Thamizhselvi Vs The State

Court: Madras High Court

Date of Decision: June 24, 2014

Acts Referred: Constitution of India, 1950 â€" Article 21, 22, 22(1), 22(5)
Explosive Substances Act, 1908 â€" Section 3
National Security Act, 1980 â€" Section 3, 5
Penal Code, 1860 (IPC) â€" Section 120(b), 120b, 124(A), 147, 148

Citation: (2014) 2 LW(Cri) 533

Hon'ble Judges: V. Dhanapalan, J; G. Chockalingam, J

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

V. Dhanapalan, J.
As the issue involved in all these Petitions is one and the same, they are taken up for disposal by a common order. In all

these cases, the detenus have been detained under National Security Act, 1980 (Central Act 65 of 1980) under various orders of the

Commissioner of Police, Chennai. The case in brief, is as follows:

On the complaint of one G.R. Ashok Kumar, Post Master, Assistant Superintendent of Post Offices, Mylapore, Chennai stating that there was a

fire accident on the early hours of 29.10.2013, in which, the franking machine, air conditioner etc., were burnt, the Inspector of Police, Law and

Order, E-1 Mylapore Police Station, registered a case in Crime No. 1804 of 2013 under Sections 285, 427 IPC r/w Section 3 of TNPPD & L

Act and Section 3 of Explosive Substances Act, 1908. On reliable information, the Inspector of Police, arrested one Umapathy (detenu in HCP

No. 3003 of 2013) on 29.10.2013 and recorded his confession statement. Based on his confession statement, the Inspector of Police arrested the

other accused viz., the detenus in HCP Nos. 3004, 3014 and 3024 of 2013. During investigation, the case was altered into one under Sections

147, 120(b), 124(A), 436 IPC r/w 3 and 4 of TNPPD & L Act and 3 of Explosive Substances Act, 1908. Thereafter, on 29.10.2013 at 17.00

hours, another complaint of attack on Mandaveli post office and residence was received from one Singaram. Based on the said complaint, another

case was registered in Crime No. 1805/2013 under Sections 285, 448, 307 IPC r/w 3of TNPPDL Act and 3 of Explosive Substances Act,

which was later altered into one under Sections 448, 120(b), 124(A), 436, 307 IPC r/w 3 and 4 of TNPP D & L Act and 3 of Explosive

Substances Act, 1908. Since the investigation revealed that these detenus had planned to attack the post office to intimidate and send a strong

signal to the Central Government not to participate in the upcoming Common Wealth Heads of Government Meeting (CHOGM) in Sri Lanka, the

detaining authority clamped the orders of detention against all the four accused.

2. In the counter affidavit filed on behalf of first and second respondents, it has been stated that the arrest of the detenus were informed to the

friend of the detenus viz., Johnson, who also belongs to the same organisation as that of the detenus. It is further stated that the detention orders

have been passed only after arriving at a subjective satisfaction with due application of mind. The sponsoring authority has placed all the relevant

materials before the detaining authority and only after perusing the records, the detention orders have been passed. That apart, the representations

sent on behalf of the detenus have also been duly considered. The documents sought for by the detenus are not relied upon by the detaining

authority and therefore, those documents need not be furnished to them and other documents relied upon by the detaining authority have been

furnished to the detenus. Since the recourse of normal criminal law would not have the desired effect of effectively preventing the detenus from

indulging in such activities which are prejudicial to the maintenance of public order, the detention orders under the National Security Act, 1980

have been passed.

3. We have heard Mr. N.G.R. Prasad, learned counsel for the petitioners; Mr. Shanmuga Velayutham, learned Public Prosecutor appearing for

the State/Respondents 1 and 2 and Ms. P. Bhuvaneswari, learned Senior Central Government Standing Counsel appearing for the third

respondent.

4. Learned counsel for the petitioners attacked the orders of detention passed under the National Security Act on three grounds. Firstly, the arrest

intimation has not been given to the near relatives of the detenus. Therefore, there is a violation of Article 22(1) of the Constitution of India.

Secondly, he would contend that there is a delay in disposal of the petitioners" representations. Right to represent and to consider the same is a

right guaranteed under Article 22(5) of the Constitution of India. Lastly, he assailed the impugned orders of detention on the ground that there is no

subjective satisfaction as the offences in the similar case relied on by the detaining authority are not similar. Therefore, the orders of detention are

vitiated in law.

5. On the above points, we have heard the learned Public Prosecutor for the State/Respondents 1 and 2 and perused the records.

