

Anitha Bruse Vs. State of Kerala,

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Court : Kerala

Decided On : Apr-04-2008

Reported in : 2008(2)KLJ170; 2008(2)KLT857

Judge : P.R. Raman and; V.K. Mohanan, JJ.

Acts : Mines and Minerals (Development and Regulation) Act, 1957 - Sections 4 (1)(A) and 21; [Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001](#) - Sections 20; [Constitution of India](#) (Forty-fourth Amendment) Act, 1978 - Sections 3; Kerala Anti-Social Activities (Prevention) Act, 2007 - Sections 2, 3, 3(1), 3(2), 3(3), 4, 5, 6, 7, 7(2), 7(3), 8, 8(2), 9, 10, 10(1), 10(2), 10(3), 10(4), 11(2), 12, 13, 14, 15 and 34; Preventive Detention (Amendment) Act, 1951; [Preventive Detention Act, 1950](#); Indian Penal Code (IPC) - Sections 34, 143, 147, 148, 308, 323, 354, 420, 427 and 452; Code of Criminal Procedure - Sections 110; [Constitution of India](#) - Articles 14, 19, 21, 22, 22(4), 22(5), 22(7), 32, 226, 246, 246(1), 246(2) and 254(2); Punjab Communist Detenu Rules, 1950

Appeal No. : W.P (Crl). No. 71 of 2008

Appellant : Anitha Bruse

Respondent : State of Kerala, ;The Superintendent of Police (Rural), ;The Circle Inspector of Police and the Su

Advocate for Def. : Government Pleader

Advocate for Pet/Ap. : K. Ramakumar (Sr.), Adv.

Judgement :

V.K. Mohanan, J.

1. Hopefully pointing out the grievance of the petitioner regarding the alleged illegal detention of her husband namely Sri.Bruce.S.Pothanikkatt, Keerambara, the petitioner approached this Court by filing the above writ petition invoking the extra ordinary jurisdiction of this Court under Article 226 of the [Constitution of India](#). The main prayer of the petitioner in this writ petition is to issue a writ of habeas corpus commanding the respondents to produce the body of the aforesaid person- the husband of the petitioner before this Court and to set him at liberty forthwith. It is also prayed to declare that the detention of her husband under the Kerala Anti-Social Activities (Prevention) Act, 2007 (Act 34 of 2007) (hereinafter referred to for short as 'the Act' only) is violative of Articles 14, 19, 21 and 22 of the [Constitution of India](#) as the procedural safeguards have been violated.

2. The allegations in the writ petition as its original form are as follows:

According to the petitioner, she read from the newspaper on the morning of 4.3.2008 that her husband, the above named, has been implicated under the Act without any justification. According to her, the husband was taken from their house at Keerampara between 1 p.m. and 2 p.m. on 3rd March 2008 by two Policemen attached to the Kothamangalam Police Station. When the Police was taking the petitioner's husband, she heard the Policemen telling her husband that the Sub Inspector of Police wanted to see him. Thus, from that time onwards, the petitioner's husband is under illegal custody of the Police and she had also come to know from the newspaper that proceedings are likely to be initiated under the provisions of the Act against her husband. It is averred that the petitioner's husband cannot be included under the aforesaid Act as he will not fall within any of the expressions under Section 2 of the Act or he was not engaged in any anti-social activities. She had admitted that the petitioner's husband has been involved in two cases of cheating and one case in relation to lifting of sand. But she had denied the involvement of the petitioner's husband in connection with removal of sand. According to the petitioner, her husband had gone to the house of one

Maneesha Sumesh at Inchathotty not for any criminal purposes, but to object their criminal activities and due to tremendous influence exerted by them on the Police, the case was converted to an attempt to outrage the modesty of a woman though the husband of the said lady was there at the house shortly after 7 p.m. It is the further case of the petitioner that some Police Officers attached to the Kothamangalam Police Station were inimical towards the husband of the petitioner. It is asserted by the petitioner that she has reasons to believe that the arrest and detention of her husband by the Kothamangalam Police on 3rd of March, 2008 is the result of personal animosity entertained against her husband by some Police Officers and there is absolutely no reason to attract the provisions of the above Act against the petitioner's husband. Thus, according to the petitioner, the detention of her husband will amount to violation of his fundamental rights and the same is unsupported by any law. It is also averred that no orders contemplated under the relevant Act has been issued in accordance with the provisions. Therefore, according to her, the detention of her husband is patently violative of Articles 14, 19, 21 and 22 of the [Constitution of India](#). Thus, according to the petitioner, the continued detention of her husband is absolutely illegal, and he is entitled to be released forthwith and she is entitled to get the reliefs as prayed for in the writ petition.

3. In the grounds especially under ground (a), it is urged that the arrest and taking into custody of her husband by the two Policemen from the Kothamangalam Police Station are absolutely illegal and no order under Section 3 of the Act has been passed at that time. Alternatively, it is contended that the petitioner's husband will not come under any of the expressions contained in Section 2 of the Act. It is also urged that the ground for detention also has not been communicated to the detenu. According to the petitioner, the order has not been read over to him at the time of the detention on 3rd March, 2008 between 1 p.m. And 2 p.m. No copy of the order of detention has been served. Thus, according to the petitioner, in any view of the matter, the arrest, detention and custody of the petitioner's husband by the Kothamangalam Police are liable to be declared altogether as invalid in law and therefore, he is liable to be released forthwith.

