



2024/KER/14616

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

TUESDAY, THE 20TH DAY OF FEBRUARY 2024 / 1ST PHALGUNA, 1945

WP(CRL.) NO. 109 OF 2024

PETITIONER/S:

RAMSEENA S



BY ADVS.
M.H.HANIS
P.M.JINIMOL
T.N.LEKSHMI SHANKAR
NANCY MOL P.
ANANDHU P.C.
NEETHU.G.NADH
CIYA E.J.

RESPONDENT/S:

1 STATE OF KERALA
REPRESENTED BY THE ADDITIONAL CHIEF SECRETARY TO
GOVERNMENT, HOME AND VIGILANCE DEPARTMENT, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM,, PIN - 695001



- 2 THE DISTRICT COLLECTOR & DISTRICT MAGISTRATE
KOLLAM DISTRICT, PIN - 691013
- 3 THE DISTRICT POLICE CHIEF
KOLLAM CITY, PIN - 691001
- 4 THE CHAIRMAN
ADVISORY BOARD, KAAPA, SREENIVAS, PADAM ROAD,
VIVEKANANDA NAGAR, ELAMAKKARA, PIN - 682026
- 5 THE SUPERINTENDENT OF JAIL
CENTRAL JAIL, VIYYUR,, PIN - 670004
BY ADVS.
ADDL. STATE PUBLIC PROSECUTOR (AG-28) SHRI K.A.ANAS

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
12.02.2024, THE COURT ON 20.02.2024 DELIVERED THE FOLLOWING:



A.MUHAMED MUSTAQUE & SHOBA ANNAMMA EAPEN, JJ.

W.P (Cr1) No.109 of 2024

“C.R.”

Dated this the 20th day of February, 2024

J U D G M E N T

A.Muhamed Mustaque, J.

This writ of habeas corpus was filed by the petitioner challenging a detention order under Kerala Anti-Social Activities (Prevention) Act, 2007 for short the KAA(P)A. This is the second writ petition challenging the very same order. The earlier writ petition, W.P.(Cr1).No.789/2023 was dismissed by this Court by its judgment dated 13.12.2023.

2. The petitioner is the wife of the detenu. The detenu suffered a previous detention order. Thereafter, he was involved in five crimes. One of the crimes was for keeping possession of a commercial quantity of narcotic substances. This Court, while dismissing the writ petition, noted that the detenu was already on bail for the offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). This Court refused to interfere



with the detention order. The present writ petition is filed by canvassing an additional ground that was not canvased in the earlier writ petition. The ground is that detenu was not released on bail as stated before this Court in the earlier writ petition and is continued to be in judicial custody as there was a bar under Section 37 of the NDPS Act.

3. The learned counsel for the petitioner Adv.M.H.Hanis argued that the second writ petition is perfectly maintainable on fresh grounds and there is no bar for filing successive habeas. He placed reliance on the judgment of this court ***Nisha Salim v. State of Kerala and Others [2009 (2) KHC 1014]***.

4. On the other hand, the learned Public Prosecutor argued that there is a bar under Article 226 of the Constitution of India to entertain successive petitions for the writ of habeas corpus and the remedy of the writ petitioner is to approach the Apex Court in civil appeal or to file a writ petition under Article 32 of the Constitution of India before the Apex Court. He placed reliance on the judgment of the Apex Court in ***Ghulam Sarwar v. Union of India [1967 KHC 679]***.



5. Habeas corpus is the oldest of the prerogative writs. The prerogative writs such as habeas corpus, mandamus, prohibition, certiorari and quo warranto have origin in English common law. In the Magna Carta Chapter 39 1215 AD, it is stated thus: *“No free man shall be taken or imprisoned, or dispossessed or outlawed or exiled or in any way ruined, nor will we go or send against him except by the lawful judgement of his peers or by the law of the land.”*.

