

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.T. SANKARAN

&

THE HONOURABLE MR. JUSTICE B. SUDHEENDRA KUMAR

TUESDAY, THE 21ST DAY OF JULY 2015/30TH ASHADHA, 1937

WP(C).No. 19959 of 2015 (T)

PETITIONER:

T. ARUNKUMAR, AGED 35 YEARS
S/O. ACHUTHAN, ARUN NIVAS, ZEROT VILLA
GOVINDAPURAM, KOZHIKODE.

BY ADV. SMT. P. REENA

RESPONDENTS:

1. THE DISTRICT MAGISTRATE/DISTRICT COLLECTOR
KOZHIKODE, PIN 673 001.
2. COMMISSIONER OF POLICE
COMMISSIONERATE OF POLICE,
KOZHIKODE, PIN 673 001.

R1 AND R2 BY ADDL. DIRECTOR GENERAL OF PROSECUTION
SRI. TOM JOSE PADINJAREKKARA
GOVERNMENT PLEADER SRI. ABDUL KAREEM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
21.7.2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER'S EXHIBITS:

- EXT.P1 TRUE COPY OF THE ORDER DATED 30-05-2014 OF SESSIONS COURT, KOZHIKODE IN CRL.M.C. NO.1000/2014 IN CR. NO.191/2014 OF NALLALAM POLICE STATION.
- EXT.P2 TRUE COPY OF ORDER DATED 22-08-2014 OF SESSIONS COURT, KOZHIKODE IN CRL.M.C.NO.1586/2014 IN CR.NO 191/2014 OF NALLALAM POLICE STATION.
- EXT.P3 TRUE COPY OF THE ORDER DATED 11-09-2014 OF SESSIONS COURT, KOZHIKODE IN CRL.M.C. NO.1593/2014 IN CR. NO.502/2014 OF MEDICAL COLLEGE POLICE STATION.
- EXT.P4 TRUE COPY OF THE ORDER DATED 12-08-2014 OF SESSIONS COURT, KOZHIKODE IN CRL M.C. NO.1595/2014 IN CR.NO 422/2013 OF KASABA POLICE STATION.
- EXT.P5 TRUE COPY OF THE ORDER IN BAIL APPL.NO.7163/2014 OF THIS COURT DATED 13-10-2014.
- EXT.P6 TRUE COPY OF THE JUDGMENT IN WP(C) NO.29256/2014 DATED 20.11.2014.
- EXT.P7 TRUE COPY OF THE COMPLAINT DATED 22-05-2014 FILED BY PETITIONER'S MOTHER T. SUBHALAKSHMI BEFORE THE HON'BLE HOME MINISTER.
- EXT.P8 TRUE COPY OF REPRESENTATION FILED BY THE PETITIONER BEFORE THE RESPONDENTS DATED 08-06-2015.

RESPONDENTS' EXHIBITS: NIL

//TRUE COPY//

ahz/

“C.R.”

**K.T.SANKARAN &
B.SUDHEENDRA KUMAR, JJ.**

W.P.(C) NO.19959 OF 2015 (T)

Dated this the 21st day of July, 2015

JUDGMENT

K.T.Sankaran, J.

The questions involved in this Writ Petition are: (1) Whether a person who apprehends that an order under Section 3(1) of the Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as 'the KAAPA') is likely to be passed against him is entitled to insist that he should be heard by the District Magistrate before passing the order of detention and whether the person concerned should get an opportunity to make a representation against the proposed order; and (2) Whether a person who apprehends that an order under Section 3 of the KAAPA would be issued against him is entitled to invoke Article 226 of the Constitution of India for the issue of a writ of mandamus commanding the District Magistrate to hear him before passing an order of detention under Section 3(1) of the KAAPA.

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2. The petitioner is involved in seven crime cases registered before the Medical College Police Station, Nallalam Police Station, Kasaba Police Station, Town Police Station and Nadakkavu Police Station at Kozhikode. Some of the crime cases relate to offences under Sections 13 and 17 of the Kerala Money Lenders Act and Sections 3 and 4 of the Kerala Prohibition of Charging Exorbitant Interest Act, apart from the offences under the Indian Penal Code. A proceeding under Section 107 of the Code of Criminal Procedure was also initiated against the petitioner. Out of the seven crime cases mentioned above, investigation was over in three cases and final reports were filed and those cases are pending before the Courts having jurisdiction.

3. Anticipating arrest, the petitioner submitted applications before the Sessions Court, Kozhikode as well as before this Court under Section 438 of the Code of Criminal Procedure and anticipatory bail was granted in his favour on certain conditions. In some of the crime cases, the petitioner was granted regular bail.