4. Subsequently, the petitioner herein had preferred three interlocutory applications. I.A. No. 3406 of 2008 is filed with a prayer to permit her to correct the error in the writ petition and the same was allowed by this Court on 19.3.2008. Thereafter, two more interlocutory applications are filed out of which I.A. No. 3730 of 2008 is filed with a prayer to amend the writ petition by incorporating an additional prayer i(a), that is, to call for the records leading to the issue of Ext.P1 and quash the same by issuance of a writ of certiorari or any other appropriate writ, order or direction and the same was allowed by this Court as per order dated 19.3.2008. The other application, I.A. No. 3892 of 2008 is filed with a prayer to amend and incorporate the two additional prayers namely, prayer Nos. (iii) and (iv). The third prayer is to call for the records leading to the issue of Ext.P7 and quash the same by the issuance of a writ of certiorari or any other appropriate writ, order or direction. The fourth prayer is to declare that Section 12 of Act 34 of 2007 is unconstitutional and violative of Article 22 of the [Constitution of India](#) and therefore, void and unenforceable in law. The said petition was also allowed by this Court as per order dated 19.3.2008. As per order dated 27.3.2008 in I.A. No. 4242 of 2008, the District Collector and District Magistrate, Ernakulam is allowed to be impleaded as additional fifth respondent in the above writ petition.

5. Respondents 1 and 2 have filed separate counter affidavits. The contention raised by the first respondent in the counter affidavit is to the effect that the District Collector by his letter dated 7.3.2008, which is received by the Government on 11.3.2008, informed the Government that his order of detention No. M7.26662/07(46) dated 3.3.2008 against the detenu has been executed on 4.3.2008 and that he has been detained under Section 3(1) and 3(2) of the Act. According to the first respondent, the report of the Collector includes the detenu's acknowledged copies of the order of detention and grounds for detention and copies of the supporting documents. It is stated that the grounds for the detention detailed crimes involving offences falling under Chapter XVI and XVII of the Indian Penal Code committed by the detenu as also for illegal mining of river sand. The Police report shows that he threatens people to prevent them from informing the police of his illegal activity. In Crime No. 52/2007, under trial now, it is stated that he has been involved in an unlawful assembly, a gang of accomplices and attacked a lady at her home at mid night on 15.1.2007 alleging that she informed

the Police about his illegal sand movements. According to the Collector, from the records, he had satisfied that the detenu can be classified as a 'Known Rowdy/Known Goonda' as defined under the Act and as classified by the District Collector in his order of detention. The first respondent further stated that on being satisfied, on evaluation of the said materials that if the detenu is allowed to continue his anti-social activities unrestricted, it will cause harm to the environment, danger, alarm and a feeling of insecurity to the public, the Government has approved the detention under Section 3(3) of the Act as per Order No. 17186/SSA5/2008/Home dated 11.3.2008, a copy of which is produced as Ext.R1(a). It is also stated that copy of Ext.R1(a) order was forwarded to the Superintendent, Central Jail, Viyyur for serving on the detenu immediately on receipt of it on 11.3.2008 itself. It is also stated that the matter will be placed before the Advisory Board on or before 25.3.2008, that is, within 21 days of the date of detention (4.3.2008) and further action as per Section 10(4) of the Act would be taken by the Government on receipt of the report of the Advisory Board under Section 10 of the Act. The Government has also stated that from the records submitted by the District Collector, Ernakulam, it is seen that the detenu is involved in five criminal cases pending trial before the competent criminal courts, relating to offences falling under Chapters XVI and XVII of I.P.C. and one case under Mines and Minerals (D&R;) Act, 1957 meriting his detention. Thus, according to the first respondent, the petitioner's husband is detained in pursuance of an order made under a law providing for preventive detention and in issuing the said order and executing the same, all procedural requirements as mandated by the provisions of the statute, namely the Kerala Anti- Social Activities (Prevention) Act, 2007 and Article 22(5) of the Constitution have been strictly complied with. Therefore, according to the first respondent, the petitioner is not entitled to get any relief.

6. In his counter affidavit, the second respondent has stated that by his preliminary report dated 1.3.2008, information was given to the District Magistrate, Ernakulam about the involvement of the detenu in six criminal cases including house trespass, attempt to culpable homicide, cheating and offence under the provisions of Mines and Minerals (Development and Regulation) Act, 1957 and [Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001](#). It was

stated in the report that the detenu cheated 17 persons in Ernakulam District by offering jobs at Kochi International Air Port and deceitfully collected huge amounts from them. The report further shows that the detenu is currently involved in illegal mining and transportation of river sand which causes danger to the safety of ecological system and environment. According to the report, the detenu is a terror in Ernakulam District, especially in the jurisdiction of Kothamangalam Police Station and neighbouring places and that he is a 'Known Goonda' and 'Known Rowdy' as defined under the Act due to his criminal activities as stated above. It is also reported that the detenu is likely to commit offences causing danger to the life and property of law abiding citizen and causing danger to the safety of ecological system and environment. The report is produced as Ext.R2(a). In para 5 of the counter affidavit, the second respondent further disclosed the details about the criminal activities of the detenu. Thus, the information is specific about the involvement of the detenu in six criminal cases namely., (1) Cr. No. 584/2004 under Section 420 and 34 I.P.C. (2) Cr. No. 605/2004 under Section 420 and 34 I.P.C. (3) Cr. No. 606/04 under Section 420 and 34 I.P.C., (4) Cr. No. 621/04 under Section 420 and 34 I.P.C., (5) Cr. No. 52/07 under Sections 143, 147, 148, 452, 323, 354, 427 and 308 I.P.C. and (6) Cr. No. 703/07 under Section 4(1)(A) read with Section 21 of the Mines and Minerals (Development and Regulation) Act and Section 20 of the Kerala Protection of River Banks Regulation and Removal of Sand Act, 2001 and all the above crimes were registered in the Kothamangalam Police Station. According to the report, in all the above cases, charge sheets have been filed after investigation and except for Crime No. 52/07 which is pending trial before the Sessions Court, Ernakulam as S.C. No. 420/07, all other cases are pending trial before the Judicial First Class Magistrate's Court, Kothamangalam as C.C. Nos. 41/06, 50/06, 49/06 and 40/06. The report further shows that the detenu is still very active in his criminal activities which cause harm, danger, alarm and feeling of insecurity to the general public of Ernakulam Rural District and he is a leader of sand mafia operating within Kothamangalm Police station limits and neighbouring places and he is committing offences causing danger to the safety of ecological system and environment. It is also reported that he is also threatening local people who passes information to the Police about his illegal action. As he was habitually committing offences causing threat to the public safety, action was

