

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH



MONDAY, THE 19TH DAY OF JANUARY 2015/29TH POUSHA, 1936

WP(Crl.).No. 505 of 2014 (S)

PETITIONER:

RAPPAYI,
NELLISSERY HOUSE, ANCHERI, KUNDOLI DESOM
OLLUR VILLAGE, THRISSUR

BY ADVS. SRI.M.SHAJU PURUSHOTHAMAN
SRI.K.S.RAJESH

RESPONDENTS:

1. STATE OF KERALA
REP.BY THE ADDL.CHIEF SECRETARY, HOME DEPARTMENT
SECRETARIAT, THIRUVANANTHAPURAM 695 001.
2. THE DISTRICT COLLECTOR.THRISSUR 680 001
3. THE DISTRICT POLICE CHIEF
THRISSUR 680 001
4. THE SUPERINTENDENT
CENTRAL JAIL, KANNUR 675 001.

BY ADDL. DIRECTOR GENERAL OF PROSECUTION SRI.TOM JOSE
PADINJAREKKARA

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR ADMISSION
ON 19-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(Crl.).No. 505 of 2014 (S)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1 COPY OF THE ORDER OF DETENTION DATED 17/8/2014.

EXHIBIT P2 COPY OF THE REPRESENTATION DATED 10/9/2014.

EXHIBIT P3 COPY OF THE LETTER ISSUED TO THE 4TH RESPONDENT DATED
25/9/2014.

EXHIBIT P4 COPY OF THE MONEY ORDER FORM DATED 26/9/2014.

EXHIBIT P5 COPY OF THE LETTER ISSUED TO THE 4TH RESPONDENT DATED
13/10/2014.

EXHIBIT P6 COPY OF THE MONEY ORDER FORM DATED 13/10/2014.

EXHIBIT P7 COPY OF THE REPRESENTATION DATED 22/10/2014.

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**K. T. SANKARAN
&
BABU MATHEW P. JOSEPH, JJ.**

W.P.(Crl.) No.505 of 2014

“C. R.”

Dated this the 19th day of January, 2015

JUDGMENT

K. T. Sankaran, J.

The son of the petitioner, namely, Arun @ Nellu was detained under Section 3 of the Kerala Anti-Social Activities (Prevention) Act, 2007, (hereinafter referred to as “the Act”), as per Ext.P1 order of detention dated 17/08/2014. This writ petition is filed by the father of the detenu praying for the issue of a writ of habeas corpus directing the respondents to produce the detenu before court, for the issue of a writ of certiorari to quash Ext.P1 order of detention and for releasing the detenu.

2. Ext.P1 order of detention shows that the detenu was involved in six crimes registered at Ollur Police Station, which come under the category of Section 2(t)(i) and 2(t)(ii) of the Act and therefore, the detenu satisfies the definition

of “known-rowdy” under Section 2(p)(iii) of the Act.

3. The learned counsel for the petitioner raised the following four points for consideration.

(1)The detenu submitted Ext.P7 representation on 22/10/2014 to the Chairman of the Advisory Board and the said representation was handed over to the Superintendent of Central Jail, Kannur. That representation was not disposed of by the Advisory Board. On the other hand, it was disposed of by the Additional Chief Secretary as per Ext.R4(o) order dated 10/11/2014. The procedure adopted was illegal.

(2)Since Ext.P7 representation was submitted before the expiry of nine weeks from the date of detention, the Advisory Board was bound to dispose of the same. The Advisory Board did not dispose of Ext.P7 representation and therefore, the continued detention of the detenu is illegal.

(3) Proceedings were initiated against the detenu under Section 107 of the Code of Criminal Procedure. The detenu was directed to execute a bond as per order dated 09/03/2013 for a period of one year for keeping peace. The detaining authority was not justified in not properly taking note of the initiation of the proceedings under Section 107 of the Code of Criminal Procedure against the detenu and therefore, the subjective satisfaction arrived at by the detaining authority is vitiated.

(4) The detenu submitted a representation to the Government on 12/09/2014. Before that date, the Government had referred the matter to the Advisory Board under Section 9 of the Act. The Government rejected the representation even before the receipt of the report by the Advisory Board. This procedure adopted by the Government is illegal.

