



2023/KER/57519

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS.JUSTICE ANU SIVARAMAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

WEDNESDAY, THE 27TH DAY OF SEPTEMBER 2023/5TH ASWINA, 1945

WP (CRL.) NO.792 OF 2023

PETITIONER:

MALATHY RAVI,

BY ADV.SRI.AJEESH M UMMER

RESPONDENTS:

- 1 STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT,
HOME DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM., PIN - 695001.
- 2 THE DISTRICT COLLECTOR & DISTRICT MAGISTRATE,
DISTRICT COLLECTORATE, CIVIL STATION,
AYYANTHOLE, THRISSUR., PIN - 680003.
- 3 THE DISTRICT POLICE CHIEF, DISTRICT POLICE OFFICE,
CIVIL STATION, AYYANTHOLE, THRISSUR, PIN - 680003.
- 4 THE CHAIRMAN, ADVISORY BOARD, KAAPA, SREENIVAS,
PADAM ROAD, VIVEKANANDA NAGAR,
ELAMAKKARA, PIN - 682026.
- 5 THE SUPERINTENDENT OF JAIL,
CENTRAL JAIL, KANNUR., PIN - 670004.

BY ADVS.SRI.K.A.ANAS, PUBLIC PROSECUTOR

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD
ON 12.09.2023, THE COURT ON 27.09.2023, DELIVERED THE
FOLLOWING:



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J U D G M E N T*Dated this the 27th day of September, 2023*C. Jayachandran, J.

Ext.P1 detention order issued under Section 3 of the Kerala Anti-Social Activities (Prevention) Act, 2007 ('KAA(P)A' for short) is under challenge in this writ petition. Petitioner is the mother of the detenu, Vineeth @ Kunji. Ext.P1 detention order was confirmed by the Government under Section 10(4) of the Act as per GO dated 14.07.2023, as per which, the detenu was put under preventive detention for a period of six months with effect from the date of detention, ie., 06.04.2023. The Detaining Authority took into consideration five instances of anti-social activity to issue the impugned detention order, the details of which are narrated under the tabular statement shown here below:



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Sl. No.	Police Station	Crime No & Section	Date of Occurrence	Status of case when detention order was issued
1	Kodakara	171/2018 U/s 341, 323, 324, 326, 294(b), 34 IPC	23/03/18	Pending trial (CC 1756/2018)
2	Thirunelli	385/2018 U/s 109, 120(b), 395, 212 IPC	17/11/18	Pending trial (SC 91/2022)
3	Varandarappilly	363/2019 U/s 143, 147, 148, 341, 323, 324, 294(b), 506(ii), 452, 308, 427 r/w 149 IPC	11/09/19	Pending trial (SC 914/2022)
4	Aloor	263/2022 U/s 20(b) (ii)B of NDPS Act	27/03/22	Pending trial (SC 1104/2022)
5	Perinthalmanna	48/2023 U/s. 20(b) (ii)B r/w 29, 31 of NDPS Act	08/01/23	Pending trial (SC 209/2023)

2. Heard Sri.Ajeesh M. Ummer, learned counsel for the petitioner and Sri.K.A.Anas, learned Government Pleader, on behalf of the respondents.

3. PETITIONER'S CONTENTIONS:

Learned counsel for the petitioner raised three contentions to assail Ext.P1 detention order. The first is with respect to the delay of 7 days in executing the detention order, which was



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issued on 30.03.2023. The same was, however, executed only on 06.04.2023. An unreported Bench decision of this Court dated 17.11.2022, in Saleena vs. State of Kerala and others (W.P. (Cr1)No.592/2022), was cited to circumvent the contention that the delay occurred on account of the necessity to obtain permission from the Court concerned to formally execute the detention order, since the detenu was undergoing judicial custody in connection with another crime. The second contention urged was that, since the detenu was already in judicial custody, there was no necessity to issue the impugned detention order, which aspect was not properly considered and weighed by the Detaining Authority, thus vitiating the impugned order. The settled legal position as regards the likelihood of being released on bail from judicial custody and likelihood of repeating a similar offence was not specifically considered by the Detaining Authority. All what is decipherable from the impugned order is an