taken against him on 12.9.2007 by registering a case in Cr. No. 882/2007, under Section 110(e) of the Cr.P.C. by the Sub Inspector of Police, Kothamangalam. According to the report, in the light of the above criminal background of the detenu, it is reported to the Collector that the detenu comes under the category of persons defined as 'Known Goonda' and 'Known Rowdy' in Section 2(o) and (p) of the Act and requested that in the interest of the safety of ecological system and environment and safety of life and property of public, he may be proceeded against under Section 3(1) of the Act. Accordingly, the District Magistrate issued the order under Section 3(1) and 3(2) of the Act, with a view to prevent the detenu in acting in such a manner as aforesaid, placing him under detention for a period of six months along with the grounds of detention, subject to confirmation by the Government within 12 days from the date of detention. Copy of the order and the grounds are produced as Ext.R2(b) and Ext.R2(c) respectively. Ext.R2(d) is a copy of the memo issued by the District Magistrate to the second respondent for executing the order of detention. The Jail Authority was informed that the detenu shall be set at liberty if no order was received from the Government confirming the detention of the detenu within 12 days. Thus, according to the second respondent, the husband of the petitioner, the detenu was arrested by the Sub Inspector of Police, Kothamangalam at 4 p.m. on 3.3.2008 from the bus stop near the Kothamangalam Police Station and was produced and detained at Viyyur Central Jail on 4.3.2008. According to the second respondent, all the documents such as copies of detention order, grounds of detention, memo for executing the order of detention and other supporting documents were served on the detenu, the receipt of which has been acknowledged by him by affixing his signature and endorsement on the concerned documents. Thus, the second respondent justified the order of detention against the husband of the petitioner. All contrary averments contained in the writ petition were specifically denied in the counter affidavit of the second respondent. It is also submitted through the counter affidavit of the second respondent that the detention of persons in pursuance of an order made under a law providing for preventive detention is permitted under Article 22(4) of the [Constitution of India](#) and it is well established proposition of law that to the extent that provisions are made in Article 22, it cannot be controlled by Article 21 of the [Constitution of India](#). Thus, according to them, there is no violation of Articles 14,

19, 21 and 22 of the [Constitution of India](#) in the matter of detention of the petitioner's husband.

7. We have heard Sri.K.Ramakumar, the learned Senior counsel appearing for the petitioner as well as Sri.K.K.Ravindranath, Special Government Pleader and the Liaison Officer.

8. During the course of argument, Sri.K.Ramakumar, Senior counsel appearing for the petitioner emphatically submitted that the detention of the petitioner's husband is in total violation of the mandate contained in Article 22 of the [Constitution of India](#). Pointing out the wordings contained in the order of detention, the learned Counsel submits that on the same set of facts and allegations, the petitioner's husband cannot be treated as 'Known Goonda' and 'Known Rowdy'. The using of the above two definitions altogether would show the non-application of mind by the detaining authority. Another point advanced by the learned Counsel is that the order and materials itself indicate the non application of mind by the detaining authority even on the available documents. It is also argued that the arrest of the detenu was not in accordance with the process prescribed by the Act as well as the position of law formulated by the Supreme Court. After inviting our attention and pointing to the statement regarding the date of arrest contained in the counter affidavit filed by the first and second respondents, it is submitted that there is a glaring contradiction regarding the actual date of arrest of the detenu. On the other hand, Mr. K.K.Ravindranath in his argument emphatically denied the allegations and submits that the detention of the petitioner's husband is in no way violated any of the provisions of the [Constitution of India](#) and the above Act. According to the learned Special Government Pleader, considering the criminal background of the detenu as disclosed from the report of the second respondent, he will definitely come within the definition of both 'Known Goonda' and 'Known Rowdy' and therefore, there is no illegality in appearing the term 'Known Goonda/Known Rowdy' in the detention order. After full consideration of the materials and on his subjective satisfaction, the detaining authority has issued the impugned order so as to prevent the detenu from indulging further criminal activities. It is also submitted that the arrest was done in accordance with the prescribed procedure and no variation from the same. It is pointed out by Mr. K.K.Ravindranath that

there is no contradictory statement regarding the arrest and detention in the counter affidavits filed by the first and second respondents. Inviting our attention to para 9 of the counter affidavit of the second respondent, the learned Government Pleader submits that as per the directions of the second respondent, the Sub Inspector of Police, Kothamangalam effected the arrest of the detenu from the bus stop near the Kothamangalam Police Station at 4 p.m. on 3.3.2008 complying with all the directions issued by the Supreme Court and thereafter, the detenu was produced before the Superintendent of Central Jail, Viyyur on 4.3.2008 and admitted there as per the Jail Admission Authorization issued by the District Magistrate. Therefore, the detention in effect will start only from 4.3.2008 though he was arrested at 4 p.m. on 3.3.2008 and thus, according to the learned Government Pleader, there is no conflict with respect to the date of arrest.

9. As pointed out earlier, the petitioner has brought an amendment to the writ petition and incorporated certain additional statement of facts and additional grounds namely grounds (b) and (c) to (f). Consequently, certain additional prayers were also incorporated. Thus the prayer No. i(a) is incorporated. The another important prayer brought by way of amendment is the fourth prayer by which it is sought for a declaration that Section 12 of the Act 34 of 2007 is unconstitutional and violative of Article 22(4) of the [Constitution of India](#) and therefore, void and unenforceable in law. Mr. Ramakumar, learned Senior Counsel appearing for the petitioner during his fervent plea for a declaration that Section 12 of the Act 34 of 2007 is unconstitutional, invited our attention to the provision of the [Constitution of India](#) namely, Article 22 of the [Constitution of India](#) and also Section 12 of the Act. Mr. Ramakumar took us through Article 22 of the [Constitution of India](#) which reads as follows:

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

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty- four hours of such arrest

excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in Clauses (1) and (2) shall apply--

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(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) and (b) of Clause (7).... [To come into effect on enforcement of Section 3 of Constitution (Forty-fourth Amendment) Act, 1978] [(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention:

Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of any High Court:

Provided that nothing in this clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under Sub-clause (a) of Clause (7).