6. Ms. P. Bhuvaneswari, learned Senior Central Government Standing Counsel would submit that all the requirements as per law have been

followed by the Central Government and therefore, there is no violation on the part of the third respondent.

7. Learned Public Prosecutor would submit that in a matter of national security, the State authorities would take all probabilities of indulgence of

the offence committed by the detenus as it would cause panic among the public and maintenance of public order is the matter for the State.

Therefore, in order to prevent any such event and taking into account the security of the country, these impugned orders of detention have been

passed and they cannot be faulted with. He would also submit that there is no delay in consideration of the petitioners'' representation. It has been

explained by the detaining authority and that explanation has to be accepted. He would further submit that material information has been taken into

consideration by the detaining authority in respect of the similar cases as there is a possibility of the detenus coming out on bail and indulging in such

activities which would be prejudicial to the maintenance of public order and therefore, the subjective satisfaction has been arrived at, taking into

account all the probabilities and the likelihood of the detenus coming out on bail. Therefore, similar case materials have been relied on by the

authority and such material consideration is the basic information available to the detaining authority and hence, there is no infirmity in such

consideration.

8. It is seen that the orders of detention have been passed on 01.11.2013 under sub-section (2) of Section 3 of National Security Act, 1980

(Central Act 65 of 1980) against the detenus - (1) Umapathy, (2) Manohar, (3) Marimuthu and (4) Ravanan. As regards the first contention viz.,

non-intimation of arrest of the detenus to the near relatives, the averments made by respondents 1 and 2 in para 6 of the counter would reveal that

at the time of arrest, the arrest was informed to one Johnson - friend of the detenu, who also belongs to the same organisation as that of the detenu.

Therefore, according to the respondents, it is perfectly in accordance with the guidelines laid down by the Supreme Court for making arrest. Only

after investigation, it was found that the said Johnson is also involved in the crime. It is further averred that the arrest intimation given is in

accordance with the guidelines.

9. Article 22(1) of the Constitution of India would mandate that the arrest intimation has to be communicated to the detenu or the near relatives.

The law laid down by the Honourable Supreme Court in A.K. Roy and Others Vs. Union of India (UOI) and Others, and D.K. Basu Vs. State of

West Bengal, would make it clear that the arrest intimation should be given to the close and near relatives or kith and kin of the detenu.

10. In A.K. Roy and Others Vs. Union of India (UOI) and Others, , the Hon''ble Supreme Court held as under:

75. Since Section 5 of the Act provides for, as shown by its marginal note, the power to regulate the place and conditions of detention, there is

one more observation which we would like to make and which we consider as of great importance in matters of preventive detention. In order that

the procedure attendant upon detentions should conform to the mandate of Art. 21 in the matter of fairness, justness and reasonableness, we

consider it imperative that immediately after a person is taken in custody in pursuance of an order of detention, the members of his household,

preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has

been taken in custody. Intimation must also be given as to the place of detention including the place where the detenu is transferred from time to

time. This Court has stated time and again that the person who is taken in custody does not forfeit, by reason of his arrest, all and every one of his

fundamental rights. It is, therefore, necessary to treat the detenu consistently with human dignity and civilized norms of behaviour.

11. In D.K. Basu Vs. State of West Bengal, , the Hon''ble Supreme Court has held as under:

35. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions

are made in that behalf as preventive measures:

(1) .....

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be

attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the

arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be

entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he

has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a

relative of the arrestee.

In the case on hand, admittedly the respondents have given the arrest intimation to the co-accused who belongs to the same organisation as that of

the detenu. This, in our opinion, would not meet the constitutional requirement. On this ground, the impugned orders are vitiated in law.

12. Secondly, as regards the ground of delay in consideration of the representation, Article 22(5) of the Constitution of India contemplates that the

detenu shall be given an earliest opportunity to make a representation and that representation has to be considered in time. Otherwise, it would

defeat the very fundamental right to life under Article 21 of the Constitution of India. In Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and

Anr, , the Honourable Supreme Court has held that the explanation of each day''s delay is not a magical formula and it only means it should be

done with the utmost expedition. In another case in Frances Coralie Mullin Vs. W.C. Khambra and Others, , it has been held that the time

imperative can never be absolute or obsessive. The occasional observations made by the Supreme Court that each day''s delay in dealing with the

representation must be adequately explained are meant to emphasize the expedition with which the representation must be considered and not that

it is a magical formula, the slightest breach of which must result in the release of the detenu.

