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Court : Kerala

Decided On : Mar-21-2012

Reported in : 2012(2)KLJ415; 2012(2)KLT229

Judge : K.M. Joseph &Amp; M.L. Joseph Francis

Appeal No. : W.P.(CRL) NO. 33 OF 2012

Appellant : Pradeep Kumar

Respondent : Union of India

Judgement :

K. M. Joseph, J.

1. Petitioner is the father of Swaroop (hereinafter referred to as the detenu). The petitioner's son stands detained under the provisions of the Kerala Anti - Social Activities (Prevention) Act (for short, 'the Act'). The detenu has been detained on the basis that he is a known - rowdy, vide Ext. P9 order. Ext. P9 is dated 27-09-2011. Pursuant to the order, the petitioner came to be arrested on 20-11-2011 (the date of detention, according to the learned ADGP is 21-11-2011). The order is approved vide Ext. P10 dated 02-12-2011.

2. We heard learned counsel for the petitioner and the learned Additional Director General of Prosecutions. There is also representation on the part of Assistant Solicitor General.

3. Learned counsel for the petitioner would address the following arguments before us : He would submit that 44th Amendment Bill to the Constitution of India was passed way back in 1978. It received the assent of the President shortly thereafter. No doubt, the Bill contemplated that Executive must bring the Bill into force from a particular date. Despite the passage of more than three decades, it is complained that on account of the inaction of the Executive, the law remains merely on paper. According to him, if the 44th Amendment is considered, the detention of the detenu is palpably illegal. It is for the reason that under the 44th Amendment, the composition of the Advisory Board is such that it is totally inconsistent with the constitution of the Advisory Board as at present. He would refer us to the judgment in **A.K. Roy Vs. Union of India, (1982) 1 SCC 271** besides the judgment of the Apex Court in **Attorney General of India Vs. Amratlal Prajivandas, 1994 (2) KLT SN 7 (C.No. 9)**. Even though we have granted time to the Union of India to file a counter - affidavit, no counter - affidavit as such is filed.

4. The next point which is urged before us by the learned counsel for the petitioner is that having regard to Entry 3 of List III of VIIth Schedule to the Constitution of India, the State of Kerala did not possess the legislative competence to enact the Act. Next, he would contend that the grounds of detention were not served on the detenu, as required under law. Still further, he would contend that the right available to the detenue to make a representation to the Government and the Advisory Board was not made known to him in writing, as required under Sec. 7(2) of the Act. Then, he would submit that the order is bad for the reason that there is non - application of mind to the conditions in the bail orders granting bail to the detenu. He would in fact, contend that the bail orders were not placed by the sponsoring authority before the detaining authority. He also complained that before the Advisory Board, there was violation of natural justice.

5. Learned Additional DGP in reply would submit that the grounds of detention were indeed served, and the detenu has acknowledged the same. So also, he would point out that in the grounds of detention, the detenu was alerted of his right to make a representation, both to the Government and to the Advisory Board. According to him, the Kerala legislature had legislative competence. As far as the

denial of natural justice before the Advisory Board is concerned as contended, it is not contemplated under law, he submits. As far as the question relating to non - application of mind by the detaining authority to the bail order, he would submit that there is application of mind and we will deal with his arguments at greater length when we take up the said issue later on, in the judgment.

6. We are of the view that the petitioner is entitled to succeed on the ground that there is non - application of mind by the detaining authority to the bail conditions as also for the reason that there was failure on the part of the sponsoring authority in placing the bail conditions and hence, we need not go into the other issues which have been raised.