6. “Habeas corpus” means, under the Black Law dictionary that, ‘you have the body’. As we note the meaning of habeas corpus and its origin in English law, it was not treated as a part of the judicial review process. It was only a procedure to enquire into the reason for detention and set the person at liberty, if he was unlawfully detained. The enquiry in that process was originally conceived to determine whether a person is illegally detained or not. Therefore, the English Court never originally considered that a judgment will have to be rendered adjudicating as to issue a writ of habeas. In *re Hasting (No.2)* (1958) 3 ALL ER 625, Queen's Bench of England rendered a discussion on the nature of orders in habeas reliefs. It narrates the nature of reliefs of habeas, and



it was their view that the decision whether or not to issue a writ of habeas corpus is not a judgment so that there is no res judicata. With the passage of time and the emergence of sovereign states, individual liberty has gained constitutional protection. Consequently, any deprivation of personal liberty must meet constitutional scrutiny. Article 22(3) of our Constitution allows preventive detention backed by law. This has given rise to challenges under administrative law, and thus detention order has become part of administrative law. The detention order is intrinsically premised on administrative decisions backed by the statutory provisions. Therefore, relief under the writ of habeas is granted only when it is shown that order of detention is ultra vires, arbitrary, or lacks a logical foundation for ordering detention. In Durga Das Basu's *Commentary on the Constitution of India*, reference is made to the book "Constitutional and Administrative Law" authored by *John Alder* wherein it is stated that "a writ of habeas may be of a little practical importance today when a judicial review can provide a speedy way of challenging unlawful detention"⁽¹⁾. The Court, therefore, has to apply the

(1) Durga Das Basu's *Commentary on the Constitution of India* 9th Edition Volume 10 Page No.10389



principles of administrative law to decide on the validity of the detention order.

7. The detention order passed under statutory provision, therefore, will have to be adjudged based on the general principles relating to administrative law to test its validity. The statutory provisions relating to detention are now well-founded under the constitutional provisions. Therefore, the Court while exercising power to issue writ of habeas corpus is essentially deciding the validity of detention order based on the objectives of detention law. Thus, general principles of administrative law are the test to check the validity of the detention order.

8. In **Ghulam Sarwar** case (*supra*), the Constitutional Bench of the Apex Court considered whether principles of *res judicata* would apply in habeas corpus matters. The Apex Court considered the issue of whether, on the dismissal of a challenge before the High Court under Article 226, a writ of habeas corpus is maintainable before the Apex Court invoking Article 32. In para 25 it was held as follows:



The petitioner did not previously move this Court for the issue of a writ of habeas corpus challenging the legality of the order of detention under S. 3(2) (g) of the Foreigners Act. He has, therefore, the right to move this Court for the issue of the writ. But he has no right to move this Court under Art. 32 more than once on the same facts. Having heard the petitioner fully on the merits once, the Court will not hear him again the same facts.

9. In Apex Court **Lallubhai Jogibhai Patel v Union of India [(1981) 2 SCC 427]** in para 13 and 14 it was held as follows:

13. The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.

14. In the present petition fresh additional grounds have been taken, to challenge the legality of the continued detention of the detenu. We would therefore hold that the subsequent writ petition is not barred as res judicata and overrule the preliminary objection raised by the respondents.

10. A Division Bench of this Court in **Nisha Salim's** case (supra) after referring to the Apex Court judgment as above, in para 14 held as follows:



The last question to be considered is whether the present writ petition is barred by the principles of res judicata. As has been noticed already, the earlier writ petition filed by the petitioner impugning the order of detention was dismissed by the Division Bench under Ext. P4 judgment dated January 21, 2009. Admittedly, the said judgment has become final inasmuch as it was not challenged before the Apex Court. It is true, in the present writ petition the petitioner has also sought to impugn Ext. P5 order issued by the Government confirming the order of preventive detention in the light of the opinion furnished by the Advisory Board. But still, as mentioned by us earlier, the attempt of the petitioner in this writ petition is obviously to reargue the validity and correctness of the order of detention. The grounds which were raised by the petitioner in the earlier writ petition have yet again been raised before us though from a different angle and couched in different terminologies. The core essence of the contentions raised in the earlier writ petition and in the present one, is fundamentally the same. All those contentions were considered in the earlier judgment itself.