13. The calculation chart given by the respondents would show that the representations were made by the petitioners herein on behalf of the

detenus, on 21.11.2013 and thereafter, the authority has called for the remarks on the very same day. As 23.11.2013 and 24.11.2013 happened

to be holidays, reminder was made on 29.11.2013 and remarks were received by them only on 02.12.2013. Circulation note was put up on

03.12.2013, the representations were considered by the Under Secretary, Joint Secretary and Principal Secretary on 04.12.2013. On

05.12.2013, the Secretary to Government, Law Department and the Chief Secretary to Government considered the representations and on

06.12.2013, the Minister for Law considered the representation. The representation was considered by the Honourable Chief Minister on

10.12.2013 and rejected on 10.12.2013 and the same was communicated to the detenu on 10.12.2013. In the said process, there were totally six

holidays (23.11.2013, 24.11.2013, 30.11.2013, 01.12.2013, 07.12.2013 and 08.12.2013). On consideration of the said chart, it is seen that

there is a delay of 7 days between 21.11.2013, the date on which remarks were called for and 02.12.2013, the date on which remarks were

received, which is not explained. Therefore, there is a delay in disposal of the representations, which would violate the rights guaranteed under

Articles 21 and 22(5) of the Constitution of India. On this ground also, the impugned orders are vitiated.

14. As regards the ground that similar case considered by the detaining authority is not similar, it would be relevant to rely on the decision in the

case of Jothi v. The Secretary to the Government (2012-2 L.W. (Crl.) 527), wherein, a Division Bench of Madurai Bench of this Court has held

as under:

17. Further, unless, the similar cases referred to by the Detaining Authority, in the grounds of detention, are comparable with the cases relating to

the detenu, in all aspects, it would not be open to the Detaining Authority to arrive at his conclusion that the detenu would be enlarged on bail. In

the present case, it has not been shown that all the relevant materials relating to the similar cases, referred to by the Detaining Authority had been

furnished to the detenu, in order to enable him to make an effective representation against the detention order. The failure of the Detaining

Authority to furnish all the materials would, no doubt, cause substantial prejudice to the detenu, resulting in the failure on the part of the Detaining

Authority in following the mandate, enshrined in Clause (5) of the Article 22 of the Constitution of India.

15. In para 3 of the grounds of detention, the detaining authority has relied on the similar cases, where bail was granted by various Courts. The

said similar cases are -(1) Crime No. 494 of 2013 on the file of E2 Royapettah Police Station for the offence under Sections 448, 324 and 307

IPC, (2)Crime No. 1850 of 2011 on the file of E5 Foreshore Estate Police Station for the offence under Sections 147, 427, 336, 285 IPC and

3(1)of TNPPD & L Act and (3)Crime No. 1573 of 2013 on the file of R3 Ashok Nagar Police Station for the offence under Sections 147, 148,

424, 341, 307and 506(H) IPC and 3of Explosive Substances Act, 1908. In the cases on hand, the offences involved are under Sections 147,

120(b), 124(A), 436 IPC r/w 3 and 4 of TNPPD & L Act and 3 of Explosive Substances Act, 1908 and Sections 448, 120b), 124(A), 436, 307

IPC r/w 3 and 4 of TNPP D & L Act and 3 of Explosive Substances Act, 1908 respectively. The similar case taken into account by the detaining

authority does not deal with the Explosive Substances Act. Obviously, the offence under Explosive Substances Act is graver in nature. Therefore,

the offences in the similar cases relied on by the detaining authority cannot be equated with the offence under the Explosive Substances Act. In our

view, the detaining authority had arrived at a conclusion that bails are being granted by Courts where offences under Explosive Substances Act are

also involved, without any material to support such a stand. Hence on this ground also, the detention order is vitiated in law.

16. In similar circumstances, a Division Bench of this Court in the case of The Home Secretary, Government of Tamil Nadu, The District

Collector, Collectorate, Singaravelar Maligai, and The Commissioner of Police, Office of the Commissioner of Police, Egmore and The Assistant

Commissioner of Police, Office of the Assistant Commissioner of Police, Mylapore Vs. Era. Selvam, , has held as under:

24. Also, an order for preventive detention is made on the subjective satisfaction of the detaining authority. The detaining authority, before

exercising the power of preventive detention, would take into consideration the past conduct or antecedents of the person and, as a matter of fact,

it is largely from the prior events showing the tendencies or inclinations of a man that an inference could be drawn whether he is likely even in the

future to act in a manner prejudicial to the maintenance of public order. If the subjective satisfaction of the detaining authority leads to this

conclusion, it can provide against such activity by making a preventive detention order.

25. The subjective satisfaction of the detaining authority with respect to the persons sought to be detained should be based only on the nature of

the activities disclosed by the grounds of detention and the grounds of detention must have nexus with the purpose for which the detention is made.

