

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Date of decision: 5<sup>th</sup> August, 2011**

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**W.P.(C) 5367/2011**

**SURESH KALMADI (IN JUDICIAL CUSTODY)**

**..... Petitioner**

Through: Mr. Ashok Desai, Mr. Neeraj Kishan Kaul  
& Mr. Siddharth Luthra, Sr. Advs. with  
Ms. Shyel Trehan, Ms. Diya Kapur,  
Ms. Manjira Das Gupta & Mr. Nikhil  
Pillai, Advs.

Versus

**UNION OF INDIA & ORS.**

**..... Respondents**

Through: Mr. A.S. Chandhiok, ASG with  
Ms. Maneesha Dhir, Ms. Preeti Dalal,  
Mr. Bhagat Singh & Ms. Mithu Jain,  
Advs. for R-1.  
Mr. Dayan Krishnan with Mr. Gautam  
Narayan & Mr. Nikhil A. Menon, Advs.  
for R-3.

**CORAM :-**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

- |    |                                                                          |     |
|----|--------------------------------------------------------------------------|-----|
| 1. | Whether reporters of Local papers may<br>be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not?                                   | Yes |
| 3. | Whether the judgment should be reported<br>in the Digest?                | Yes |

**RAJIV SAHAI ENDLAW, J.**

1. The petitioner, a Parliamentarian in judicial custody has filed this writ petition seeking direction for permission to attend the Parliament while remaining in judicial custody. It is *inter alia* the case of the petitioner that he has received summons dated 14<sup>th</sup> July, 2011 summoning him to attend the 8<sup>th</sup> Session of the 15<sup>th</sup> Lok Sabha commencing from 1<sup>st</sup> August, 2011; that on enquiry, he has been informed that a Member who is in prison in connection with any criminal case can be permitted by the competent Court to attend day-to-day proceedings of the Lok Sabha; that the bail application filed by him has been rejected vide order dated 6<sup>th</sup> June, 2011; that though he made an application before the Special Judge before whom he is being prosecuted for offences under Sections 120B read with Sections 420, 467, 468 and 471 of the Indian Penal Code, 1860 and under Sections 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 but the same was withdrawn with permission to apply to this Court for the reason that Ministry of Home Affairs is a necessary party to the matter as security arrangements in Parliament fall within the jurisdiction of the said Ministry.

2. It is further the case of the petitioner that the Courts have routinely in the past permitted Members of Parliament to attend Parliament Sessions while in custody; that Article 105(1) of the Constitution of India grants to a Parliamentarian the freedom of speech subject only to the rules and standing orders regulating the procedure of Parliament; that no rule, standing order or procedure prevents the petitioner from attending Parliament and speaking there-at while in custody; that the Constitutional right of the petitioner to participate in Parliamentary proceedings and the right to vote in Parliament as an elected representative is the essence and expression of Parliamentary democracy and an expression of the Constitutional right to vote guaranteed to every adult citizen under Article 326 of the Constitution of India and the freedom of expression guaranteed by Article 19(1)(a) exercised in electing the petitioner as an elected representative; that Parliamentary democracy is the basic feature of the Constitution of India and there is no reason for denying such participation to the petitioner when the same is possible while remaining in custody; that because refusing participation in Parliamentary proceedings to the petitioner would deny him the opportunity to fulfill his

Constitutional obligations to attend the proceedings of Parliament. It is further pleaded that the petitioner is willing to abide by any condition which may be imposed in this regard. The petitioner seeks mandamus to the respondents Union of India Ministry of Home Affairs, Jail Superintendent Tihar Jail and Central Bureau of Investigation (CBI) to take appropriate steps for allowing the petitioner to, in custody attend the Parliamentary proceedings commencing from 1<sup>st</sup> August, 2011 and scheduled until 8<sup>th</sup> September, 2011.

3. The petition came up first before this Court on 29<sup>th</sup> July, 2011 when the senior counsel for the petitioner relied on the orders dated 27<sup>th</sup> November, 2008 and 10<sup>th</sup> February, 2009 in W.P.(C) No.7548/2008 and W.P.(C) No.854/2009 both preferred by Sh. Rajesh Ranjan @ Pappu Yadav permitting him to attend the Sessions of Parliament. Reliance was also placed on newspaper reports of the Jharkhand High Court having allowed Mr. Madhu Koda to attend Parliament while in custody.