Explanation.--In this clause, 'appropriate High Court' means,--

(i) in the case of the detention of a person in pursuance of an order of detention made by the Government of India or an officer or authority subordinate to that Government, the High Court for the Union territory of Delhi;

(ii) in the case of the detention of a person in pursuance of an order of detention made by the Government of any State (other than a Union Territory), the High Court of that State; and

(iii) in the case of the detention of a person in pursuance of an order of detention made by the administrator of a Union territory or an officer or authority subordinate to such administrator, such High Court as may be specified by or under any law made by Parliament in this behalf.]....

(5) 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.

(6) Nothing in Clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe---

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under Sub-clause (a) of Clause (4).... [To come into effect on enforcement of Section 3 of Constitution (Forty-fourth Amendment) Act, 1978]

(7) Parliament may by law prescribe--[(a)] the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and [(b)] the procedure to be followed by an Advisory Board in an inquiry under [clause (4)].

After inviting our attention to the various provisions contained under Article 22 of the [Constitution of India](#), it is submitted that Section 12 of the Act is per se illegal and ultra vires as the same authorises the detaining authority to detain a person for a period of 12 months. According to the learned Counsel, on a further reading of Clause (a) to Article 22(4) of the [Constitution of India](#), it can be seen that the detaining authority has no power to detain a person beyond three months unless the Advisory Board has reported that according to its opinion, there is sufficient cause for such detention. It is also argued by the learned Counsel on the basis of the proviso to Article 22(4)(a) that Act 34 of 2007 being the State Act, the mandate contained under Article 22(4) has to be strictly complied with and the State has no authority to fix a period more than three months contrary to what provided under Article 22(4) of the [Constitution of India](#) and this position is more clear on a reading of the proviso. If the law is made by the Parliament, the Parliament can fix any period even more than three months. According to the learned Counsel, in view of the specific bar, the State has no authority to fix the period of detention for more than three months. But Section 12 of the State Act namely, Act 34 of 2007 contained the provisions empowering the detaining authority to detain a person for a period of 12 months.

10. Sri.Ramakumar, learned Counsel appearing for the petitioner in his persuasive argument submits that Section 12 of Act 34 of 2007 is ultra vires and unconstitutional since the above provision enables the Government to fix the period of detention as six months and the same is diametrically opposed to the

mandate contained in Clause (4) of Article 22. According to the learned Counsel, the law made by the State cannot fix the detention period more than three months and if any law made in contravention of the above provisions of the Constitution could be rendered as unconstitutional. In support of the above contention, the learned Counsel placed reliance on a decision of the Supreme Court reported in *Vashisht Narain Karwaria v. State of U.P.* : 1990 CriLJ1311 ; *Rajesh Vashdev Adnani v. State of Maharashtra and Ors.* (2005) 8 SCC 390 and *Rashidmiya v. Police Commissioner, Ahmedabad* : [1989]3SCR182 . The learned Counsel placed reliance on the decision of the Apex Court in *State of West Bengal v. Ashok Dey* : 1972 CriLJ1010 . In para 7 of the above decision, the Apex Court has held as follows:

7. We are unable to accept this construction of Clause (7) of Article 22. It is noteworthy that Shri Chatterji, learned Counsel for the respondents, expressly conceded before us that Article 22(7) is only an enabling or a permissive provision and it does not impose a mandatory obligation on the Parliament to make a law prescribing the circumstances under which a person may be detained for more than three months as stated therein. But according to him, Sub-clauses (b) and (c) of Clause (7) do contain a mandate to the Parliament which is obligatory. In our view, Clause (7) of this Article on its plain reading merely authorises or enables the Parliament to make a law prescribing, (i) the circumstances under which a person may be detained for a period longer than three months (ii) the maximum period for which a person may in any class or classes of cases be detained under any law providing for preventive detention and (iii) the procedure to be followed by the Advisory Board in an enquiry under Clause (4)(a) of this Article. The respondents' contention that 'may' in the opening part of this Article must be read as 'shall' in respect of Sub clauses (b) and (c) though it retains its normal permissive character in so far as Clause (a) is concerned. In the absence of special compelling reasons can be supported neither on principle nor by precedent of which we are aware. On the other hand, this Court has in *S.Krishnan v. State of Madras* : [1951]2SCR621 agreeing with the observations of Kania,C.J, in *Gopalan v. State of Madras* : 1950 CriLJ1383 held Sub-clause (b) of Clause (7) to be permissive. This opinion is not only binding on us but we are also in respectful agreement with it. Apart from the exclusive power of the Parliament to make laws