4. For comprehending the contentions put forward by the petitioner, certain dates and events as shown below are relevant:-

a)	Date of the order of detention	17/08/2014
b)	Execution of the order of detention	23/08/2014
c)	Date of order of approval by the Government under Section 3(3) of the Act	30/08/2014
d)	Date of reference by the Government to the Advisory Board	02/09/2014
e)	Date of submission of representation by the detenu to the Government (Ext.P2)	12/09/2014
f)	Date of the report submitted by the Advisory Board	13/10/2014
g)	Date of confirmation of the order of detention	17/10/2014
h)	Date of representation submitted by the petitioner to the Advisory Board (Ext.P7)	28/10/2014
i)	Date of commission of the last offence referred to in Ext.P1	05/05/2014

5. Points 1 and 2:- To consider these contentions, it is necessary to comprehend the scheme of the Act. Section 3 of the Act provides for making an order for detaining a person who is either a “known-goonda” or “known-rowdy” as defined under the Act. The order of detention can be passed by the Government or an officer authorised by the

Government under Section 3(2) of the Act. When an order is made under Section 3 of the Act by the authorised officer, he is bound to submit a report to the Government and the Director General of Police, Kerala, together with a copy of the order and supporting records and the Government or the Secretary, Home Department, authorised in that behalf has to approve the order of detention within 12 days. Unless such approval is granted within 12 days, no order of detention shall remain in force beyond 12 days, as provided under Sub-section (3) of Section 3 of the Act. Section 7(2) of the Act reads as follows:-

“The grounds of detention, specifying the instances of offences, with copies of relevant documents, as far as practicable, on the basis of which he is considered as a “known goonda” or “known rowdy” and giving such materials-relating to his activities on the basis of which his detention has been found necessary, shall be furnished to him as soon as possible, nevertheless, in any case, within five days of detention and he shall also be informed in writing, under acknowledgment, of his right to represent to the Government and before the Advisory Board against his detention:

Provided that nothing in this section shall require any authority to disclose to the detained person any fact, the disclosure of which will reveal the identity of any confidential source or the disclosure of which will be against the interests of internal security or national security.”

Section 7(2) of the Act is in tune with the mandate of Article 22(5) of the Constitution of India. Section 9 of the Act provides 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 of the Act. Section 10 of the Act provides for the procedure of the Advisory Board and further action. Section 10(1) of the Act reads as follows:-

“The Advisory Board to which a reference is made under the above section shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the Government or from any person called for the

purpose through the Government, or from the person concerned and if, in any particular case, it considers necessary so to do or if the person concerned desires to be heard in person, after hearing him in person, 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.”

Sub-section (4) of Section 10 of the Act provides that in every case where the Advisory Board has reported that there is in its opinion, sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion 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. Section 13 of the Act provides that a detention order may, at any time, be revoked or modified by the Government.

6. The detenu has a right to make a representation to

the Government and before the Advisory Board. Going by the scheme of the Act, the reference to the Advisory Board shall be made within three weeks from the detention of a person, as provided under Section 9 of the Act. The Advisory Board shall give the opinion within nine weeks from the date of detention of the person concerned, as provided under Section 10 of the Act. If the Government fails to make a reference to the Advisory Board within three weeks or if the Advisory Board fails to give its opinion within nine weeks from the date of detention of the person concerned, the continued detention of the detenu would be illegal. The Government is also bound to release the detenu forthwith in case the opinion of the Advisory Board is that there is no sufficient cause for his detention. If the Advisory Board opines that there is sufficient cause for the detention of the person concerned, the Government may confirm the detention order. Even after such opinion is given by the Advisory Board, the Government can revoke the order of

detention at any time. If the mandatory requirements as provided in the Act are not complied with, within the time frame, that would vitiate the continued detention of the detenu. If a representation is submitted by the detenu before the Government through the prison authorities, the Government is bound to place that representation as well before the Advisory Board. The Advisory Board shall consider the reference as well as the materials placed before it before forming an opinion as provided under Section 10 of the Act. The Advisory Board has got the power to call for such further information as it may deem necessary from the Government or from any person called for the purpose through the Government. If the detenu desires to be heard in person, the Advisory Board shall hear him in person. After completing the formalities, the Advisory Board has to prepare a report specifying its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit that report within nine weeks from the date of detention of

the person concerned. The right of the detenu to make a representation to the Government as well as to the Advisory Board is indefeasible. The duty of the Government to approve the order of detention under Section 3(3) of the Act within 12 days, to refer the matter to the Advisory Board within three weeks from the date of detention and the duty of the Advisory Board to give its opinion within nine weeks of the date of detention of the person concerned are also statutorily built in safeguards to protect the interests of the detenu. If these safeguards and mandatory requirements are not complied with, the detenu would be entitled to be released on the ground of non-compliance of the statutory requirements. In the light of the time frame provided in the Act and in view of the mandatory nature of complying with the time frame by the Government and by the Advisory Board, it cannot be said that the detenu would be entitled to insist that the Advisory Board shall wait till the last date to submit its opinion and wait for the representation of the

