(2011) 11 MAD CK 0150

Madras High Court

Case No: Habeas Corpus Petition No. 910 of 2011

K. Manoharan	APPELLANT
Vs	
State	RESPONDENT

Date of Decision: Nov. 17, 2011

Acts Referred:

- Constitution of India, 1950 - Article 22(5)
- Penal Code, 1860 (IPC) - Section 294, 307, 427, 506
- Tamil Nadu General Clauses Act, 1891 - Section 15

Hon'ble Judges: T. Sudanthiram, J; C. Nagappan, J

Bench: Division Bench

Advocate: N.R. Elango, for Mr. S. Swamidoss Manokaran, for the Appellant; I. Subramanian, Public Prosecutor Assisted by Mr. M. Maharaja Additional Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

C. Nagappan, J.
The cousin of the detenu Hari @ Harikrishnan is the petitioner in this habeas corpus petition, and he has challenged the order of detention passed by the second respondent in BDFGISSV No. 41/2011 dated 14.7.2011.

2. The detaining authority relied on one adverse case viz. Crime No. 187/2011, on the file of T-13 Kunrathur Police Station, and also the ground case in Crime No. 199/2011, on the file of T-13 Kunrathur Police Station, for the alleged offences under Sections 294(b), 427, 307 and 506(ii) IPC, to arrive at a conclusion that the detenu was a Goonda as defined u/s 2(f) of Tamil Nadu Act 14/1982.

3. Though the order of detention is assailed on various grounds, the main submission of the learned Counsel for the petitioner is that the detenu made a

representation dated 20.7.2011, to the detaining authority seeking for revocation of the order of detention, and that representation was not considered by the detaining authority within the stipulated time and the procedure prescribed under law, has also not been followed and hence the order of detention is vitiated.

4. Mr. N.R.Elango, learned Senior Counsel representing the Counsel on record for the petitioner, submits that the authority making the order of detention, shall afford to the person detained, the earliest opportunity of making a representation against the order of detention and a plain reading of Section 14 of the Tamil Nadu Act 14 of 1982, engrafting the provisions of Section 15 of the Tamil Nadu General Clauses Act, 1891, into it, makes it explicitly clear that the legislature purposely retained the power of the detaining authority to rescind, amend or vary its order and that being the position, non-consideration of the representation prior to approval of the detention order, constitutes an infraction of valuable right of the detenu under Article 22(5) of the Constitution of India and that would make the order of detention invalid. In support of his submission, reliance is placed on the following decisions:

(i) Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, ;

(ii) State of Maharashtra and Others Vs. Santosh Shankar Acharya, and

(iii) S. Thai V. State rep. by The Commissioner of Police, Tiruchirappalli and Others 2000 (3) MWN (CRI.) 142).

5. Per contra, Mr. I. Subramanian, learned Public Prosecutor, submits that in view of the language of sub-section (3) of Section 3 of Tamil Nadu Act 14/82, the detaining authority is required to forthwith report the fact of detention to the State Government together with the grounds, on which the order has been made, and the State Government becomes the authority thereafter, either to approve or revoke, and therefore, Act 14/82 never contemplated that the detaining authority has specific power to revoke its own order and it cannot be inferred that a representation can be made to it within the meaning of Article 22(5) of the Constitution and therefore, the representation made by the detenu, can only be to the Government, which has the power to approve or to revoke the same, and in the present case, the detaining authority has forwarded the representation sent by the detenu, to the Government and there is no infirmity in the same. In support of his submission, he placed much reliance on the decision of the Supreme Court in Veeramani Vs. State of T.N., .

6. We bestowed our anxious consideration to the rival submissions made.

7. The impugned order of detention is dated 14.7.2011. The petitioner, namely the cousin of the detenu, has sent a representation dated 20.7.2011, on behalf of the detenu, seeking for revocation of the order of detention. In the counter affidavit filed by the second respondent, namely the detaining authority, it is stated that the representation dated 20.7.2011, sent on behalf of the detenu, was received in his

Office on 22.7.2011, and the same was forwarded to the Government along with para war remarks on 26.7.2011. Learned Counsel for the petitioner also produces a copy of approval order dated 25.7.2011, of the first respondent/State Government served on the detenu. Hence it is an admitted fact that the representation dated 20.7.2011, sent on behalf of the detenu, seeking for revocation of the detention order, was received by the detaining authority and was available with it prior to its approval by the State Government. The further fact remains that the detaining authority has not considered the said representation and it has simply forwarded it with para war remarks to the State Government.