7. It is salutary and elementary principle that a statutory authority must apply its mind to all relevant aspects. This principle is equally applicable in the case of an order of detention passed under laws relating to preventive detention. In this case, five cases are relied on to hold that the detenu is a known rowdy. Ext. P6 is the report submitted by the Sub Inspector before the Superintendent of Police. They reveal inter alia that the detenu is allegedly involved in Crime No. 551/2011, wherein, he is accused of offences under Sec. 143, Sec. 147, Sec. 341, Sec. 323, Sec. 325 and Sec. 308 read with Sec. 149 IPC. Ext. P6 would reveal that the detenu was arrested on 09-06-2011 and he was bailed out on 22-07-2011. Ext. P6 would further reveal that he stands accused in Crime No. 590/2011 for offences under Sec. 143, Sec. 147, Sec. 148, Sec. 323, Sec. 427, Sec. 452 read with Sec. 149 IPC. In the said crime, he was arrested on 09-06-2011 and it is stated that he is bailed out on 22-07-2011. Ext. P8 purports to be the final report of the Superintendent of Police, Kannur, submitted before the District Magistrate, apparently, within the meaning of Sec. 3 of the Act. Therein, reference is made to various crimes. Under the heading Crime No. 590/2011, it has been stated that he was arrested on 09-06-2011 and that he underwent judicial custody till 22-07-2011 inter alia. Likewise, in Crime No. 551/2011 also, it is stated that he was arrested on 09-06-2011 and he underwent judicial custody till 22-07-2011. In Ext. P9 order of detention, it is repeated by the Magistrate that the detenu was arrested on 09-06-2011 and underwent custody till 22-07-2011 in Crime No. 551/2011 and also Crime No. 590/2011.

8. Learned counsel for the petitioner would draw our attention to the judgment of a Division Bench of this Court reported in **Philip Vs. State of Kerala and Others, 2009 (2) KLJ 715**. The said case also arose from an order of detention under Sec. 3 of the Act. Therein, the Magistrate had proceeded to pass an order of detention apparently on the basis that the detenu was absconding. The said belief apparently was shared also by the sponsoring authority. However, in point of fact, Ext. P15 order by the Magistrate produced in the said case revealed that the detenu was granted bail subject to conditions and he was actually released. It was in the said circumstances, the Court found that the detention order was vitiated, holding that the sponsoring authority was either unaware of Ext. P15 or suppressed the same. Further, it was reasoned that the detaining authority did not know and did not apply its mind to Ext. P15 and consequently, the detaining authority did not consider whether in spite of the conditions imposed under Ext. P15, detention of the detenu was necessary. It is also found by the Bench that not only that the detaining authority did not know of Ext. P15, but was under the impression that the detenu was absconding and that incorrect fact was also reckoned as a ground of detention.

9. Learned Additional DGP would respond to the said position by pointing out that unlike the said fact situation in this case, the order of detention would show that the District Magistrate was aware that the detenu had been arrested and he was released on bail having regard to the language of the order of detention which we have already referred to, viz., both the sponsoring authority and the Magistrate would refer to the fact that he was arrested on 07-06-2011 and he was in judicial custody till 22-07-2011. Therefore, the learned Additional DGP would distinguish the said judgment.

10. He would, in fact, draw our attention to the judgment of a Division Bench of this Court in **Sunitha Mujeeb Rehman Vs. State of Kerala, 2010 (4) KLT 478**. In the said case, the bench, in fact also referred to the judgment reported in **Philip Vs. State of Kerala and Others, 2009 (2) KLJ 715**. In the said case, the detenu had been released on bail. There were conditions imposed. The conditions were as follows: The accused were directed to report before the Investigating Officer on every Monday, Wednesday and Saturday until final report is filed or until further

orders. They were also not to intimidate the witnesses or tamper with evidence. The bench found that the said conditions were intended to secure the interests of the investigation in the crime in which they were released on bail and not the probability, possibility or propensity of the accused to commit any future offences or indulge in anti - social activities. We notice in the said case also that there was no indication available from the order of detention or the grounds of detention or other contemporaneous documents to conclude that the conditions in the bail order were specifically considered by the detaining authority before the impugned order was passed. In this case also, there is nothing to indicate that the conditions of the bail orders have been considered by the detaining authority. It is relevant for us to refer to paragraph 19 of the decision reported in **Sunitha Mujeeb Rehman Vs. State of Kerala, 2010 (4) KLT 478**. Paragraph 19 reads as follows:

"19. We are in complete agreement with the learned counsel for the petitioner that the question is not the impact which the document / input may have actually made in the mind of the detaining authority. The crucial question is whether the document / input is such that it must be considered by the detaining authority before the order of detention is passed. If following the test in Usha Agarwal (supra) paragraph 13 the document is found to be a crucial and vital document relevant to the issue, the fact that the detaining authority may still have ordered detention after considering the document is totally irrelevant and an inadequate defence to a plea of non - application of mind."