detenu till the last day of nine weeks from the date of detention of the detenu. There is no such duty cast on the Advisory Board to keep the matters in abeyance waiting for the representation of the detenu at any time before the expiry of nine weeks. The right given to the detenu to make a representation to the Advisory Board is coupled with a disqualification that he should submit the representation intended to be sent to the Advisory Board before the jail authorities, before the Government refers the matter to the Advisory Board. Even after the reference is made by the Government to the Advisory Board, the Government is bound to forward the representation submitted by the detenu to the Advisory Board, provided the Advisory Board is in seisin of the matter. If the Advisory Board has already given its opinion, there is no power vested in the Advisory Board to reconsider its opinion by considering the belated representation of the detenu. The detenu has a right to be heard before the Advisory Board and nothing prevents him

from making a representation when he is produced before the Advisory Board. At all stages, the rights of the detenu are safeguarded by specific provisions.

7. The representation addressed to the Advisory Board was received on 28/10/2014 by the Superintendent, Central Prison, Kannur and on the same day, he forwarded the same to the Chairman of the Advisory Board. The Secretary of the Advisory Board, as per letter dated 01/11/2014 forwarded the said representation to the Additional Chief Secretary, Home, S.S.A. Department, Secretariat, Thiruvananthapuram, with copy to the Superintendent of Central Prison, Kannur, and that was intimated to the detenu. The Additional Chief Secretary, as per the order dated 10/11/2014 disposed of the said representation dated 28/10/2014 submitted by the detenu and rejected the request for revoking the order. When the detenu made the representation dated 28/10/2014, the proceedings before the Advisory Board were not pending. The Advisory Board had already given its

opinion and report dated 13/10/2014 to the Government. Therefore, the Secretary of the Advisory Board rightly forwarded the representation and papers to the Additional Chief Secretary. The Additional Chief Secretary disposed of that representation, as per the order dated 10/11/2014 and rejected the request for revoking the order of detention. To our mind, the procedure adopted in this regard was quite legal and proper. Since the representation to the Advisory Board was made after the report of the Advisory Board was sent to the Government, the Advisory Board could not consider the representation submitted by the detenu, as the Advisory Board lacked jurisdiction to deal with such representation after it became functus officio on submitting the report and opinion as provided under Section 10 of the Act. Therefore, the only course open for the detenu to make any move for his release was to make a representation to the Government to revoke the order of detention, invoking the power of the Government under Section 13 of the Act. To

facilitate this, the Secretary of the Advisory Board forwarded the representation of the detenu to the Additional Chief Secretary and the Additional Chief Secretary considered the request of the detenu as a request for revocation of the order of detention under Section 13 of the Act and accordingly, rejected that request on the merits. No right of the detenu is infringed and no duty cast on any of the authorities is shirked in the particular case.

8. The Advisory Board has got power to call for further information as it may deem necessary as provided under Section 10 of the Act. The detenu gets an opportunity to make a request to the Advisory Board to hear him in person. The detenu can also submit his written representation before the Advisory Board. The Advisory Board has to form its opinion and make a report containing the opinion within nine weeks from the date of detention of the person concerned. On making such report containing the opinion, the Advisory Board becomes functus officio. Thereafter, the

Advisory Board has no jurisdiction to entertain or consider any representation submitted by the detenu. The detenu does not have an indefeasible right to make such representation after the Advisory Board gives its report containing the opinion. After the submission of the report and opinion by the Advisory Board, the only forum which can consider the representation of the detenu and invoke the power of revocation is the Government. Of course, the court can find an order of detention illegal or the continued detention of the detenu illegal and pass appropriate orders. Except that, no other authority under the Act other than the Government could exercise the power of revocation of the order of detention. That power can be exercised at any time and the detenu gets sufficient opportunity to make a representation for that purpose at any time. We cannot read into the provisions of the Act certain imaginary rights of the detenu. If the contentions raised by the petitioner are accepted, the functioning of the various authorities under

the Act would be paralysed which would again infringe the rights of the detenu.