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apprehension that the accused may apply for bail, since the final report is filed. Relying on the judgment of Hon'ble Supreme Court in Amritlal and others v. Union of India and others [(2001) 1 SCC 341::2001 (1) KHC 1349], a subtle distinction was pointed out between the likelihood to file bail application as against the likelihood to secure the bail. {***Note:-Ameena Begum vs. State of Telengana and Others [2023 SCC Online 1106]}. In this regard, another decision of the Hon'ble Supreme Court in Dharmendra Suganchand Chelawat and another v. Union of India and others [1990 (1)SCC 746 :: 1990 KHC 748], was also pressed into service. The third contention, the most important one according to the learned counsel for the petitioner, is regarding the inordinate delay of more than three months in confirming Ext.P1 detention order by the Government under Section 10(4) of the KAA(P)A Act. The learned counsel would point out that, the detention order was issued 30.03.2023, executed on 06.04.2023 and that



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the Advisory Board recommended confirmation on 10.05.2023, whereas the Government took more than three months to confirm the same on 14.07.2023. This delay is completely unexplained, thus causing serious prejudice to the detenu. Although, a timeline is not fixed by the statute for confirmation, learned counsel relied upon a Bench decision of this Court in Sarojini vs. Union of India and others [2009 (4) KLT 436:: 2009 KHC 1134], to urge that an order of confirmation under Section 10(4) of the KAAPA Act has to be passed expeditiously and that the detenu cannot be kept in suspended animation as regards the fate of the order, as per which he was detained.

4. COUNTER ARGUMENTS OF THE GOVERNMENT PLEADER:

The learned Government Pleader refuted all the points urged on behalf of the petitioner. As regards the first point, regarding the delay in executing the detention order, the learned Government Pleader pointed out that the detenu was



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undergoing judicial custody as on the date of Ext.P1 detention order, i.e., 30.03.2023. On the very next date, necessary application was filed before the Special Court (NDPS, Manjery) seeking permission for formal arrest, to execute the detention order. The day immediately following, ie., 02.04.2023, was a Sunday and the Special Court issued orders permitting the execution of the detention order on 04.04.2023. The same was received on 06.04.2023, on which date itself, Ext.P1 detention order was executed. Thus, according to the learned Government Pleader, there is no delay, much less any unexplained delay, in executing the detention order. To support the proposition that a detention order can be passed while in judicial custody, learned Government Pleader relied upon the decisions of the Hon'ble Supreme Court (1) Abdul Sathar Ibrahim Manik v. Union of India and others [1992 1 SCC 1 :: 1992 KHC 726] (2) Union of India and another v. Dimple Happy Dhakad [AIR 2019 SC 3428 :: 2019 KHC 6662]



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which was followed in (3)Union of India Through Joint Secretary (COFEPOSA), Ministry of Finance, New Delhi v. Ankit Ashok Jalan [(2020) 16 SCC 185 :: 2019 KHC 7166]. On the question of 7 days delay in executing the order, the learned counsel, apart from the explaining the delay as referred above, relied upon the judgment of the Hon'ble Supreme Court in Licil Antony vs. State of Kerala and another [(2014) 11 SCC 326 :: 2014 KHC 4256], which was followed by a Division Bench of this Court in Anju P Anilkumar vs. State of Kerala [2023 (4) KLT 67 :: 2023 KHC 289]. It was finally urged that, the alleged delay in execution of the detention order has not caused any prejudice, whatsoever, to the detenu, for, he was already undergoing judicial custody, when the detention order was passed.

5. As regards the second contention, pertaining to the necessity of the impugned detention order since the detenu was already in custody, learned



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Government Pleader pointed out that, the final report in the crime in which the detenu was undergoing judicial custody has already been filed, wherefore, the Sponsoring Authority, as also the Detaining Authority, apprehended that the detenu is likely to apply for bail and get himself enlarged. This aspect was specifically noticed by the Detaining Authority in the impugned order as could be seen from the page nos.9, 10 and 12 in the impugned Ext.P1 order. Secondly, the learned Government Pleader pointed out that the contraband in the said crime, which was registered under Section 20(b)(ii)B of the NDPS Act, was of intermediary quantity, wherefore, there existed every chance that the bail application to be preferred by the detenu would be allowed, since the rigor of Section 37 of the NDPS Act would not apply.