We still further consider it apposite that we refer to paragraphs 24 and 25, which read as follows:

"24. The learned Government Pleader points out that in para.12 the detaining authority had stated specifically that the detenu is not a person who can be deterred from indulging in anti - social activities by conditions of bail imposed on him.25. We find merit in the submission of the learned Government Pleader. It is not a case where the fact that detenu had secured bail under Ext. P13 was not known to the sponsoring and detaining authorities. They knew that fact. They applied their mind to that fact. They expressed the opinion that the detenu was a person who cannot be deterred from indulging in anti - social activities by the bail

conditions imposed on him. In spite of that, the detaining authority decided in favour of detention."

In paragraph 29, it is inter alia stated as follows:

"29. The learned counsel for the petitioner points out that this is not a bail order which was distant in point of time vis - a - vis the order of detention. The alleged crime in SI. No. 6 was committed on 12-03-2010. The detenu was arrested immediately thereafter (03-03-2010 it is said). He was ordered to be released on 12-03-2010 under Ext. P13. The Circle Inspector of Police had recommended to the Superintendent of Police on 26-03-2010 that action must be taken against the detenu under the KAAPA and the Superintendent of Police by Ext. P12 dated 13-05-2010 had sponsored the detenu for detention before the 2nd respondent. The order of detention was passed on 20-05-2010 and he was arrested on 24-05-2010. What the learned counsel for the petitioner wants to highlight is that the order of detention was on 20-05-2010 and the order granting bail was on 12-03-2010. The gap of time between 12-03-2010 and 20-05-2010 is not too big or yawning as to conclude that it was not essential to refer to Ext. P13. We make it clear that we are holding that the omission to refer to the conditions in Ext. P3 are not fatal not because of the time gap between Ext. P13 and the date of the order of detention; but because the nature of the conditions are not crucially or vitally relevant in deciding the need to order detention. In this view of the matter, we conclude that the omission to refer to the conditions of bail in Ext. P13 in the order of detention - Ext. P1 or the omission of the sponsoring authority to place Ext. P13 before the detaining authority cannot lead to an inference of non - application of mind and consequent invalidation of the order of detention. The challenge on the first ground therefore fails."

11. On the strength of the observations contained in the said judgment the learned Additional DGP would contend that it has been held that the conditions which are intended to secure the interest of investigation in the particular case in which bail is granted cannot avail the detenu. He would further reiterate that both the sponsoring authority and detaining authority were aware that the detenu was on bail and therefore applied their minds to this aspect.

12. We asked the Additional DGP whether the bail orders in Crime No. 551/2011 and Crime No. 590/2011 were made available to the detaining authority. He would submit that the bail orders passed in the said cases were not made available to the detaining authority. But his case is that the fact that they were released on bail was known to the sponsoring authority and this fact was brought to the notice of the detaining authority.

13. We then asked the learned Additional DGP to make available the orders granting bail. He made available the orders granting bail. In one of the cases, Crime No. 551/2011, the Sessions Court passed the order granting bail subject to the following conditions.

"In the result, the petition is allowed. Petitioners are released on bail on their executing bond for Rs.30,000/- each with two solvent sureties each for the like amount to the satisfaction of JFMC I, Kannur and on the following conditions:2) Petitioners shall appear before the I.O. on every Wednesday and Saturday in between 10 am and 11 am until further orders.3) Petitioners shall not try to interfere with the investigation or influence and intimidate the witnesses.4) Petitioners shall not involve in any other crime while on bail."

This was not made available by the sponsoring authority to the detaining authority. Two results will necessarily follow on the admitted facts.

14. Firstly, there is suppression of the said bail order. We are of the view that the bail order which was indeed a vital document containing important information ought to have been made available to the detaining authority. It is settled law that it is the duty of the sponsoring authority not to withhold any relevant / crucial information from the person entrusted with the task of deciding whether an order of detention must be passed. It is not open to the sponsoring authority to speculate that the detaining authority may take a particular view. It is for the detaining authority to apply its mind to the relevant information and to come to the conclusion as to whether detention is necessary or not.

