

**Sainaba Vs. State of Kerala**

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**SooperKanoon Citation :** [sooperkanoon.com/730211](http://sooperkanoon.com/730211)

**Court :** Kerala

**Decided On :** Jul-24-2002

**Reported in :** 2003(86)ECC617; 2003(1)KLT236

**Judge :** K.S. Radhakrishnan and; K.A. Mohamed Shafi, JJ.

**Acts :** [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) - Sections 3(1)

**Appeal No. :** O.P. No. 9623/02

**Appellant :** Sainaba

**Respondent :** State of Kerala

**Advocate for Def. :** P.S. Sreedharan Pillai, S.C.G.S.C. and; K.G. Bhaskaran, Government Pleader

**Advocate for Pet/Ap. :** K. Raman Pillai, Sr. Adv. and; Jeorge Jabob (Jose), Adv.

**Disposition :** Petition allowed

**Judgement :**

**K.S. Radhakrishnan, J.**

1. This writ of Habeas Corpus has been preferred by the wife of V. Haris, the detenu. He has been detained in the Central Prison under Sections 3(1)(iii) and

3(1)(iv) of the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) (hereinafter called as COFEPOSA Act).

2. Petitioner challenges the detention order dated 18th October, 2001 as well as the order dated 18th January, 2002 confirming the order of detention. The case of the respondent State is that the detenu was intercepted on 17th August, 2001 while he was travelling in a bus near Sales Tax Check Post, Manjeswaram and 34 gold biscuits of foreign origin, weighing 3,961 grams and valued at Rs. 17,42,840 was recovered from this person and seized under a mahazar drawn on 18th August, 2001. He was arrested on 18th August, 2001 and was remanded to judicial custody. He was later granted bail by order dated 25th September, 2001. Government of Kerala issued detention order dated 18th October, 2001 and detenu was arrested on 30th October, 2001 in pursuance of the said order of detention. The COFEPOSA Advisory Board heard his case on 7th January 2002. Later Government ordered continued detention for a period of one year as per Government Order dated 18th January, 2002. Detenu filed detailed objection to the order of detention, vide Ext. P-4 English translation of which is Ext. P-4(a). Apart from various other grounds raised against detention order, counsel for the detenu laid stress on paragraph 4 of the reply statement which we extract below for easy reference.

'While so, pursuant to the order under reference dated 18th October, 2001 the petitioner has been arrested and he has been detained in the Central Prison, Thiruvananthapuram since 30th October, 2001. After I was so detained I was furnished with the grounds of detention as well as the documents relied on for my detention. The contents of those documents were not read over to me by the authorities. The authorities also do not make me understand the contents. I am an illiterate and I cannot read and write. I could understand the contents of those documents at a later stage though not fully with the help of my co-subordinates.'

He was later served with Ext. P-5 reply stating that there is no reason to revoke the order of detention since all the aspects were taken into consideration while passing the detention order. Counsel submitted one of the grounds raised by the detenu against the detention order was properly considered by the authorities

when rejecting the same. Counsel also submitted that a specific grounds has been taken in the Writ Petition stating that the detenu is an illiterate person and he cannot read or write Malayalam. Counsel made specific reference to ground E in the Writ Petition which reads as follows:

'It is respectfully submitted that the detenu is an illiterate person unable to read and write and/or write any language. It is well-settled in law that in such circumstances, he should be made aware of the contents of the documents by writing over to him the same. Even his statements was recorded by officers of the Customs Department being fully aware that he was unable to read and write. He had studied upto 2nd standard. His statement that he could not read or writte any language has been recorded by the said officer. Thus, the detention of the detenu without communicating to him reasons for his detention is absolutely illegal.'

3. Counter-affidavit has been filed by the first and second respondents. In the counter-affidavt filed by the first respondent, with regard to the contention that the detenu cannot write or read Malayalam, it is stated as follows:

'The detenu, on being arrested, pursuant to the order of detention, was served with a copy of the grounds for his detention and a set of relied on documents along with their translations into Malayalam..... The detenu could have refuted the charges leveled against him when he was produced before the Chief Judicial Magistrate which he has not done. Sri Haris made a retraction vide letter dated 29th June, 2001. In his statement dated 15 October, 2001 (not a relied on document in this case but relied on in the case of his co-accused Sri. P.M. Abdul Nazar) he had clarified that the said retractionpetition was drafted as directed by his advocate and he had only put his signature in it and that he was not aware of the content of that petition. Whereas the statement recorded by the Department Officer was read to him as evidenced in the statement itself.'

Counsel appearing for the petitioner submitted that the statement of the detenu that he is an illiterate person and that he cannot write or read Malayalam was not denied by the respondent. Counsel contended that the grounds of detention were not read out to him or made him understand and for that sole reason, the order of detention is vitiated. Counsel placed reliance on the decision of the Apex Court in

Harikisan v. State of Maharashtra (AIR 1962 SC 911), Hadibandhu Das v. District Magistrate (AIR 1969 SC 43), and Kubic Darusz v. Union of India (1990 (1) SCC 568).