6. As regards the third and final point, regarding the delay of 2 months in confirming



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Ext.P1 detention order, learned Government Pleader submitted that, the confirmation of an order of preventive detention cannot be done mechanically. Each and every aspect has to be considered meticulously and the Confirming Authority has to arrive at a satisfaction that the preventive detention order is infact necessary in larger public interest. It was therefore contented that, the process would take a reasonable time and having regard to the voluminous documents and facts to be considered, coupled with the inherent seriousness and importance of a detention order, the period of two months cannot be said to be inordinate. It was further pointed out that the Confirming Authority has a further duty to consider and pass orders in the representation preferred by the detenu pursuant to his detention. Learned counsel would again place reliance upon *Licil Antony* (supra) in this regard, wherein, the Hon'ble Supreme Court held that, a delay of 35 days in executing the detention order is not



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fatal.

7. It was further contended that there is no time limit prescribed by the statute in issuing a confirmation order, wherefore, the larger public interest cannot be jeopardized on technical and specious grounds of delay and latches. Moreover, the detenu cannot point out any prejudice whatsoever, due to the alleged delay, failing which the impugned order cannot be assailed on that count is the final submission of the learned Government Pleader.

8. OUR ANALYSIS:

Before addressing the issues raised, we may first refer to the time line as regards the attendant facts.

Sl. No.	Date	Event
1	08.01.23	Last prejudicial activity - NDPS Crime No.48/23.
2	29.01.23	Final report in the above crime file.
3	21.02.23	The District Police Chief filed report/recommendation to the District Collector.



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4	16.03.23	Clarification report filed by the District Police Chief incorporating the details of bail etc.
5	30.03.23	Ext.P1 detention order issued.
6	06.04.23	Ext.P1 order was executed by recording formal arrest of the detenu, who was in judicial custody in connection with Crime No.48/23.
7	18.04.23	The Government approved Ext.P1 detention order as per Section 3(3).
8	19.04.23	The matter was referred to the Advisory Board under Section 9.
9	28.04.23	The detenu preferred representation against Ext.P1 detention order.
10	10.05.23	The Advisory Board filed report opining sufficient cause for detention under Section 10.
11	14.07.23	The Government confirmed Ext.P1 detention order and continued the detention for a period of six months.

9. We will now address the issues raised, one by one. As regards the first contention regarding the alleged delay in executing the impugned detention order, we fully endorse the explanation offered by the learned Government Pleader. It is undisputed that the detenu was undergoing judicial custody in NDPS Crime No.48/23 of Perinthalmanna Police Station, when Ext.P1 detention order was passed on 30.03.2023. As pointed out by the learned Government Pleader, necessary application was



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filed before the Special Court seeking permission, on the next day itself and orders were passed allowing the same on 04.04.2023. Upon receipt of that order on 06.04.2023, Ext.P1 detention order was executed on the same day. We do not find any delay, much less any unexplained delay, in executing the impugned order. We are of the view that the Bench decision of this Court in Saleena(supra) has to be read and understood in the facts of that case. Moreover, we notice that in Saleena(supra), the delay in executing the impugned detention order was reckoned only as one among the various grounds, based upon which the order was frowned upon by the Division Bench. We cannot hold that a pre-arrest/pre-detention delay in executing the detention order will prejudice the detenu in any manner. Pertinent in this context to notice that, the delay in executing the order becomes significant essentially in the realm of larger public interest. In elaboration, we may say that, once it is found that the free roaming



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of an individual with high criminal propensity in the society is pernicious and a detention order passed, the continuance of that individual in the society even for a single day can be proved to be fatal and certainly against the public interest. It is in this context that the delay in execution of the detention order - such delay implying that there is no imminent necessity to shield the society from the detenu - becomes highly significant. In the instant case, there is no such contingency, inasmuch as the detenu was already in judicial custody in connection with another crime, when the detention order was passed. We therefore repel the first contention urged by the learned counsel for the petitioner.

10. Coming to the second, we may first take note of the legal position prevailing on the topic that there is no embargo in initiating an action for preventive detention, when the detenu is in judicial custody in connection with another crime.



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A three-pointer test in this regard was propounded in Kamarunnisa vs. Union of India [1991 (1) SCC 128], which held as follows:

"(1) If the authority passing the order is aware of the fact that he is actually in custody;

(2) If he has reason to believe on the basis of reliable material placed before him;

(a) that there is a real possibility of his being released on bail, and

(b) that on being so released he would in all probability indulge in prejudicial activity and

(3) if it is felt essential to detain him to prevent him from so doing"

11. The principle was reiterated in (1) Union of India vs. Paul Manickam [2003 (8) SCC 342] (2) Huidrom Konungjao Singh vs. State of Manipur [2012 (7) SCC 181] (3) Veeramani vs. State of TN [1994 (2) SCC 337] and recently, (4) Union of India and another vs. Dimple Happy Dhakad [AIR 2019 SC 3428] and Union of India through Joint Secretary (COFEPOSA), Ministry of Finance, New Delhi vs. Ankit Ashok Jalan [(2020) 16 SCC 185].



