Detaining Authority Must Be Aware That Detenu Is Already In Custody & Must Show Compelling Reasons To Pass Preventive Detention Order: Kerala HC

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
ALEXANDER THOMAS & SOPHY THOMAS, JJ.
W.P (Criminal) No.917 of 2022; 2 November, 2022
RISHADA HARIS K.P. *versus* STATE OF KERALA

Petitioner by Adv P.K. Ravisankar

Respondents K.A. Anas, Public Prosecutor.

J U D G M E N T

ALEXANDER THOMAS, J.

The prayers, as amended, in the afore captioned W.P (Crl.), seeking for writs of Habeas Corpus and quashment in relation to the challenge mounted against the preventive detention of the detenu in this case, are as follows:

"(i) issue a writ of Habeas corpus commanding the respondents to produce the body of Sameem V.V., the husband of the petitioner, and release him from illegal detention;

(ia) Call for the records leading to Exhibits P5 and P6 and issue a writ of certiorari quashing Exhibits P5 and P6;

(ii) Dispense with filing of the translation of vernacular documents; and

(iii) award cost of this proceedings".

2. Heard Sri.P.K Ravisankar, learned counsel appearing for thepetitioner and Sri.K.A Anas, learned Prosecutor, appearing for the respondents.

3. The petitioner herein is the wife of Sri.V.V Sameem, who has been ordered to be preventively detained, in terms of Ext.P6 detention order dated 27.04.2022 issued by the 2nd respondent under Section 3(1) of the Kerala Anti-Social Activities (Prevention) Act, 2007 (KAAP Act).

4. The brief facts leading to this case are as follows:

The sponsoring authority in this case, the District Superintendent of Police, Kannur, has furnished report dated 04.04.2022 to the 2nd respondent (District Magistrate cum District Collector, Kannur), recommending that, based on the materials mentioned therein, it is a fit case to enable the 2nd respondent to issue orders, preventively detaining the above detenu under Section 3(1) of the Act, so as to prevent him from committing further prejudicial anti-social activities, as understood in Section 2(a) of the Act. After consideration of the said report of the sponsoring authority, the 2nd respondent (District Magistrate cum District Collector, Kannur), who is the authorised detaining authority in terms of Section 3(3) of the Act, has issued the impugned Ext.P6 detention order dated 27.04.2022, ordering that, based on the materials, he is satisfied that it is a fit case to issue orders under Section 3(1) of the Act to preventively detain the detenu, with a view to prevent him from committing further prejudicial anti-social activities. Further, the 1st respondent (State Government) has approved Ext.P6 detention order dated 27.04.2022 on 13.05.2022. Ext.P6 detention order was executed on 29.04.2022. Thereafter, Ext.P6 detention order has been approved, as per Ext.P2 order dated 13.05.2022. Later, the Government has referred the matter to the statutory Advisory Board for their opinion, as mandated under Section 9 of the Act, on 19.05.2022. In pursuance thereof, the Advisory Board, after hearing the detenu, has rendered their report on 22.06.2022, recommending to the Government that there is sufficient cause for the preventive

detention of the detenu, as per Ext.P6. Later, the Government has issued Ext.P5 order dated 07.07.2022, confirming Ext.P6 detention order and fixing the period of detention of the detenu as six months from the date of detention (29.04.2022). The sponsoring authority and the 2nd respondent-detaining authority have altogether reckoned nine criminal cases, in which the detenu has been involved, the details of which have been given in Ext.P6 detention order as well as in the separate counter affidavits filed by the 1st respondent (State Government) and the 2nd respondent (detaining authority). There are no serious disputes regarding those crimes and the factual allegations raised therein, and also as to the fact that the detenu would fulfill the definitional parameters of 'known rowdy' as per Section 2(p)(iii) read with Section 2(t) of the Act. Hence, there is no necessity for us to examine as to whether the detenu would fulfill the parameters of 'known rowdy' as per Section 2(p).

5. Sri.P.K Ravisankar, learned counsel appearing for the petitioner, has essentially raised two grounds in support of his plea, for quashment of the impugned Ext.P6 detention order, as confirmed by Ext.P5 order.

6. The first ground is that, there is violation of the mandatecontained in the first limb of Section 3(3) of the Act, which demands that detention order along with relevant documents shall be forthwith communicated by the authorised detaining authority to the State Government.

7. The second ground is that, the 2nd respondent-detaining authority was not even aware that the bail granted to the detenu, in respect of his involvement in the seventh case (out of the nine cases), was already cancelled by the jurisdictional Magistrate court concerned on 28.03.2022, in pursuance of an application for bail cancellation given by the Chief Prosecution Agency earlier and that therefore, there has been total non consideration of the vital and crucial aspects, regarding the impact of the bail cancellation order and as to whether it was really necessary and imperative to issue the order of detention.

8. If the petitioner succeeds in any one of the two grounds, then the impugned Ext.P6 order is liable for interdiction. Now, we will deal with each of the two contentions separately.