11. This Court considered the issue of application of principle of res judicata for successive writ petitions for habeas corpus and took the view that when the grounds raised in the new writ petition are essentially the same, fresh writ petition is not maintainable as no new fresh grounds have been raised.

12. We note that both in the Apex Court judgment as well as in the judgment of this Court, no proposition of law was decided as to the impact of a second judicial review through a successive



writ on the legality of the detention order. In any other habeas of simpliciter, nothing prevents a person from approaching the Court repeatedly on fresh grounds for a writ of habeas. Our constitution gives utmost importance to the liberty of the citizen. The constitutional Courts are not barred from exercising its power of habeas corpus and issuing a prerogative writ of habeas corpus in a successive writ petition filed on a new ground or grounds which were omitted to be canvassed in the first writ petition if such writs are not depended upon any predicated challenge. The liberty of the citizen is supreme, and it neither rest on pleas and counter pleas but on the freedom offered to him under the Constitution. The law discourages only repeated agitation of issues already decided and does not discount granting reliefs that have no bearing on issues. Therefore, in habeas of simpliciter, the successive writ petition is possible, and judicial practice only discourages fresh writ petitions being brought before the Court as more as a vexatious attempt to redo what the Court already refused. However, relief of habeas sought based on the challenge against detention order stands differently. The essential challenge in that process is against the detention order though ultimate relief is



granted, by way of habeas corpus. If the substantial challenge is against the detention order, the very same Court cannot entertain writ petition, even if new grounds have been raised as the Court is precluded from reopening its judgment challenging the validity of detention order which has become final. The Apex Court in **P. Bandopadhyaya v. Union of India [(2019) 13 SCC 42]**, after referring to the judgments in **S.V. Vasaikar v. Union of India [2003 SCC OnLine Bom 171]** and **Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra [(1990) 2 SCC 715]**, held that the principles of *res judicata* is equally applicable in writ jurisdiction. Therefore, we order that the successive writ petition challenging the very same detention order is not maintainable. Accordingly, the writ is dismissed.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

Sd/-

SHOBA ANNAMMA EAPEN, JUDGE



APPENDIX OF WP (CRL.) 109/2024

PETITIONER EXHIBITS

- Exhibit -P1 A TRUE COPY OF ORDER NO. DCKLM/4420/2023 M-16 DATED 13.07.2023 OF THE 2ND RESPONDENT
- Exhibit -P2 A TRUE COPY OF THE JUDGMENT DATED 13.12.2023 IN W.P.(CRL.).NO.789/2023 OF THIS HON'BLE COURT
- Exhibit -P3 A TRUE COPY OF G.O.(RT).NO.2542/2023 HOME DATED 11.09.2023 OF THE 1ST RESPONDENT
- Exhibit-P4 A TRUE COPY OF THE ORDER DATED 23.06.2023 IN CRL. M.C.NO. 1345/2023 IN CRIME NO.754/2023 OF PARIPPALLY POLICE STATION OF THE PRINCIPAL SESSIONS COURT, KOLLAM
- Exhibit-P5 A TRUE COPY OF THE ORDER DATED 21.07.2023 IN B.A.NO.5792/2023 IN CRIME NO.754/2023 OF PARIPPALLY POLICE STATION
- Exhibit-P6 A TRUE COPY OF THE REPRESENTATION BEFORE THE 1ST RESPONDENT ON 04.08.2023
- Exhibit-P7 TRUE COPY OF THE POSTAL ACKNOWLEDGMENT CARD EVIDENCING THE RECEIPT OF EXT P6