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12. Based on the above legal premise, let us now examine whether the parameters culled out in Kamarunnisa (supra) has been in satisfied in the given facts. A perusal of page nos.9 (towards bottom) and 12 of Ext.P1 detention order would clearly indicate that the Detaining Authority was quite aware of the fact that the detenu was undergoing judicial custody in connection with the NDPS crime, which was the last one reckoned for the purpose of detention. The second parameter pertains to the possibility of the detenu being released on bail and upon relief, whether, he would, in all probability, indulge in prejudicial activity/anti-social activity. In Ext.P1 order, at page nos.9, 10 and 12, the Detaining Authority specifically refers to the fact that final report has already been filed in the NDPS crime referred above and therefore, the detenu is likely to be enlarged on bail. The second ingredient of this parameter, that upon release, the detenu is likely to indulge in anti-



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social activity, is reflected in the impugned order in so many words. The Detaining Authority in page no.12 of Ext.P1 refers to the fact that the detenu has scant regard for law and orders of court, that he had indulged in several crimes including the five crimes reckoned for the purpose of detention, that ordinary legal remedies of arrest and enlargement on bail with conditions are not sufficient to curb his criminal propensity and that his continuance in the society would pose a potential threat to the members of the society, besides being not in public interest. The satisfaction of the authority as regards the potential danger of the detenu roaming free in the society, especially of the probability of indulging in anti-social activity on release is quite evident, which is based on relevant and adequate materials and we cannot find any insufficiency as regards the subjective satisfaction arrived in this regard by the Detaining Authority. We therefore, repel the



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second contention as well.

13. What remains is the 3rd and the most important contention canvassed by the learned counsel for the petitioner, which pertains to the delay of more than three months in issuing the order, confirming the detention, under Section 10(4) of the KAA(P)A. We may straight away refer to the constitutional mandate in this regard contained in Article 22(4) of the constitution, which is extracted here below:

"22. Protection against arrest and detention in certain cases.-

(1) xxxx

(2) xxxx

(3) xxxx

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a)



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and (b) of clause (7)."

14. If we look at the language of Article 22(4) in the literal sense, the embargo for detention beyond the period of three months may not appear to apply, once the advisory board reports sufficient cause for detention before the expiration of the said period; and that it may not be strictly necessary for the Government to pass an order confirming the initial detention order within the stipulated period of three months. A perusal of the judgment of the Honourable Supreme Court by the three judges in Ujjal Mondal v. The State of W.B [AIR 1972 SC 1446] would expose that the above thought was nothing but a misconception. In that case, the Supreme Court was concerned with the detention under the West Bengal (Prevention of Violent Activities) Act, 1970. The petitioner therein was arrested on 11.05.1971, the Board filed report opining sufficient cause for detention on 12.07.1971 and the confirmation order



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was passed on 17.08.1971, the same being clearly beyond the period of three months from the date of arrest, afore referred. The relevant findings of the Honourable Supreme Court in paragraph Nos.9 and 10 are extracted here below:

"9. Article 22 (4) of the Constitution has specified the maximum limit of initial detention and detention for a longer period than 3 months can only be made on the basis of the report of the Board. The Act authorises a possible detention of more than 3 months. It is because the appropriate Government wants to detain a person for more than 3 months that the matter is referred to the Board and it is only when the Board makes its report that the appropriate Government can fix the period of detention under sub-section (1) of Section 12. So when the Government receives the report of the Board stating that there is sufficient cause for detention of a person, if the Government wants to detain him for a period beyond 3 months, it has to pass an order or make a decision under section 12 (1) to confirm the order of detention. The confirmation of the detention order without anything more would result in an automatic continuation of the detention, even if there is no separate decision to continue the detention for any specific period as held by this Court in (1952) SCR 612=(AIR 1952 SC 181). When Section 12(1) of the Act speaks of "and continue the detention of the person concerned for such period as it thinks fit", it can only mean continuance of detention from the point of time at which detention would become illegal if the order of detention is not confirmed, namely, the expiry of 3 months from the date of detention. It would not be necessary to confirm the order of



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detention even after the receipt of the report of the Board by the Government if the Government only wants to continue the detention for the period of 3 months from the date of detention, as the initial order of detention would authorise the continuance of detention for that period without any confirmation. Confirmation is necessary only to continue the detention after the expiry of 3 months. If that be so, it stands to reason to hold that the order of detention must be confirmed before the expiry of the 3 months.