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4. It is stated in the Writ Petition that the mother of the petitioner submitted Ext.P7 representation before the Honourable Home Minister of Kerala and the petitioner submitted Ext.P8 representation before the District Magistrate, Kozhikode as well as the Commissioner of Police, Kozhikode. In Ext.P7 representation submitted by the mother of the petitioner, the prayer is that a detailed enquiry may be conducted regarding the cases initiated against her son (the petitioner). A grievance is also raised in that representation that it is reasonably apprehended that misusing the power, proceedings are being taken against the petitioner under the provisions of the KAAPA. In Ext.P8 representation submitted by the petitioner, he has mentioned about the ill-will nurtured by Sri.A.V.George, the then Commissioner of Police, Kozhikode. Even after the transfer of Sri.A.V.George, at his instigation, proceedings are being initiated against the petitioner under the KAAPA. The prayer in the Writ Petition is to issue a writ in the nature of mandamus commanding the District Magistrate, Kozhikode to consider Ext.P8 representation submitted by the petitioner with notice to the petitioner and also to consider the various bail orders

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passed by the Courts, before passing an order under Section 3 of the KAAPA against the petitioner.

5. In the counter affidavit filed by the first respondent (District Magistrate), he has disputed the receipt of Ext.P8 representation. In the counter affidavit filed by the second respondent, the details of the cases registered against the petitioner are mentioned. The respondents contended that the petitioner is not entitled to any relief in the Writ Petition since he has no legal right to demand a right of hearing before issuing an order of detention under Section 3 of the KAAPA by the District Magistrate.

6. The learned counsel for the petitioner submitted that even if there is no specific provision in the KAAPA or in the Constitution of India, the petitioner has got a right to be heard before an order under Section 3(1) of the KAAPA is passed against him. It is submitted that Article 21 of the Constitution of India takes in this right as well.

7. From the details furnished in the counter affidavit, it would appear that the proposal is to pass an order under Section 3(1) of

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the KAAPA on the ground that the petitioner is a “known goonda”. Learned Government Pleader submitted that the petitioner is a “loan shark” as defined in Section 2(q) of the KAAPA and thus a “goonda” as defined in Section 2(j) and a “known goonda” as defined in Section 2(o) of the KAAPA. Since the petitioner is involved in more than the required number of cases under Section 2(o), he satisfies the definition of “known goonda”.

8. Two types of preventive action is contemplated under the KAAPA. One is an order of detention under Section 3 of the KAAPA and the other is an order restricting the movements of the person concerned under Section 15(1) of the KAAPA. Before passing an order under Section 15(1) of the KAAPA, the person concerned has a right to get an opportunity to be heard by notice served on him. Such a right is not provided in the case of preventive detention under Section 3(1) of the KAAPA. By the very nature of the preventive detention order and execution of the order of detention, it is inconceivable that the person concerned would have an opportunity of being heard. Article 22(5) of the Constitution of India provides that when any person is detained in pursuance of an order made under

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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. Clause (3) of Article 22 of the Constitution provides that nothing in clauses (1) and (2) of Article 22 shall apply to any person who is arrested or detained under any law providing for preventive detention. The Constitution of India does not contemplate any right of hearing or any right to make a representation by the person concerned at any time before an order of detention is passed. The personal liberty contemplated under Article 21 of the Constitution of India does not extend to a right being claimed by the person concerned to get an opportunity to be heard before an order of detention is passed under the preventive detention laws. The mandate of Article 21 of the Constitution is that no person shall be deprived of his life or personal liberty except according to procedure established by law. The law on the subject, namely, KAAPA provides for a procedure for passing an order of preventive detention, the execution thereof, the conditions to be satisfied on execution of the order of detention, reference to Advisory Board, confirmation of the

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order of detention and revocation of the order of detention. The procedure established by law as contemplated under Article 21 of the Constitution and the mandate of Article 22(5) of the Constitution would not enable a person against whom an order under Section 3 of the KAAPA is sought to be passed to insist that the detaining authority should issue a notice to him, hear him and then only he should pass an order of preventive detention. If this interpretation placed by the learned counsel for the petitioner is accepted, the very purpose of preventive detention would be defeated. Article 22(5) protects the right of the detenu to have an opportunity of making a representation against the order of detention. The various provisions of the KAAPA also safeguard the rights of the detenu. A right which is not provided under the KAAPA and which is not contemplated by the Constitution or any law cannot be claimed as of right by a citizen against whom an order of detention is proposed to be passed under Section 3(1) of the KAAPA.