in respect of 'preventive detention for reasons connected with defence, foreign affairs or security of India; persons subject to such detention' (vide Article 246(1) and Entry 9, List 1, Seventh Schedule), Parliament and State Legislatures have both concurrent powers to make laws in respect of 'preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subject to such detention' (vide Article 246(2) and Entry 3 in List III of Seventh Schedule). A law made by Parliament in respect of preventive detention falling under Entry 3 of List III has to prevail over a State law on the subject to the extent to which it is repugnant to the State law unless the State law is covered by Article 254(2). Parliament, however, is not debarred by cl.(2), as is clear from the Proviso, from enacting a law with respect to preventive detention enumerated in Entry 3 of List III which may have the effect of adding to, amending, varying or repealing such State law. The State Legislature has thus plenary power to make a law providing for preventive detention within the limitations imposed by the Constitution just noticed. The power of the State Legislatures under Article 246 with respect to preventive detention enumerated in Entry 3 of List III is co-extensive with that of Parliament with respect to such preventive detention and it must necessarily extend to all incidental matters connected with preventive detention as contemplated by this entry, subject only to the condition that it does not come into conflict with a law made by Parliament with respect to the same matter. There is no provision of the Constitution to which our attention has been drawn nor has any principle of law or precedent been brought to our notice, which would justify a limitation on the power of the State Legislature, as suggested by the respondent, to make a valid law providing for detention under Article 22(4) for a period beyond three months on the ground of absence of a law made by Parliament permitting detention for such period. Had the Constitution intended such a result it would certainly have made an express provision to that effect. Since Article 22 covers the subject of preventive detention both under the law made by Parliament and that made by State Legislatures, if State Legislatures were intended by the Constitution to function under a limitation in respect of the period of detention one would have expected to find such a limitation expressly stated in this Article. But as we read Clause (7) of Article 22 it merely invests the

Parliament with an overriding power enabling it, if the circumstances so require, to make a law, providing for preventive detention prescribing the circumstances under which a person may be detained for a period longer than three months without obtaining the opinion of an Advisory Board and, also prescribing the maximum period for which any person may be detained under any such law and further prescribing the procedure to be followed by an Advisory Board. It does not prohibit the State Legislature from making a law either providing for preventive detention for a longer period than three months when there is a provision for securing the opinion of an Advisory Board or prescribing procedure to be followed by such Advisory Board. Such a power with the State Legislature, hedged in by effective safeguards as it is, appears to us to be necessary to enable it to deal with emergent situations necessitating enactments with respect to preventive detention for safeguarding the security of the State against violent activities secretly organised by anti- social and subversive elements with the intention of producing chaos. Security of a State, maintenance of public order and of supplies and services essential to the community demand effective safeguards in the larger interest of sustenance of peaceful democratic way of life. Article 22, therefore, must be construed on its plain language consistently with the basic requirement of preventing anti-social subversive elements from imperilling the security of States or the maintenance of public order or of essential supplies and services therein.

Thus, according to the learned Counsel, though the State Legislature has plenary power, a power to make a law providing for preventive detention, the legislature cannot enact provisions so as to enable the State to detain citizens for a period of more than three months unless the Advisory Board, before the expiry of the period of three months, holds that there are sufficient grounds for such detention. Therefore, Section 12 of the Act is liable to be declared as unconstitutional. Learned Counsel invited our attention to another decision of this Court reported in *Vasanthi v. State of Kerala* : 2008(1)KLT568 . In the said decision this Court had held as follows:..If the detention is beyond three months, the right to have the matter examined by the Advisory Board under Clause (4) of Article 22 and irrespective of the period of preventive detention, the right to have the matter examined by the Government, based on the detenu's representation, are independent and separate constitutional safeguards. One is not a substitute for the

other. Neither Article 22(5) nor Section 7(1) expressly provides that the representations filed by the detenu should be considered by the Government. But, those provisions imply a right in the detenu to have his presentation considered by the Government expeditiously....

Therefore, power of the Government under Section 12 of the Act for detaining a person for more than three months except when the Advisory Board found the detention to be justified is unconstitutional. On the basis of the decision of the Apex Court reported in *Fagu Shaw v. The State of W.Bengal* : 1974 CriLJ486 the learned Counsel submits that the Parliament is not bound to fix the maximum period of detention under Article 22(7)(b) of the Constitution in order that the Proviso to Article 22(4)(a) might operate. Both Parliament and State Legislatures have power under entry 3 to List III of the Seventh Schedule to provide for detention of a person for a specified period. The following lines of the above decision are as follows: The purpose of Article 22(4)(a) is to put a curb on that power by providing that no law shall authorize the detention of a person for a period exceeding three months unless an Advisory Board has reported within the period of three months that there is sufficient cause for detention. And, what the proviso means is that even if the Advisory Board has reported before the expiration of three months that there is sufficient cause for detention, the period of detention beyond three months shall not exceed the maximum period that might be fixed by any law made by Parliament under Article 22(7)(b).... The proviso says in effect that if Parliament fixes the maximum period under Article 22(7)(b), the power of Parliament and State legislatures to fix the period of detention in a law passed under the entry would be curtailed to that extent.

Therefore, the counsel for the petitioner submits that Section 12 of the Act is diametrically opposed to the settled position of law and against provisions contained in the Constitution and hence the same is liable to be set aside.

11. It is pertinent to note that Article 22 is coming within Part-III of the [Constitution of India](#) which deals with fundamental rights of citizens. Thus, Article 22 itself is one of the fundamental rights guaranteed by the Constitution to the people of India. But, on a close scrutiny of Article 22, it can be seen that such right is not an

absolute unrestricted one, but subject to certain limitations. Such restrictions are always to protect the larger interest of the society as well as the nation and the individual right must always be subject to the interest of the society as a whole. Therefore, such restrictions cannot be termed as authoritarian or undemocratic under any system of governance. Thus, it is crystal clear that while protection is granted to the citizens of India against arrest and detention, in certain cases as per Article 22 of the [Constitution of India](#), in deviation of normal procedure, but subject to the further provisions contained therein, arrest and detention can be effected. In the light of the averments and pleadings raised on behalf of the petitioner, Article 22(4) is relevant in this case. Thus, on a reading of Clause (a) to Article 22(4) and the proviso thereto and Clause (b), it can be seen that what is prohibited is the detention of a citizen for more than three months as per the law made by the State which contained no provision for an Advisory Board as constituted as per Clause (a) to Article 22(4) for giving opinion as to whether the detention is with sufficient cause. Therefore, if the State law contains no provision for such Advisory Board, such law will be unconstitutional. Now let us examine the various provisions of the Act 34 of 2007 with the above understanding.