4. However, the aforesaid orders, on a reading thereof appeared to be consensual and were not found to contain any reasoning or adjudication. It

was thus put to the senior counsel for the petitioner that the same could not constitute a precedent.

5. It was enquired from the senior counsel for the petitioner whether the need / duty to attend Parliament can be placed at higher pedestal than the other duties which other persons in detention may be required to perform. It was felt that on the same parity, every person under detention can claim that he / she should be allowed to carry on his trade / vocation or to perform his / her duties including as of a son / father / husband / wife etc.; every person performing public functions would take the same plea; the Directors on Board of Companies, the office bearers of Trusts / Charities / Clubs would say that they too should be allowed to perform their duties – thereby making arrest / detention farcical.

6. The senior counsel for the petitioner had then contended that unless the petitioner is so permitted, the Parliamentary Constituency which had elected him would go unrepresented in Parliament. It was thus contended that public interest demands that the petitioner be permitted to attend Parliament.

7. In the face of the aforesaid argument, need was felt to enquire into the past record of attendance of the petitioner in the Parliament. This Court felt that if the petitioner in the past, without being prevented as he now is, had not regularly attended the Parliament then he ought not be permitted to use that as a mere excuse. The petitioner was as such called upon to file an affidavit detailing his attendance in Parliament in the last five years.

8. Further, considering that the Parliament Sessions are now telecast live, need of the petitioner to attend Parliament in person was also enquired into.

9. Yet further, in view of the newspaper reports having indicated that the petitioner was under medical examination, the petitioner was required to file an affidavit in that regard also.

10. Though the learned ASG and the counsel for the CBI appearing on advance notice had sought opportunity to file counter affidavits but being of the view that the question involved was purely legal and considering the urgency expressed, need for issuing formal notice of the petition and calling for counter affidavits was not felt and the counsels were called upon to

address finally on the matter.

11. The petitioner has filed an affidavit as directed. CBI has also put in a short reply.

12. The petitioner in his affidavit has disclosed his attendance during the Parliamentary Sessions of the 14<sup>th</sup> Lok Sabha from 2<sup>nd</sup> June, 2004 to 26<sup>th</sup> February, 2009 as varying from a low of 42% to a high of 91%. I may however add that except for one Session where the attendance was 42%, the attendance in all the other Sessions was above 57%. Qua the Parliamentary Sessions of the 15<sup>th</sup> Lok Sabha from 1<sup>st</sup> June, 2009 to 25<sup>th</sup> March, 2011 attendance has been disclosed as 100%, 85%, 48%, 75%, 12%, 4% & 39%. It is stated that the poor attendance in some of the Sessions was during the time leading up to the Commonwealth Games and during which time the petitioner was dedicating all his time to organization of the Games. The poor attendance thereafter is stated to be owing to the participation in Asian Games in China and owing to organizing the National Games at Ranchi.

13. The petitioner qua his participation in the Parliamentary Sessions has deposed that he has frequently asked questions and participated in debates

and has in the 15<sup>th</sup> Lok Sabha already raised 42 questions. It is further deposed that Members of Parliament are also permitted to participate in the discussions on the floor of the House and the petitioner intends to participate in the discussions in the ensuing Session on issues relating to Pune Airport, the local train network and urban development.

14. The respondent No.3 CBI in its short reply has pleaded that the offences with which the petitioner is charged with are extremely grave and serious causing huge wrongful pecuniary benefits to certain private parties and consequent loss to the public exchequer; that some of the other accused officials of the Organizing Committee for Commonwealth Games of which the petitioner was the Chairman are still absconding; that the CBI apprehends that the petitioner may misuse the liberty sought by way of the present petition to influence the witnesses and tamper with the evidence. The respondent No.3 CBI without prejudice to the said pleas has also detailed the conditions to be imposed in the event of the petition being allowed.