Moreover, the subjective satisfaction of the detaining authority must comprehend the very fact that the person sought to be detained is already in

jail or under detention and yet a preventive detention order is a compelling necessity. If the subjective satisfaction is reached without the awareness

of this very relevant fact, the detention order shall be vitiated.

27. The second ground raised by the petitioners is that the detaining authority has not supplied the vernacular version of the bail order and other

relevant documents passed in similar cases relied on by him and the same would deprive the detenus from making an effective representation. On

verification of the records as well as the material information and the submission made by the learned Public Prosecutor, we find that those

documents have not been furnished to the detenus. The detenus are certainly prejudiced by such non furnishing of vernacular version of the

documents relied upon by the detaining authority.

28. Article 22(5) of the Constitution of India provides that when any person is detained in pursuance of an order made under any law providing for

preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has

been made and shall afford him the earliest opportunity of making a representation against the order. Such an opportunity can be effectively utilised

by the detenu by going through the detention order, the grounds of detention, the documents in support thereof on which the detaining authority

have the subjective satisfaction and the translation of such documents to the language known to the detenu and by making a representation to the

detaining authority for redressing his grievances. In the instant case, from the above grounds, it is evident that such bail order and other relevant

documents in vernacular version have not been furnished to the detenu and thereby depriving the detenu from making an effective representation,

which would definitely deprive the constitutional right guaranteed under Article 22(5).

17. In the light of the settled legal position under the cardinal principles underlined under the preventive detention laws, it is seen that the detaining

authority has not followed the constitutional mandate in more than one aspect as to the grounds of (i) non-intimation of arrest to the near relatives

of the detenu (ii) delay in disposal of the petitioners'' representations and (iii) no subjective satisfaction as the offences in the similar case relied on

by the detaining authority are not similar. Any order under preventive detention would require that the constitutional mandate guaranteed under

Articles 22(1) and 22(5) of the Constitution of India should be primarily followed, otherwise, the action of the detaining authority would lead to

violation of the said constitutional rights. On analysing several factors, we are of the considered opinion that the impugned orders of detention are

vitiated in law and they are liable to be set aside.

18. The object sought to be achieved in the National Security Act is that in the prevailing situation of communal harmony, social tensions, extremist

activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitation on different issues, it was

considered necessary that the law and order situation in the country is tackled in a most determined and effective way. Also, the anti-social and

anti-national elements including secessionist, communal and pro-caste elements and also other elements who adversely influence and affect the

services essential to the community pose a grave challenge to the lawful authority and sometimes even hold the society to ransom. Therefore,

considering the complexity and nature of the problems in respect of defence, security, public order and services essential to the community, the

Government has come out with a legislation to deal with such situations effectively in the absence of powers of preventive detention. The National

Security Act is essential to achieve the above object.

19. The fundamental rights of the citizens enshrined under Articles 21 and 22 of the Constitution of India are of paramount consideration while

dealing with a legislation for national security, namely, the National Security Act. The authorities, while detaining any citizen under the preventive

detention laws, have to make a cautious approach as to the constitutional requirements as well as the security of the nation under the relevant Act.

If that could be the position, in the given circumstances, the detaining authority has given a go-by to the constitutional requirements. Instead, it was

concerned with the statutory requirements under the Act. True it is, security of the nation is more important and the object of the Act is to be

achieved in the manner as contemplated. Equally, the national interest coupled with the fundamental rights of the citizens has to be viewed with

great caution, as there cannot be any infringement of fundamental rights of the citizens.

20. Upon considering the constitutional wisdom and statutory principles and analysing various rulings of the Hon''ble Apex Court and this Court,

we are of the considered opinion that the impugned detention orders suffer from legal infirmity. Accordingly, these Habeas Corpus Petitions are

allowed and the impugned detention orders made in Memo Nos. 14/NSA/2013, 17/NSA/2013, 16/NSA/2013 and 15/NSA/2013, respectively,

dated 01.11.2013 are set aside and the detenus (1) Umapathy, S/o. Ramalingam, (2) Manohar, S/o. Mani, (3) Marimuthu, S/o. Ramalingam and

(4) Ravanan, S/o. Thiyagarajan, respectively, who are confined at Central Prison, Puzhal, Chennai, are directed to be set at liberty forthwith,

unless their custody is required in connection with any other case. However, considering the gravity of the offences involved in this case, it is open

to the prosecution to effectively contest the matter before the Regular Court, uninfluenced by the above order. It is also made clear that this order

shall not confer any right or advantage whatsoever to the detenus to claim anything before the Regular Court.