Contention (a)

9. As noted above, the first contention is that there has been aviolation of the statutory mandate contained in the first limb of Section 3(3), which demands that the detaining authority should necessarily forthwith forward the detention order along with all the relevant documents to the State Government. In that regard, heavy reliance is placed by Sri.P.K Ravisankar, learned counsel appearing for the petitioner, on the dictum laid down by the Division Bench of this Court in **Anupama S.V** *vs.* **State of Kerala and others** (2022 (5) KHC 281) which in turn has been rendered after placing reliance on the dictum laid down by the Apex Court in the case in **Hetchin Haokip** *vs.* **State of Manipur** [(2018) 9 SCC 562]. The contention of the State Government in that case was to the effect that, though the first limb of Section 3(3) of the Act stipulates that the authorised detaining authority should forthwith communicate the detention order, along with relevant documents, to the State Government, the timeline of 12 days is stipulated only in the second limb of Section 3(3), which mandates that the Government should approve the detention order within 12 days from the date of detention, after excluding public holidays, failing which the order of detention shall no longer be in force. Hence, it is contended by the State Government that so long as the timeline of 12 days, after excluding public holidays, is complied with by the State Government, in approving the detention order i.e. within 12 days from the date of detention, then the statutory mandate is fulfilled and merely because the detention order, along with the relevant documents, may have been sent not immediately after the issuance of the detention order to the State Government, will not vitiate the decision making process.

10. The Division Bench of this Court, after placing reliance on the decision of the Apex Court in ***Hetchin Haokip' case*** supra [(2018) 9 SCC 562], paras 14 and 15, has overruled the present contention of the State and has held that the mandate of the first limb of Section 3(1) of the KAAP Act is that even the order of detention should necessarily be forthwith sent by the detaining authority to the State Government along with all relevant documents and any unexplained delay will be fatal. In that regard, in ***Anupama's case*** supra (2022 (5) KHC 281), the Division Bench held that the unexplained delay of five days, in communicating the detention order along with relevant documents, by the detaining authority to the State Government, is fatal.

11. It was also argued by the State Government before the Division Bench of this Court in ***S.V Anupama's case*** supra (2022 (5) KHC 281) that the case considered by the Apex Court in ***Hetchin Haokip' case*** supra [(2018) 9 SCC 562] was in relation to the National Security Act, wherein Section 3(4) of the National Security Act mandated that the timeline of 12 days for approval should be counted from the date of the order of detention, whereas Section 3(3) of the KAAP Act stipulates that the period of 12 days for the State Government to approve the detention order should be computed from the date of actual detention and not from the date of issuance of the detention order.

12. It may be true that in the National Security Act, the timeline in Section 3(4) thereof for approval is to be reckoned from the date of the detention order itself and whereas in Section 3(3) of the KAAP Act, the timeline of 12 days for approval is to be reckoned from the date of the actual detention of the detenu and not from the date of issuance of the detention order. But, the crucial aspect of the matter is that the State Government should have the requisite materials to decide on the question of approval of the detention order well in advance and it is for this purpose that it has been exclusively mandated, in the first limb of Section 3(1), that the authorised detaining authority is under the statutory obligation and mandate to forthwith send the detention order along with all the relevant documents to the State Government. Further, as observed by the Division Bench of this Court in ***S.V Anupama's case*** supra (2022 (5) KHC 281), the Government has also the discretion to revoke the detention order at any time under Section 13(1) of the Act. Since Section 13(1) of the Act stipulates that the State Government is empowered to revoke the detention order at any time, it follows that the State Government has jurisdiction to withdraw the detention order even before the actual execution and arrest of the detenu. Therefore, it is all the most necessary that the detention order and the relevant materials are forthwith communicated by the detaining authority to the State Government.

13. So, the issue is as to whether the mandate contained in thefirst limb of Section 3(1) of the KAAP Act has been complied with in this case, inasmuch as it has to be ascertained as to whether the detaining authority has forthwith sent the detention order and the relevant materials to the State Government.

14. Sri.K.A Anas, learned Prosecutor would invite the attentionof this Court that the above said legal contention, advanced by the learned counsel for the petitioner, is without any factual foundation. In that regard, the learned Prosecutor would invite our attention to para 9 of the counter affidavit of the 1st respondent (State Government) that the District Magistrate, as per letter No.DCKNR/3948/2022/SS1 dated 27.04.2022, had forthwith intimated the Government about the issuance of the detention order as per Section 3(3) of the Act. Further that, the 2nd respondentDistrict Collector (authorised detaining authority) in para 13 of his counter affidavit dated 20.10.2022, has also averred that the detention order and other relevant materials were duly forwarded to the State Government and the Director General of Police, immediately after the issuance of the detention order and that all the relevant documents were also handed over to both the Government and the State Police Chief through special messenger.

15. The above said specific factum of averments in the counteraffidavits of the 1st respondent (State Government) and the 2nd respondent (detaining authority) have not been controverted. In view of this aspect, we are constrained to hold that the 2nd respondent (detaining authority) has, in fact, complied with the mandate of the first limb of Section 3(3), inasmuch as the detention order and the relevant materials have been forthwith communicated to the Government. In that view of the matter, the first contention of the petitioner will stand overruled.