15. The senior counsel for the petitioner has urged that Parliamentary

representation is essential in a democracy and basic feature of the Constitution; the people / citizens are represented in the Parliament through their elected representatives as the petitioner is; that after the 44<sup>th</sup> amendment to the Constitution of India, Article 21 cannot be suspended; that Article 105 prevails over Article 19; that the guilt of the petitioner has not been established as yet and the petitioner is but an accused; that the apprehension expressed by the CBI of the petitioner upon being so allowed to attend Parliament, influencing witnesses can be allayed by imposing appropriate conditions; that Members of Parliament are the live link which connect the people to their Government; that the elected representative has a duty under the Constitution to his electorate and which entails a corresponding obligation to attend Parliament; that there is a need for balancing the said functions of the petitioner with his detention; that for the petitioner to exercise the right of freedom of speech as a Parliamentarian, he needs to have access to the Parliament and without such access there can be no such freedom. It is further stated that Mr. Madhu Koda who has been allowed by the concerned Court to attend Parliament is also presently lodged

in Tihar Jail and arrangements have already been made for his transit to and fro Parliament and it will be travesty that while one Parliamentarian lodged in the same jail is allowed to attend Parliament, other is not.

16. The senior counsel for the petitioner during the course of hearing has referred to:

- (i) ***P.V. Narasimha Rao Vs. State (CBI/SPE)*** (1998) 4 SCC 626 in para 47 whereof it was held that Parliamentary democracy is a part of the basic structure of the Constitution; in paras 162 & 165, that in a democratic form of Government, it is the Member of Parliament who represents the people of his Constituency in the highest law making bodies at the Centre and performs a public duty.
- (ii) ***People's Union for Civil Liberties (PUCL) Vs. Union of India*** (2003) 4 SCC 399 para 94 whereof details the duties and responsibilities of a Member of Parliament.
- (iii) ***Pandit M.S.M. Sharma Vs. Sh. Sri Krishna Sinha*** AIR 1959 SC 395 in paras 24 & 25 whereof it was laid down that the freedom of speech under Article 194(1) cannot be cut down in any way by any law contemplated by Article 19(2).

17. The arguments as raised by the senior counsel for the petitioner were raised before the Constitution Bench of the Apex Court also as far back as in ***K. Ananda Nambiar Vs. Chief Secretary, Government of Madras*** AIR 1966 SC 657. The legendary Mr. Setalvad appearing for the Member of Parliament then under detention had also contended that a Member of Parliament has Constitutional rights to function as such Member and to participate in the business of the House to which he belongs – that he is entitled to attend every Session of Parliament, to take part in the debate, and to record his vote and no law can validly take away his right to function as such Member. It was thus the contention before the Apex Court also that the legislators have certain Constitutional rights which cannot validly be taken away by any statute or statutory rule.

18. Of course, the senior counsel here, has not pegged the right of the petitioner so high. Nevertheless, an exception to the principle of detention, of the person under detention being deprived from access to his family, friends, work, vocation etc., is sought to be carved out in the case of Members of Parliament.

19. Before advertng to what was held by the Constitution Bench on the contentions aforesaid of Mr. Setalvad, I may humbly observe that the argument as raised before this Court amounts to placing Members of Parliament at a pedestal higher than their electorate. The argument assumes that the work of a Member of Parliament is more sacred and important than the work / vocation in which the citizens who have elected the said Parliamentarian may be engaged in. Such an argument is archaic and creates two classes of citizens as in a monarchy i.e. the King and the Subject and is alien to our Constitution. The legal luminary of our times, Mr. Nani A. Palkhivala in his book "Our Constitution Defaced and Defiled" has explained the essence of our Constitution as under:-

“Our Constitution is primarily shaped and moulded for the common man. It takes no account of "the portly presence of the potentates, goodly in girth". It is a Constitution not meant for the ruler but the ranker, the tramp of the road, the slave with the sack on his shoulders pricked on with the goad, the man with too weighty a burden, too weary a load.”