15. Secondly and clearly the conclusion is inevitable that the detaining authority has not applied its mind to the relevant information. This could be due to the

refusal on the part of the sponsoring authority to place the bail orders before the Magistrate. But, at the same time, the Magistrate also cannot wash his hands by saying that the materials was not before him. He could have posed the question as to what are the conditions in the bail orders. He was aware that the detenu had been arrested and was in judicial custody till 22-07-2011. We must therefore take it that the detaining authority was aware that bail had been granted. If that be so, he could have certainly insisted on seeing the bail order. Apparently, he has not made any attempt in the said direction. The result is that the detaining authority has been oblivious to the bail conditions.

16. Now the further question arises as to whether the Additional DGP could sustain the detention on the basis of the dictum laid down in **Sunitha Mujeeb Rehman Vs. State of Kerala, 2010 (4) KLT 478**.

17. We feel that the said decision is distinguishable on the facts. That was a case where as noted in paragraphs 24 and 25 which we have extracted the detaining authority was apparently aware of the conditions attached to the order granting bail and had still found that detention is necessary. In this case the Magistrate does not say that the detenu is a person who can not be deterred from indulging in anti - social activities by the conditions imposed on him. The bail conditions were known to the Magistrate in Sunitha Mujeeb's case. But, in this case, going by the order the Magistrate was not certainly aware of the bail conditions.

18. More importantly, this is a case where as noted bail was granted on 20-07-2011. One of the conditions imposed in the order granting bail is that the detenu shall not involve in any other crime while on bail. Bail order is passed on 20-07-2011. The order of detention is passed on 27-09-2011. Learned Additional DGP would, after getting instructions, also submit that after the date of the bail order and after being enlarged on bail, the detenu has not committed any crime. No doubt, his case is that the detenu violated one of the bail conditions, namely, that he should report before the police officer. But, as far as the crucial condition in the bail order that he shall not involve in any crime we can proceed on the basis that the said conditions had not been flouted by the detenu. Unlike the fact situation in Sunitha Mujeeb's case where as noted by the Bench the bail conditions were

geared to secure the interests of investigation in that case, in this case the conditions include the condition that the detenu shall not involve in any crime. This condition we are of the view is germane and crucial in a proceeding under Sec. 3 of the Act. This was indeed vital information which may have turned the case in favour of the detenu that is to say had this condition been considered by the Magistrate the Magistrate may have come to a different conclusion. Therefore this was vital information which was not placed before the Magistrate. On that score alone the order of detention is liable to be interfered with. The order of detention is liable to be interfered also on the ground that the said bail condition has not even been considered by the detaining authority. There is non - application of mind to a relevant and vital aspect of the matter.

19. The learned Additional DGP would submit that even if the conditions of bail had been placed before the Magistrate he still may have ordered detention for which indications are present in the order. We would think that this argument cannot hold good and we feel that the reasoning in paragraph 19 of the judgment in Sunitha Mujeeb's case provides a complete answer which we have extracted above.

20. Another contention raised by the Additional DGP is that this is a case where the detenu had violated one of the bail conditions, namely he should report before the police station. Learned counsel for the petitioner denies the allegation. He would at any rate say that the remedy of the police officer would have been to bring it to the notice of the Court and to seek cancellation of the bail. Whatever that be we are of the view that even proceeding on the basis that detenu had not complied with the said condition it may not have any bearing on the issue relating to non - application of mind to the vital aspect that the Sessions Court had granted bail subject to the condition that the detenu should not involve in any crime. If the detaining authority had the order granting bail before him the detaining authority would have certainly posed the question as to whether the detenu has committed any crime thereafter. At least the detaining authority would have considered the question as to whether the condition in the bail order that he should not involve in any other crime is insufficient to deter the detenu from carrying on the undesirable activities. This exercise has apparently not been done by the detaining authority.

We are therefore of the view that the order of detention is vitiated for non - application of mind to the relevant aspects and therefore the order detention cannot be sustained.

In the result, we allow the Writ Petition (Criminal) and quash Ext. P9 order of detention and we further direct that the detenue Sri. Swaroop, S/o. Pradeepan who is detained at Central Prison, Kannur shall be released forthwith unless his detention is wanted in connection with any other case. Registry will communicate this direction to the concerned prison Authorities forthwith.