12. The preamble of Act 34 of 2007 namely, the Kerala Anti-Social Activities (Prevention) Act, 2007 states 'Whereas, it is expedient specifically to provide for the effective prevention and control of certain kind of anti-social activities in the State of Kerala'. The Act deemed to have come into force with effect from 13th December, 2006. Section 2 is the definite clause of the Act which contains the definition of various terms such as 'anti-social activity, advisory board, bootlegger, depredator of environment, drug-offender, goonda, immoral traffic offender, known goonda, known rowdy, loan shark, money lender, property grabber, rowdy etc.' From the definitions contained under the above terms/words, it can easily be inferred the class of persons to be brought under the purview of the Act and thus, the legislative intention is clear for legislating the Act. Section 3 of the Act deals with the power to make orders for detaining 'Known Goondas' and 'Known Rowdies' which runs as follows:

3. Power to make orders for detaining Known Goondas and Known Rowdies.--

(1) The Government or an officer authorised under Sub-section (2), may, if satisfied on information received from a Police Officer not below the rank of a Superintendent of Police with regard to the activities of any Known Goonda or Known Rowdy, that with a view to prevent such person from committing any anti-social activity within the State of Kerala in any manner, it is necessary so to do, make an order directing that such person be detained.

(2) If having regard to the circumstances prevailing, or likely to prevail in any area, the Government, if satisfied that it is necessary so to do, may, by order in writing, direct that during such period as may be specified in the said order, the District Magistrate having jurisdiction may exercise the powers under Sub-section (1) in respect of such persons residing within his jurisdiction or in respect of such persons not so resident who have been indulging in or about to indulge in or abet any anti-social activities within such jurisdiction.

(3) When any order is made under this section by the authorised officer under Sub-section (2), he shall forthwith report the fact to the Government and the Director General of Police, Kerala, together with a copy of the order and supporting records which, in his opinion, have a bearing on the matter and no such order shall remain in force for more than 12 days, excluding public holidays, from the date of detention of such Known Goonda or Known Rowdy, unless, in the meantime, it has been approved by the Government or by the Secretary, Home Department if generally so authorised in this regard by the Government.

So Section 3(1) and 3(2) enable the Government or the authorised officer to issue such order of detention on satisfaction of the ground mentioned. As per Sub-section (3) of Section 3, when any order is made under Section 3 by the authorised officer under Sub-section (2), he shall forthwith report the fact to the Government as well as the Director General of Police, Kerala together with a copy of the order and supporting records which in his opinion, have a bearing on the matter and such order shall not remain in force for more than 12 days from the date of detention unless it has been approved by the Government or by the Secretary, Home Department if generally so authorised in this regard by the Government. So the detention order issued initially either by the Government or by

the authorised officer shall not be more than 12 days unless the same is approved by the Government. Section 4 of the Act deals with execution of detention orders and Section 5 deals with places of detention. Section 6 deals with powers in relation to absconding persons. Section 7 mandates the ground of order of detention to be disclosed to the persons arrested. Sub-sections (2) and (3) ensure the right of the detenu to get the relevant documents and also the right to give legal assistance to make representation against the arrest and detention if so aggrieved. The above provisions are strictly in terms of the salutary provisions contained in Article 22 of the [Constitution of India](#).

13. Section 8 of the Act deals with the constitution of Advisory Board. Sub-section (2) of Section 8 says that every such Board shall consist of a Chairman who is, or had been Judge of a High Court and two other members who are qualified under the [Constitution of India](#) to be appointed as a Judge of High Court. So the Act itself made provisions for the constitution of an Advisory Board as contemplated by Clause (a) of Article 22(4) of the [Constitution of India](#). Section 9 of the Act says that it is mandatory in nature that in every case where a detention order has been made under the Act, the Government shall, within three weeks from the date of detention of a person, place before the Advisory Board, the grounds on which the order has been made and the representation, if any, made by the person affected, and in the case where the order has been made by an authorised officer, the report by such officer under Sub-section (3) of Section 3. It is relevant to note that Section 10 deals with various procedures to be followed by an Advisory Board and its further action. As per Sub-section (1) of Section 10, the Board, after hearing the affected party in person, shall prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within nine weeks from the date of detention of the person concerned. It is relevant to note that on getting the information from the Advisory Board, the Government may confirm the detention order and continue the detention of the persons concerned for such period as it thinks fit. Thus it can be seen that the final authority is vested with the Government for fixing the period of detention whereby the citizens can be placed under detention. Sub-section (4) of Section 10 which is mandatory in nature says that if the Advisory Board is of the opinion that there is no sufficient cause for the

detention of a person concerned, the Government shall revoke the detention order and cause the person to be released forthwith. Thus by a reading of Section 10 and sub-sections, it can be seen that this section is purposefully designed and incorporated to save the fundamental right of the citizens as guaranteed by Article 22(4)(a) of the [Constitution of India](#). Thus, we are of the opinion that Section 10 of the Act specifies the constitutional requirement and thereby, protects the right of the citizens from illegal and vexatious arrest and detention.

14. Section 12 of the Act deals with maximum period of detention which runs as follows:

12. Maximum period of detention.-- The maximum period for which any person may be detained in pursuance of any detention order made under this Act, which has been confirmed under Section 10, shall not exceed six months from the date of detention.