8. Now, the point for determination is whether the failure on the part of the detaining authority to consider the representation sent by the detenu through the petitioner, seeking for revocation, prior to its approval by the State Government, would infract the right of the detenu under Article 22(5) of the Constitution.

9. The Supreme Court in the decision in Veeramani Vs. State of T.N., , considered the question as to whether the detaining authority has the power to revoke within 12 days, namely within the period of approval, and whether it is under an obligation to consider the same within the meaning of Article 22(5) of the Constitution, and held that Tamil Nadu Act 14 of 1982 never contemplated that the detaining authority has specific power to revoke and it cannot be inferred that a representation can be made to it within the meaning of Article 22(5) and therefore, the representation to be made by the detenu, can only be to the Government, which has the power to approve or to revoke. The said observations do not hold the field in view of the subsequent judicial pronouncement of the Constitutional Bench of the Supreme Court in the decision in Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, . The Constitutional Bench has considered the scope of Article 22(5) of the Constitution pertaining to the right of the detenu to make a representation against the order of detention, and held thus:

14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.

10. The authoritative pronouncement of the Constitutional Bench is that the detenu has a right to make a representation to the detaining authority and that authority is competent to give immediate relief by revoking the said order and there is an

obligation on the part of the detaining authority to consider such a representation. The Supreme Court in the subsequent decision in State of Maharashtra and Others Vs. Santosh Shankar Acharya, , while considering the power of the detaining authority to consider the representation of the detenu seeking for revocation of the detention order before its approval, in the light of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders and Dangerous Persons Act, 1981, placed reliance on the decision of the Constitutional Bench referred above, and further held that until the detention order is approved by the State Government, the detaining authority can entertain a representation from the detenu and in exercise of its power u/s 21 of the Bombay General Clauses Act, 1904, can amend, vary or rescind the order, as is provided u/s 14 of the Maharashtra Act.

11. It is to be noted that Section 15 of the Tamil Nadu General Clauses Act, 1891, is in pari materia similar to Section 21 of the Bombay General Clauses Act, 1904, and it is extracted below:

THE BOMBAY GENERAL CLAUSES ACT, 1904	THE TAMIL NADU GENERAL CLAUSES ACT, 1891
21.Where, by any Bombay Act (or Maharashtra Act), a power to issue notifications, orders, rules or by-laws is conferred, then that power includes power exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or by-laws, so issued.	15.Revocation and alteration of rules, bylaws and orders:- Where an Act confers a power to make any rules or bylaws, or to issue notifications or orders, the power shall be construed asincluding a power exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, bylaws, notifications or orders

Consequently, in the present case also, until the detention order isapproved by the State Government, the detaining authority canentertain a representation from the detenu and in exercise of its power u/s 15 of the Tamil Nadu General Clauses Act, 1891, can amend, vary or rescind the order, as is provided u/s 14 of the Tamil Nadu Act 14 of 1982. In fact, a Division Bench of this Court in the decision in S. Thai V. State rep. by the Commissioner of Police, Tiruchirappalli and Others (2000 (3) MWN (CRI.) 142), has referred to the Constitutional Bench decision in Kamleshkumar Ishwardas Patel''s case and the decision in Santosh Shankar Acharya''s case referred above, and held that the detenu has got a right to make representation to the detaining authority as enshrined in Article 22(5) of the Constitution and it is incumbent on the part of the detaining authority to consider the representation and the failure to inform the detenu of his right to make representation to the detaining

authority would amount to infraction of his constitutional right which would render the order of detention invalid.

12. In view of the judicial dictum of the Constitutional Bench in the decision in Kamleshkumar Ishwardas Patel''s case, the detaining authority that has made the order of detention, is competent to give immediate relief by revoking the said order and it is bound to consider the representation of the detenu till the detention order is approved by the State Government.

13. In the present case, the detaining authority having received the representation sent on behalf of the detenu, before the approval of the detention order, has failed to consider the same, but has simply forwarded it to the State Government for consideration and that would constitute an infraction of the valuable constitutional right guaranteed to the detenu under Article 22(5) of the Constitution and consequently, such failure would make the order of detention invalid. Therefore, for the above reasons, the order of detention is liable to be set aside.

14. In the result, this habeas corpus petition is allowed, and the impugned order of detention in BDFGISSV No. 41/2011 dated 14.7.2011, passed by the second respondent, is set aside. The detenu Hari @ Hari Krishnan, S/o. Deivasigamani, is ordered to be set at liberty forthwith unless his custody is required in connection with any other case.