20. The senior counsels for the petitioner did not address on the query posed to them as aforesaid on 29<sup>th</sup> July, 2011, i.e. as to how the work of a

Parliamentarian can be placed on a higher pedestal. A Member of Parliament cannot tell the citizens who have elected him that the sweat of his brow is dearer or that the work performed by him is more important. The argument, of a Parliamentarian being entitled to continue attending Parliament notwithstanding his arrest and when the citizen who has elected him, inspite of holding position, be that of a Director in a public limited Company or of an office bearer in a Society or a Club or having the duty towards spouse, parents and children, being not so entitled, runs contrary to the principle of equality enshrined in our Constitution. The duty of a father to a growing child or of a son to an ailing parent cannot be held to be any less important. If the arguments as raised were to be accepted, it will be difficult for the Courts to refuse the same concession to others under detention. They will also claim that they, while remaining under custody should be allowed to continue with their vocation to prevent their dependent family members from starving or suffering. I find, a practicing Advocate under detention to have similarly claimed that he should, while in custody, be allowed to conduct the cases of clients who had earlier engaged him; he

had also contended that his clients will go unrepresented and will file consumer complaints against him. The said claim was negated by the Division Bench in ***Daljit Singh Rajput Vs. Chandigarh Administration*** MANU/PH/0047/1998. It was held that the arrest and judicial custody being in accordance with the established criminal law of the country, he could not exercise the rights of personal liberty, so long as deprived thereof in accordance with the procedure prescribed by law. The same holds good for the petitioner herein.

21. The senior counsel for the petitioner himself had invited attention to Section 135A of the Civil Procedure Code carving out an exception for a Parliamentarian when Parliament is in Session, from civil arrest. The Legislature has not made any such exception qua arrest for criminal offences or where the Member of Parliament is charged with an indictable offence and rightly so, for the House cannot be expected to allow even the sanctuary of its walls to protect a member from the process of criminal law.

22. Coming back to the Constitution Bench judgment in ***K. Ananda Nambiar*** (supra), it was held that the Constitution does not impose any

obligation on individual Members of Parliament – they are neither bound to attend the Session nor under an obligation to be present in the House when the President addresses it; subject-matter of the various Articles of the Constitution is not the individual rights of the Members of Parliament, but they refer to the right of the President to issue a summon for the ensuing Session of Parliament or to address the House. It was further held that though the basis of democratic form of Government is that Members of Legislatures must be given absolute freedom of expression when matters brought before the Legislature are debated but that is only when they attend the Session of the House. The argument that it is the Constitutional and fundamental right of a Parliamentarian to attend the Session of the House was negatived. It was held that if the order of detention validly prevents a Parliamentarian from attending a Session of Parliament, no occasion arises for exercise of the right of freedom of speech and no complaint can be made that the said right has been invalidly invaded. Similarly, the argument that so long as the Member of Parliament has not incurred any disqualification, he is entitled to exercise his rights as such Member was also negatived and it

was held that a person who is detained, himself foregoes his right to participate in the business of the Legislature. It was yet further held that so far as a valid order of detention is concerned, a Member of Parliament can claim no special status higher than that of an ordinary citizen and is as much liable to be arrested and detained under it as any other citizen.

23. Though the senior counsel for the petitioner contended that ***K. Ananda Nambiar*** was pronounced in the background of emergency when Articles 19 to 21 were suspended and dealt with a case of preventive detention which has an element of adjudication of guilt as compared to the arrest in the present case and was in the context of challenge to the law of preventive detention, but in my opinion the said factors have no bearing on the ratio as culled out herein above of the judgement of the Constitution Bench.

24. The counsel for the respondent No.3 CBI has contended that the present also cannot be said to be a case of non application of mind by the Court in whose judicial custody the petitioner is inasmuch as the charge sheet has been filed and cognizance has been taken. He further contends

that even in *Indira Nehru Gandhi Vs. Raj Narain* 1975 (Supp) SCC 1 the same principles as in *K. Ananda Nambiar* were reiterated and the principle laid down by Commons in a conference with the Lords in 1641 that “privilege of Parliament is granted in regard to the service of the Commonwealth and, is not to be used to the danger of the Commonwealth” was held to be applicable. He has also drawn attention to (i) *Raja Ram Pal Vs. Hon’ble Speaker, Lok Sabha* (2007) 3 SCC 184 also laying down that the privilege of a Member of Parliament from arrest has never been allowed to interfere with the administration of criminal justice; (ii) passages in Sir Thomas Erskine May’s “Treatise on The Law, Privileges, Proceedings and Usage of Parliament” Twenty-fourth Edition; and (iii) passages in M.N. Kaul and S.L. Shakdher’s “Practice and Procedure of Parliament” Fifth Edition, and contends that it is not as if non-attendance of the Parliamentary Session of the petitioner would lead to forfeiture of his membership.