Thus, Section 12 imposed a limitation on the Government in its power for placing a citizen under detention. Therefore, though it is an enabling provision, the maximum period that can be fixed by the Government is only six months. By Section 13 of the Act, ample powers have been given to the Government either for revoking or modifying the order of detention made. Section 14 is another clause enabling the Government to temporary release the persons detained and in exercise of such powers, the Government can temporarily release such persons for a maximum period of one week and the Government is also given power to cancel such interim order at any time. Section 15 deals with the power to make orders restricting the movements of certain persons. The remaining provisions in the Act are not much relevant in the light of the pleadings taken in this writ petition and also the arguments advanced at the bar. Thus, on a conjoint reading of Sections 3(3), 9, 10(1), 10(4) and Section 12 of the Act, one can understand that the initial order passed by the Government or the Officer authorised under Sub-section (2) of Section 3 will remain only for a maximum period of 12 days unless the same is approved by the Government and the further period of detention is fixed by the Government under Section 10(4) on the basis of the opinion given by the Advisory Board under Section 10(1) and (3) within nine weeks from the date of

detention of the persons concerned, for which the Government has to place the detention order within three weeks from the date of detention. That means the final order of the Government on the basis of the Advisory Board will have to be issued within nine weeks or 63 days. Thus the final order, that may be issued by the Government by which it decides to approve the detention and to fix the period, shall not exceed six months from the date of detention in view of Section 12 of the Act. It is relevant to note that the periods fixed in these Sections are mandatory in nature and any lapse in taking steps or complying with the formalities within the time limit fixed by the above provisions will entail the detention as illegal. Thus, on a scrutiny of the scheme envisaged by the Act, it can be seen that ample provisions and safeguards have been incorporated so as to safeguard the fundamental right of the citizens, against illegal arrest and detention, as contemplated by Article 22(4) especially, Article 22(4)(a) of the [Constitution of India](#).

15. The outcome of the survey of various provisions in the Act 34 of 2007 shows that the Government or the authorized officer under Section 3(2) shall forward the detention order as well as the other materials within 12 days from the date of detention to the Government and such detention will not be valid beyond the period of 12 days unless the Government approves the same and fixes the further period, if any, in exercise of its powers under Section 10(4) of the Act on the basis of the opinion given by the Advisory Board constituted under Section 8 of the Act within nine weeks from the date of detention for which the Government has to place the detention order before the Advisory Board within three weeks from the date of detention order in terms of Section 9 of the Act. The net result is that the Advisory Board has to give an opinion within nine weeks that means within 63 days from the date of detention and only upon such opinion, the Government can either approve the detention order passed by the detaining authority and to fix the period of detention or to cancel the order of detention. Any how the maximum period which the Government can fix is only six months in view of Section 12. In the result, the Government's power under Section 10(4) can be exercised only on the basis of an opinion given by the Advisory Board constituted under Section 8, that too within 63 days or nine weeks from the date of detention. So the opinion of the Advisory Board should come within 63 days, which is a period lesser than fixed

by Article 22(4) of the [Constitution of India](#). Therefore, it can be seen that an effective scheme with workable provisions have been incorporated in the Act itself in tune with the salutary principles and mandates contained in Article 22 of the [Constitution of India](#). Hence, we are unable to accept the above contentions raised by the petitioner. In the light of the above discussion, we hold that Section 12 of Act 34 of 2007 is well within the provisions of the [Constitution of India](#) and hence the same is constitutionally valid and perfect.

16. Another important contention raised by the learned Counsel for the petitioner is that the order of detention passed by the District Collector is against the mandate contained in Article 22(4) of the [Constitution of India](#) and also against the provisions of Act 34 of 2007. The learned Counsel took us through Ext.P1 which is the order passed by the District Collector, Ernakulam as per the proceedings in M7.26662/07 (46) dated 3.3.2008. Along with the counter affidavit filed by the second respondent, a copy of the above same order is produced and marked as Ext.R2(b). Mr. Ramakumar. Learned Senior counsel invited our attention to the 5th paragraph of the impugned order namely Ext.P1(Ext.R2(b) which reads as follows:

Therefore, in exercise of the powers vested in me under Section 3(1) read with 3(2) of the Act and with a view of prevent him from acting in such manner as aforesaid, I hereby order that Sri.Bruce, S/o.Devassia be placed under detention with immediate effect for a period of 6 months at Viyyur Central Jail, subject to confirmation of this order by the Government within the mandatory twelve days (excluding Gazetted holidays) from the date of detention.

From the above passage of the order, it can be seen that by the impugned order, the authorised officer placed the husband of the petitioner under detention with immediate effect for a period of six months at Viyyur Central Jail subject to confirmation of the order by the Government within 12 days from the date of detention. According to the learned Counsel, such period fixed by the detaining authority is illegal and diametrically opposed to the provisions contained in the [Constitution of India](#) namely, Article 22(4). According to him, the District Collector, being the detaining authority as envisaged by Section 3(2) of the Act, can detain a person at the most for a maximum period of three months and even a single day in

excess of the three months period will amount to illegal detention because it will amount to infringement of freedom of citizen of India. According to him, when the provisions of the Constitution stipulates only three months period, the detaining authority under the Act which being a State Act, has no jurisdiction or authority to keep a person more than the above period fixed by the provisions of the [Constitution of India](#). Therefore, the initial detention order passed by the detaining authority itself is illegal and arbitrary.

17. In support of the above contention, he placed reliance on the decision of the Apex Court in *Makhan Singh Tarsikka v. State of Punjab* : 1952 CriLJ321 . That was a case arose out of a petition filed under Article 32 of the [Constitution of India](#) before the Supreme Court with a prayer for the release of the petitioner therein from the alleged unlawful detention. That is a case related to [Preventive Detention Act, 1950](#). For the correct understanding of the position of law settled by the Apex Court, brief facts of the above case are necessary. The petitioner in the above decision was arrested and detained under an order dated 1.3.1950 made by the District Magistrate, Amritsar, under Section 3(1) of the [Preventive Detention Act, 1950](#) and the grounds of detention were communicated to the petitioner as required by Section 7 of the Act on 15.3.1950 The petitioner challenged the validity of the order on various grounds, but while the petition was pending, after the Supreme Court issued a rule nisi to respondent therein, the petitioner therein was served on 6th August with another detention order dated 30.7.1951 purporting to be made by the Governor of Punjab under Sub-section (1) of Section 3 and Section 4 of the Act as amended by the Preventive Detention (Amendment) Act, 1951 and he was served with fresh grounds of detention on 16.8.1951. Thereupon, the petitioner filed a supplementary petition impugning the validity of the said order on the ground, inter alia, that it directed the detention of the petitioner up to 31.3.1952, the date on which the Act itself was to expire and that this was contrary to the provisions of the Act as amended. In the above judgment, the impugned order is reproduced which runs as follows:

Whereas the Governor of Punjab is satisfied with respect to the person known as Makhan Singh Tarsikka, son of Gujjar Singh, Jat, of Tarsikka Police Station, Jandiala, Amritsar District, that with a view to preventing him from acting in a

manner prejudicial to the security of the State, it is necessary to make the following order:

Now, therefore, in exercise of the powers conferred by Sub-section.(1) of Section 3 and Section 4, [Preventive Detention Act, 1950](#) (Act IV of 1950), as amended by the Preventive Detention(Amendment) Act, 1951 (Act IV of 1951), the Governor of Punjab directs that the said Makhan Singh Tarsikka be committed to the custody of Inspector General of Prisons, Punjab, and detained in any jail of the State till 31.3.1952, subject to such conditions as to maintenance, discipline and punishment for breaches of discipline as have been specified by a general order or as contained in the Punjab Communist Detenu Rules, 1950.

In paragraph 4 of the judgment, the Apex Court had held as follows:

(4) Whatever might be the position under the Act before the amendment in February 1951, it is clear that the Act as amended requires that every case of detention should be placed before an Advisory Board constituted under Act (Section 9) and provides that if the Board reports that there is sufficient cause for the detention 'the appropriate Government may confirm the detention order and continue the detention of the persons concerned for such period as it thinks fit' (Section 11). It is, therefore, plain that it is only after the Advisory Board, to which the case has been referred, reports that the detention is justified, the Government should determine what the period of detention should be and not before. The fixing of the period of detention in the initial order itself in the present case was, therefore, contrary to the scheme of the Act and cannot be supported. The learned Advocate General, however, urged that in view of the provision in Section 11(2) that if the Advisory Board reports that there is no sufficient cause for the detention the person concerned would be released forthwith, the direction in the order dated 30.7.1951 that the petitioner should be detained till 31.3.1952 could be ignored as mere surplusage. We cannot accept that view. It is obvious that such a direction would tend to prejudice a fair consideration of the petitioner's case when it is placed before the Advisory Board. It cannot be too often emphasised that before a person is deprived of his personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the

person affected.

18. The factual situation in the case at hand is not much different from the facts of the above case. In the above case, subsequent orders were passed on the basis of the amendment brought and the total period thus will exceed the three months' time as seen in Article 22(4) of the [Constitution of India](#). But in the present case, by Ext.P1 order, the detaining authority namely, the District Collector at a stretch fixed the detention period as six months. No authority placed before us showing a different or contra view to the above decision. Though we have already held that Section 12 of the Act is constitutionally valid, we cannot support the detention order passed by the District Collector while exercising his powers under the provisions of the Act itself since the same is not in terms of the provisions, especially Section 12 of the Act. As indicated earlier, a reading of Section 10(4) would show that the Government is the competent authority to fix the period of detention, that too only on the basis of the positive opinion by the Advisory Board. Even if the Advisory Board recommended for the continued detention, the authority is vested with the Government to fix the period. If the Advisory Board is of opinion that there is no ground for further detention, it is mandatory for the Government to release the detenu forthwith. On a reading of Section 3 (3), it can be seen that the detaining authority shall forthwith report the fact to the Government and the Director General of Police, Kerala together with a copy of the order and supporting records which, in his opinion, have a bearing on the matter. The very same section further declared that 'no such order shall remain in force for more than 12 days, excluding public holidays, from the date of detention of such Known Goonda or Known Rowdy, unless, in the meantime, it has been approved by the Government or by the Secretary, Home Department if generally so authorised in this regard by the Government.' From the wordings used in Section 3(3) and on a conjoint reading of Sub-section (4) of Section 10, it can be seen that the absolute authority is vested with the Government to fix the period of detention and in view of Section 12 of the Act, only the Government can fix the period not exceeding six months from the date of detention. That being the position, the detaining authority in the present case who issued Ext.P1 order has exceeded his jurisdiction and he has no authority to fix the period of detention as six months and therefore, the same is unsustainable in law and especially, it is diametrically

opposed to the three months period envisaged by Article 22(4) of the [Constitution of India](#). Consequently, the same is liable to be quashed.

19. Learned Senior counsel Mr. Ramakumar invited our attention to the various clauses contained under Section 2 of the Act and also other provisions of the Act and submits that the petitioner's husband will not come under the category of either a 'Known Rowdy' or 'Known Goonda'. It is also submitted that in order to attract, there must be three separate instances as defined in the definition clause and the case which relied on by the detaining authority as well as the sponsoring authority are not sufficient to satisfy the above definition. It is also pointed out that the F.I.R. mentioned with respect to the offences alleged against the petitioner's husband and at the time of alleged offence, he had sufficient licence under the said Act. Thus, based upon the particular facts involved in the case, the learned Counsel took various grounds for his plea for release of the petitioner's husband from detention. Since we have already found that Ext.P1 detention order is not sustainable in law and liable to be set aside, we do not propose to enter into a finding on merits regarding those contentions and those issues are left open.

20. In the result, we hold that Section 12 of the Kerala Anti-Social Activities (Prevention) Act, 2007 (Act No. 34 of 2007) is constitutionally valid and legal, but Ext.P1 order of the detaining authority is unsustainable in law. Consequently, Ext.P7 also is unsustainable. Therefore, Exts.P1 and P7 are quashed.

21. In the aforesaid circumstances, there will be a direction to the respondents to release the petitioner's husband - Sri.Bruce.S.Pothanikkatt, the detenu forthwith if he is not required in any other case.

The writ petition is partly allowed. No order as to costs.

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