4. Learned Government Pleader appearing for the State as well as the Central Standing Counsel submitted that effective opportunity had been given to the detenu and that he had filed objection in reply to the grounds of detention in Malayalam. Consequently it could be presumed that the detenu has understood the contents of the ground of detention and detention order is not vitiated on that ground. We may point out since Counsel for the petitioner has contended that the detenu is an illiterate person and is unable to read and write Malayalam we directed respondents 1 and 3 to produce the detenu before us. Accordingly detenu was produced before us on 15th July 2002. We have also questioned the detenu. We are satisfied that detenu is unable to read and write Malayalam.

5. The Apex Court in Kubic Darusz's case (supra) while examining the scope of Article 22(5) of the Constitution as well as the necessity of communication grounds of detention to the detenu held as follows:

"Communicate' is a strong word. It requires that sufficient knowledge of the basic facts consisting the grounds should be imparted effectively and fully to the detenu in writing in a language which he understands, so as to enable him to make a purposeful and effective representation. Where the grounds are couched in a language which is not known to the detenu, unless contents of the grounds are fully explained and translated to the detenu, it would tantamount to not serving the grounds to the detenu and would thus vitiate the detention ex facie. If the grounds are only verbally explained to the detenu and nothing in writing is left with him in a language which he understands, then that purpose is not served and Article 22(5) is infringed. Thus what is considered necessary is a working knowledge of the language enabling the detenu to understand the grounds or full explanation or translation thereof in the language understood by the detenu."

The Apex Court in Hadibandhu Das v. District Magistrate (AIR 1969 SC 43), while dealing with the scope of Sections 3(1)(a)(ii) and 7(1) of the COFEPOSA Act read with Article 22(5) of the Constitution of India highlighted the necessity of proper

communication of grounds of detention. The Apex Court held:

'Mere oral explanation of a complicated order of the nature made against the appellant without supplying him the translation in script and language which he understood in our Judgment, amount to denial of the right of being afforded the opportunity of making a representation against the order.'

The said decision was followed by the Apex Court in *Surjeet Singh v. Union of India* (1981 (2) SCC 359). As already indicated, the Apex Court in *Kubic Darusz's* case (*supra*) also highlighted the necessity of proper communication of the ground of detention in the language known to the detenu. After exhaustive survey of the decisions of the point, Apex Court in *Powanammal v. State of Tamil Nadu and Anr.* (1999 (2) SCC 413), highlighted the necessity of proper communication of the grounds of detention. The court held as follows:

'The amplitude of the safeguard embodied in Article 22(5) extends not merely to oral explanation of the grounds of detention and the material in support thereof in the language understood by the detenu but also to supplying their translation in script or language which is understandable to the detenu. Failure to do so would amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making a representation against the order.'

We may point out as a corollary the safeguard embodied in Article 22(5) extends not merely to supply the translation in the language which he can understand by hearing, but be explained to him orally if the detenu cannot read and write.

6. In the light of the above-mentioned principles, we are of the view there is failure on the part of the respondents in giving oral explanation to the grounds of detention to the detenu in the language which he can understand and consequently the order is vitiated. We have pursued the explanation given by the detenu to the order of detention. It is stated in the explanation the detenu is an illiterate person and he cannot read or write Malayalam. The said ground has been reiterated in the Writ Petition also which has not been denied in the counter-affidavit filed by the respondents. We have also questioned the detenu this point when he appeared before us on 15th July, 2002. We are satisfied that he is an

illiterate person and is unable to read and write Malayalam.

7. In such circumstances, we are of the view the order of detention in this case is vitiated by failure to give oral explanation of the grounds of detention to the detenu since he is unable to read and write Malayalam.

8. Counsel appearing for the detenu raised another ground that the order of detention was made relying upon various documents the copies of which have not been served on the detenu. Counsel placed reliance on the decision of the Apex Court in *Pushpa v. Union of India* (1980 Supp. SCC 391) wherein the Apex Court held that copies of documents relied on by the detaining authority have to be served within five days from the date of detention order. We are of the view in this case the detenu had not made any request for any document. Consequently we are of the view, on that ground of detention is not vitiated. We may also indicate that in *Powanammal's case* (supra) the Apex Court held as follows:

'However, this Court has maintained a distinction between a document which has been relied upon by the detaining authority in the grounds of detention and a document which finds a mere reference in the grounds of detention. Whereas the non-supply of a copy of the document relied upon in the grounds of detention has been held to be fatal to continued detention, the detenu need not show that any prejudice is caused to him. This is because the non-supply of such a document would amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making an effective representation against the order. But it would not be so where the document merely finds a reference in the order of detention or among the grounds thereof. In such a case, the detenu's complaint of non-supply of document has to be supported by prejudice caused to him in making an effective representation. What applies to a document would equally apply to furnishing a translated copy of the document in the language known to and understood by the detenu, should the document be in a different language.'

We are of the view detenu could not show that any prejudice has been caused to him due to non-supply of any document especially when he had not made any request for the supply of documents. In such situation, the contention of the

petitioner fails.

9. However, we have already held that detention order is vitiated on the ground of failure to give oral explanation of the grounds of detention to the detenu.' In such circumstances we are inclined to allow this petition of Habeas Corpus. Let the detenu be released forthwith if he is not required in connection with any other case.

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