10. To put the matter in a nutshell: the State Government has power under the Act to detain a person without trial beyond a period of 3 months but limited to a period of one year. That power the State Government may exercise on the receipt of the opinion of the Board that there is sufficient cause for the detention. When the State Government receives that opinion, it has still the opinion to exercise the power and to continue the detention beyond the period of 3 months or not. Confirmation is the exercise of the power to continue the detention after the expiry of the three months. Unless that power is exercised within the period of 3 months from the date of detention, the detention after the expiry of that period would be without the authority of the Law."

(Underlined by us, for emphasis)

15. The Honourable Supreme Court also referred to the various decisions on the point by the High Courts of Calcutta, Pepsu, Mysore, Assam and West Bengal, all of which held that the confirmation order has been issued within three months from the



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date of detention. The Supreme Court found no reason to doubt the correctness of the said decisions and chose to follow it.

16. The precise issue as to whether the confirmation order has to be passed within three months under Article 22(4) fell for consideration before a two judges bench of the Honourable Supreme Court in Deb Sadhan Roy v. The State of W.B [AIR 1972 SC 1924]. After elaborate discussion, in paragraph No.7 the Honorable Supreme Court concluded as follows:

"7.....
.....In such cases a question whether the confirmation and extension has to be made by the appropriate Government within a reasonable period may arise for consideration, but in any case failure to confirm and extend the period within three months will result in the detention becoming illegal the moment the three months period has elapsed without such confirmation. Any subsequent action by the appropriate Government after the three months cannot have the effect of extending the period of detention.
..... It would be meaningless to suggest that the confirmation of the Board's opinion can take place beyond three months when the period of detention has come to an end and has not been extended by the want of it. Looking at it in a different way what



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these provisions amount to is that no person can be detained for any period beyond three months or for any period thereafter upto 12 months unless the Board's opinion is confirmed within three months."

(Underlined by us, for emphasis)

17. Ujjal Mondal (supra) and Deb Sadan Roy (supra) were followed by the Honourable Supreme Court in Joydeb Gorai v. State of W.B. [(1972) 2 SCC 417]. The precise issue of failure to pass the confirmation order within a period of three months, thereby violating Article 22(4) of the Constitution, was considered by the Honourable Supreme Court in Nirmal Kumar Khandelwal v. Union of India and Others [(1978) 2 SCC 508]. Here again, Ujjal Mondal (supra) was relied upon to arrive at the following conclusion in paragraph No.8:

"Read in the light of Article 22(4) of the Constitution and the context of the words "continue the detention", they definitely lead to the conclusion that the sine qua non for continuing the detention made beyond the period of three months, is the confirmation of the detention order by the appropriate Government. Conversely, the non-confirmation of the initial order by the appropriate Government before the expiry of the period of three months' detention, shall automatically result in



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revocation and termination of the legal authority for its continuance."

18. Coming to the instant facts, we notice that the order of detention was dated 30.03.2023, which was executed on 06.04.2023. The Advisory Board filed report on 10.05.2023. However, the same was confirmed only on 14.07.2023, clearly beyond a period of three months reckoned from the date of execution of the detention order afore referred. We also notice that the Government took more than two months from the date of report of the Advisory Board, to issue the order of confirmation continuing the detention. In the light of Article 22(4) of the Constitution, as interpreted by the various decisions afore referred, we find that the detention, pursuant to order dated 30.03.2023, has become illegal upon the expiry of three months period from 06.04.2023 (date of formal arrest), for want of confirmation and continuance.

We therefore, direct the release of the



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petitioner's husband forthwith.

sd/-

**ANU SIVARAMAN,
JUDGE**

sd/-

**C. JAYACHANDRAN,
JUDGE**

TR/ww



W.P. (Cr1) No. 792 OF 2023

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APPENDIX OF WP (CRL.) 792/2023

PETITIONER'S EXHIBITS:

EXHIBIT P1 A TRUE COPY OF THE ORDER NO.C1/2678/
2023 DATED 30/03/2023 ALONG WITH
DOCUMENTS RECEIVED AS SUCH.