9. The learned counsel for the petitioner relied on the decisions in **Julias Nikhithas @ Unni v. Inspector General of Police, Kannur Range (2013 (3) KHC 420)**, **Rekha v. State of T.**

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Nadu Tr. Sec. to Govt. and another ((2011) 5 SCC 244 = 2011 KHC 4343) and Susi v. State of Kerala and others (2011 (1) KHC 657 = 2011 (1) KLT 760).

10. In **Julias Nikhithas @ Unni v. Inspector General of Police, Kannur Range (2013 (3) KHC 420)**, an order under Section 15(1) of the KAAPA was under challenge on the ground that an opportunity of being heard was not provided. Section 15(1) of the KAAPA specifically provides for an opportunity of being heard before passing an order and therefore, the decision in ***Julias Nikhithas's*** case is not applicable to the present case. In **Rekha v. State of T. Nadu Tr. Sec. to Govt. and another ((2011) 5 SCC 244 = 2011 KHC 4343) and Susi v. State of Kerala and others (2011 (1) KHC 657 = 2011 (1) KLT 760)** referred to above, the order of detention, after its execution, was under challenge. Therefore, those decisions also would not apply to the present case.

11. The law on the question of availability of writ of mandamus is well settled. In **Mani Subrat Jain etc. etc. v. State of Haryana**

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and others (AIR 1977 SC 276), the Supreme Court held thus:

“9. It is elementary though it is to be restated that no one can ask for a mandamus without a legal right. There must be a judicially enforceable right as a legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by some one who has a legal duty to do something or to abstain from doing something. (See Halsbury's Laws of England 4th Ed. Vol. I, paragraph 122); State of Haryana v. Subash Chander, (1974) 1 SCR 165 = (AIR 1973 SC 2216); Jasbhai Motibhai Desai v. Roshan Kumar Haji Bashir Ahemd, (1976) 3 SCR 58 = (AIR 1976 SC 578) and Ferris Extraordinary Legal Remedies paragraph 198.”

12. The person against whom an order of detention is sought to be issued has no legal right to be heard before an order of detention under Section 3(1) of the KAAPA is issued. He has no legal right to make any representation before issuing the order. The District Magistrate or the Government has no legal duty to hear the person concerned or to afford him an opportunity to make a representation against the proposed order of detention.

13. In **Mariamamma Antony v. State of Kerala and others** (2014 KHC 2551 = ILR 2014(1) Ker. 90), the question involved was whether a person who apprehended arrest in execution of an order of detention under Section 3(1) of the KAAPA was entitled to get a copy of the order of detention by the issue of a writ of mandamus. Answering the question in the negative, the Division Bench (in which Justice K.T.Sankaran was a member) held thus:

“10. It is well settled that a writ of mandamus will issue only when there is a right vested in a person and a corresponding duty cast on the authority concerned to do a particular thing in a particular manner and in spite of demand, the authority failed to discharge its duty. The authorities under the KAAPA are not bound to issue copy of the order of detention, grounds of detention or the documents relied on by the detaining authority to the person sought to be detained at any time before execution of the order of detention. The person sought to be detained has no right to demand copies of such documents before he is arrested. That the person sought to be arrested and detained under the KAAPA would be entitled to challenge the order of detention at its pre-execution stage on limited grounds would not mean that he has a right to get copies of the documents

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mentioned above. The right to challenge the order of detention does not cast any corresponding obligation on the detaining authority or the sponsoring authority to supply the documents mentioned above to the person sought to be arrested, before execution of the order of detention. In these circumstances, we are of the view that the petitioner is not entitled to the relief of a writ of mandamus as prayed for in the Writ Petition.”

14. In order to obtain a writ or order in the nature of mandamus, the applicant must show that he has a legal right to the performance of a legal duty (as distinguished from a discretion), by the party against whom the mandamus is sought, and such right must be subsisting on the date of the petition. The Court should not issue a writ of or in the nature of mandamus on the basis of sympathy. The duty enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law. Even though the aforesaid conditions are satisfied, the relief by way of mandamus is discretionary and cannot be claimed as of right. Mandamus will be refused where the application is premature or when no action contrary to law has yet been taken or proposed.

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15. The petitioner has no legal right to claim a writ in the nature of mandamus. There is no corresponding legal duty cast on the District Magistrate (detaining authority) to issue a show cause notice or to provide an opportunity of being heard or to provide an opportunity to make a representation by the petitioner, before the District Magistrate exercising his power under Section 3(1) of the KAAPA.

The Writ Petition fails and, accordingly, it is dismissed.

K.T.SANKARAN
Judge

B.SUDHEENDRA KUMAR
Judge

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