25. Ld. ASG has also opposed the grant of relief to the petitioner. He has invited attention to the application filed by the petitioner in July, 2011 before

the Special Judge in whose judicial custody the petitioner is, where the petitioner has stated that he is sick and infirm, suffering from various ailments resulting *inter alia* in forgetfulness. It has been suggested that the petitioner in such state of health cannot be expected to make any contribution to the Parliament and is using the excuse of attending Parliament to get away from the rigours of imprisonment after he has been unsuccessful in obtaining bail. Reliance is also placed on ***Raghu Raj Pratap Singh @ Raja Bhaiya Vs. State of U.P.*** MANU/UP/0237/2003 where a Division Bench of the Allahabad High Court also held that the Legislators have no enforceable right to participate in the Session of the House so long as they are under detention and carved out a distinction between the right to attend Parliament and the right to vote, right to contest election or right to take oath as a Parliamentarian. It was held that right to vote and right to contest election are statutory rights; while a person in jail can cast his vote and contest election but there is no such provision regarding the right to attend Parliament.

26. I find similar view to have been taken in ***Kameshwar Baitha Vs. State***

*of Jharkhand* MANU/JH/1070/2009 and in *Shekhar Tiwari Vs. State of UP* MANU/UP/0553/2009. The Apex Court in *Raja Ram Pal* (supra) also held that expulsion of a Member from Parliament does not violate the democratic principles and the challenge to expulsion on the ground that the Constituency would go unrepresented in Parliament was not sustained. The same ground urged here to seek a special right in favour of the petitioner, thus has no merit.

27. What thus follows is that merely because the petitioner is a Parliamentarian does not entitle him to claim any exception from the effect of being in detention. Else, the petitioner has not made out any case necessitating him to attend the Parliament. It is not the case that the vote of the petitioner on any aspect is vital or that without such participation the citizens of his Constituency would suffer. Though the need for participation on issues relating to Pune Airport, the local train network and urban development is mentioned but no particulars have been given. It cannot also be lost sight of that the petitioner in the past, as per his convenience has been missing Sessions of Parliament. It was not the mandate of his electorate that

he should take up the Chairmanship of the Organizing Committee for Commonwealth Games or spend time on National Games or participate in the Games at China. When the petitioner could afford to miss Parliament then, his desire / keenness to attend now can only be understood as an attempt for fresh air outside the prison walls. What the American publisher William Randolph Hearst said, “a politician will do anything to keep his job – even become a patriot” seems apposite.

28. Allowing the petitioner to attend the Parliament, even if in judicial custody, would certainly provide the petitioner respite from imprisonment. I see no reason to carve out an exception in favour of the petitioner when his fellow prisoners are not provided such respite. Sophocles said “Nobody has a more sacred obligation to obey the law than those who make the law”. The Parliamentary privileges which the Members of Parliament enjoy are intended to facilitate their work as representatives of people and should not be mistaken as indicative of rank or creating a separate class different from the other citizens. The Apex Court in *Vineet Narain Vs. Union of India* (1998) 1 SCC 226 held that the law does not classify offenders differently

for treatment thereunder, including investigation of offences and prosecution for offences, according to their status in life – every person accused of committing the same offence is to be dealt with in the same manner in accordance with law, which is equal in its application to everyone.

29. Though during the hearing, I had enquired whether any provision in the guidelines relating to parole / furlough exists qua Parliamentarians but the senior counsel for the petitioner has stated and it has been so observed in Lok Sabha Debates dated 24<sup>th</sup> November, 1965 at page 3615 also that a Parliamentarian on parole is not entitled to attend the House. Moreover, parole is post conviction. No other instances under which a person while in custody can be permitted to perform his duties has been cited.

30. The petitioner is thus not found entitled to the relief claimed. There is no merit in the petition. The same is dismissed with costs of ₹1,00,000/- to the Prime Minister's National Relief Fund.

**AUGUST 5<sup>th</sup>, 2011**  
'gsr'

**RAJIV SAHAI ENDLAW, J**