicial to the maintenance of public order. Unless, cogent materials are available, the subjective satisfaction of the detaining authority would be a clear indication of the non-application of mind by the detaining authority in the passing of the detention order.

15.4) In Balaji Vs. State of Tamil Nadu (2010 (1) CTC 820), a Division Bench of this Court, referring to the decisions, in Chandru Vs. The Commissioner of Police, Thiruchirapalli City, Trichy and another (2007 (1) TCJ 766, and Chelladurai Vs. State of Tamil Nadu, represented by Secretary to Government, Home, Prohibition and Excise Department, Fort St. George, Chennai-600009, and another, had held that the mere statement of the Detaining Authority, that there is a real possibility of the detenu coming out on bail, especially, when no bail application had been filed on behalf of the detenu, shall not be sufficient to show that the satisfaction recorded by the Detaining Authority is

based on cogent materials.

15.5) In Soosai @ Balu Vs. The Secretary to Government [2011 (1) MWN (Cr.) 416 (DB)], it had been held as follows:

4ï¿½ï¿½.. In the second and Third Adverse cases and also in the Ground case, the detenu has not moved for any bail. Apart from this, the Second Adverse case is one for murder. But the Authority has mechanically stated in the order that there is a real possibility of the detenu coming out on bail. The said observation is without any basis or material much less cogent material, which the law would require.

15.6) In Gowri Vs. The Secretary to Government of Tamil Nadu, Home, Prohibition and Excise Department and The District Collector and District Magistrate, this Court had held that the subjective satisfaction recorded by the Detaining Authority was without sufficient or cogent materials, relying on the decision of the Full Bench of this Court, in Kalaiselvi, G. Vs. The State of Tamil Nadu (2007 (5) CTC 657), wherein, it had been held as follows:

24. From the reading of the aforesaid decisions, it is clear that the conclusion of the Detaining Authority that there is imminent an possibility of the detenu being released on bail must be based on cogent materials and not on the mere ipse dixit of the Detaining Authority. As has been observed by the Supreme Court, the question as to whether there is possibility of being released on bail depends upon several factors, such as nature of offence, the stage of the investigation, the availability of statutory bail as envisaged u/s 167(2), Proviso of Cr.P.C. Even though it is not possibility nor desirable to enumerate the circumstances in which bail is likely to be granted, one can venture to say that it is very rare for a Court of law to grant bail during pendency of the investigation when there is allegation of commission of serious offence, such as punishable u/s 302 or Section 395, I.P.C. On the other hand, it is also safe to conclude that in offences relating to prohibition laws or white collar offences, the Courts usually grant bail notwithstanding the fact that in offences relating to prohibition laws or white collar offences, the Courts usually grant bail notwithstanding the fact that investigation may be still going on. Similarly, when a charge-sheet is not filed within the statutory period contemplated, notwithstanding the seriousness of the allegation, on the expiry of the period, the accused got a right to be released on bail.

25. In the present case, the conclusion of the Detaining Authority, as already been extracted. We have searched for the materials on record in support of such conclusion and we find none. There was no imminent possibility of the detenu obtaining statutory bail as hardly 60 days had elapsed from the date of the arrest and the investigating agency had more than a month for completion of the investigation. The alleged offence u/s 302, IPC cannot be characterised as an offence of routine nature which would prompt any Court to grant bail even before completion of investigation. Top of it, the Bail Application had in fact been rejected by the Sessions Judge and no other Bail Application was

pending. In such a factual situation, in our considered opinion, the decision of the Supreme Court in T.V. Saravanan @ S.A.R. Prasana Venkatachaariar Chaturvedi Vs. State through Secretary and Another, is squarely applicable and it can be said that the conclusion of the Detaining Authority is mere ipse dixit and there is hardly any material in support of such conclusion. On this score also, the detention order is liable to be quashed.

15.7) In M. Rajesh Vs. The Government of Tamil Nadu [2011 (1) MWN (Cr.) 279 (DB)], it had been held that, when no bail application is pending, the decision of the Detaining Authority that there was a real possibility of the detenu coming out on bail would show the non-application of mind on the part of the Detaining Authority, in passing the detention order.

16. In such circumstances, this Court is constrained to hold that the impugned detention order, dated 28.09.2011, passed by the Detaining Authority, is devoid of merits and therefore, it is liable to be set aside. Hence, it is set aside. Accordingly, the Habeas Corpus Petition stands allowed. The detenu is directed to be set at liberty, forthwith, unless his detention is required in connection with any other case or cause.