Contention (b):

16. The next and last contention raised by the petitioner is as follows:

The petitioner, in regard to his involvement in the seventh crime (out of the nine crimes), was initially released on bail, as per order dated 12.01.2022, granted by the Judicial First Class Magistrate Court-I, Kannur. But later, the Prosecution Agency has filed an application for cancellation of bail and the learned Magistrate had passed an order dated 28.03.2022 cancelling the bail. Further that, thereafter non bailable warrant was issued and the detenu was arrested and remanded to judicial custody on 26.04.2022 and he continued to remain in judicial custody since then.

17. It is later that the detenu was released on bail in that crimeon 28.04.2022. The contention raised by the petitioner is that, the bail cancellation application was given by the Prosecution Agency much before 28.03.2022, pursuant to which the learned Magistrate had passed bail cancellation order on 28.03.2022. The factum regarding the submission of bail cancellation application as well as the issuance of the bail cancellation order dated 28.03.2022 has not been brought to the knowledge of the 2nd respondent-detaining authority, before it had passed Ext.P6 detention order on 27.04.2022. As a matter of fact, as on 27.04.2022, the detenu had already been sent to judicial custody on 26.04.2022. It is pointed out that in such a case, the 2nd respondent-detaining authority was obliged to take into consideration the crucial fact regarding bail cancellation order rendered on 28.03.2022, to consider whether it is highly necessary and imperative to issue preventive detention order and whether it was very likely that the petitioner would have secured bail in that case. That there has been total non consideration of these crucial and relevant aspects. The legal position in this regard is no longer res integra. After extensively considering the various previous case laws on the subject, the three Judge Bench of the Apex Court, in the case in ***Dharmendra Suganchand Chelawat*** vs. ***Union of India and others*** [(1990) 1 SCC 746] has held in para 21 as follows:

"21. The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities".

18. So, it is by now well settled that an order of detention can bevalidly passed against a person, who is already in custody, subject to the condition that the detaining authority must necessarily be aware of the fact that the detenu is already in detention and secondly, there are compelling reasons justifying such preventive detention, despite the fact that the detenu is already in detention and for the latter component of compelling reasons, it has to be

established that cogent materials are available before the detaining authority, on the basis of which it is satisfied that the detenu is likely to be released from custody in the near future and that therefore, taking into account the antecedents of the detenu, he is very likely to indulge in further prejudicial activities after his release from custody and that therefore, his preventive detention is highly necessary and imperative.

19. In the instant case, it is true that the detenu had secured bail in respect of his involvement in the seventh crime on 12.01.2022. But, none other than the Prosecution Agency had thereafter filed application for cancellation of bail and the said application was allowed by the learned Magistrate on 28.03.2022 and the detenu was thereafter remanded into judicial custody on 26.04.2022. The factum relating to even the filing of the bail cancellation order and the issuance of the bail cancellation order by the learned Magistrate on 28.03.2022 has not even been taken into account in Ext.P6 detention order. In other words, for the reasons not known to us, the detaining authority was completely unaware about the fact that the Prosecution Agency had earlier filed a bail cancellation application and that the said application was duly allowed by the Magistrate on 28.03.2022, resulting in the bail granted to the detenu being cancelled and he was later remanded on 26.04.2022. So, even the basic facts regarding the above said crucial and relevant aspects were totally unknown to the 2nd respondent-detaining authority, while he issued the impugned Ext.P6 detention order on 27.04.2022. Hence, the decision making process, in this regard, is fatally affected. If the 2nd respondent-detaining authority had considered these aspects and had reached the considered conclusion that, going by the nature of the crime, the detenu is very well likely to again get bail and that therefore, his preventive detention is highly necessary, and imperative, then the scenario would have been different. That is not the factual aspect in this case. The legal principles laid down by the Apex Court, in the afore-stated decision in ***Dharmendra Suganchand Chelawat's case*** supra [(1990) 1 SCC 746], would lead to the situation that this Court has to necessarily hold that the impugned decision making process in this case is vitiated and therefore, the same is liable for interdiction. Hence, on this sole ground, the petitioner is entitled to succeed.

In that view of the matter, it is ordered that the impugned Ext.P6 detention order No.DCKNR/3948/2022/SS1 dated 27.04.2022, issued by the 2nd respondent (District Collector cum District Magistrate), as confirmed by Ext.P5 G.O (Rt) No.1879/2022/HOME dated 07.07.2022, will stand quashed and set aside. We are told by both sides that, going by Ext.P5 confirmation order dated 07.07.2022, the period of detention of the detenu in this case was six months from the date of execution of detention order viz, 29.04.2022 and the said period of six months has expired on 28.10.2022. However, we make it clear that since Ext.P6 detention order has now been quashed and set aside, the said detention order cannot be treated as a valid order and that therefore, in case the respondents issue any subsequent detention order, the same will have to be treated as the first order, so that the maximum period of detention can only be six months from the date of detention and not one year. This is so as the period of one year envisaged in Section 13(2), can be imposed by the respondents only in a case where the first detention order for six months is valid and the second detention order could then be ordered for a period upto one year from the date of detention.

With these observations and directions, the above W.P (Crl) will stand disposed of.