9. For the aforesaid reasons, we reject the contentions put forward by the learned counsel for the petitioner.

10. Point No.3:- The learned counsel for the petitioner relied on the decision of a Division Bench of this Court (in which Justice Babu Mathew P. Joseph was a party) in **Abidha Beevi v. State of Kerala (2013 (1) KLT 286)**, in support of the contention that the subjective satisfaction of the detaining authority is vitiated since it did not properly consider that proceedings were initiated against the detenu under Section 107 of the Code of Criminal Procedure. In **Abidha Beevi's case (2013 (1) KLT 286)**, it was held that a mere statement in the order of detention that the proceedings initiated against the detenu under Section 107 Cr.P.C were not sufficient for preventing him from committing anti-social activities, would not be a sufficient requirement. The detaining authority should consider the

sufficiency or insufficiency of the proceedings under Section 107 Cr.P.C initiated against the detenu with the support of relevant materials and necessary discussions in the order of detention. In **Abidha Beevi's case (2013 (1) KLT 286)**, the proceedings against the detenu were initiated under Section 107 Cr.P.C on 23/05/2012. The last anti-social activity allegedly committed by the detenu was on 06/02/2012, much prior to the initiation of the proceedings under Section 107 Cr.P.C. In the present case, proceedings were initiated before the Sub Divisional Magistrate in the year 2013 and as per the order passed by the Sub Divisional Magistrate, the detenu executed the bond on 09/03/2013 for keeping peace for a period of one year. The period of the bond expired on 09/03/2014. Crime No.963 of 2014 was registered at Ollur Police Station against the detenu in respect of the occurrence on 05/05/2014, much after the expiry of the period of the bond executed under Section 107 Cr.P.C. In the order of detention, it is specifically stated that

even after initiation of proceedings under Section 107 Cr.P.C, the detenu did not mend his ways and he indulged in activities disturbing the peace and tranquility and involved in anti-social activities. The order of detention also mentions about the registration of Crime No.963 of 2014 and the necessity of detaining the son of the petitioner under the Act in order to prevent him from committing any anti-social activity and to protect the life and properties of the general public. Since the factual situation is entirely different in the present case, the decision in **Abidha Beevi (2013 (1) KLT 286)** does not apply to the case.

11. In **Hidayath K. v. State of Kerala (2014 (1) KHC 718)**, another Division Bench of this Court (in which Justice K.T.Sankaran was a party), held as follows:-

“The learned counsel for the petitioner relied on the decision in *Rekha Gopakumar v. State of Kerala* and contended that proceedings under Section 107 of the Code of Criminal Procedure having been initiated against the detenu, there was no justification for passing an order of detention under Section 3(1) of the KAAPA. It is stated in the order of detention that though

proceedings were initiated against the detenu under Section 107 of Cr.P.C, even thereafter he continued to indulge in criminal activities with added force. In the counter-affidavit, it is stated that after the initiation of the proceedings under Section 107 of Cr.P.C, the detenu involved himself in the commission of four crimes. In *Rekha Gopakumar v. State of Kerala*, a Division Bench of this Court held that the question whether the proceedings under Section 107 of Cr.P.C are sufficient or not is a question of fact depending upon various factors. In *Rekha Gopakumar's* case, though a report was made indicating that proceedings under Section 107 of Cr.P.C had been initiated against the detenu, the authorised officer did not consider the same at all. In the present case, the fact that proceedings were initiated against the detenu under Section 107 Cr.P.C was taken into account by the second respondent and he was satisfied that recourse to Section 107 of Cr.P.C would not be enough in the present case since the detenu committed four other crimes thereafter."

Accordingly, point No.3 is also answered against the petitioner.

12. Point No.4:- The submission of the learned counsel for the petitioner is that since the detenu submitted a representation dated 12/09/2014, after the date of the reference by the Government to the Advisory Board, the Government should have waited till the opinion is given by

the Advisory Board. Instead, the Government rejected the representation on 20/09/2014. It is well settled that when a representation is submitted by the detenu to the Government, the Government is bound to consider the same without unreasonable delay. The requirement of reference to the Advisory Board within the time frame is mandatory. The Advisory Board is also statutorily bound to submit its report within the time frame. If the Government fails to dispose of the representation submitted by the detenu promptly, that itself would be a ground for holding that the continued detention is illegal. In the present case, a contention which is quite contrary to the usual contentions raised in the preventive detention matters is seen raised. That is, the Government should not have disposed of the representation promptly, but it should have waited for the opinion of the Advisory Board. It was not necessary for the Government to have waited for the report of the Advisory Board for two reasons. (1) If the report of the Advisory Board is received, the Government is bound to act on the same as provided under Section 10(4) of the Act either confirming the order of

detention or revoking the order of detention. (2) Even after the order of detention is confirmed, the Government could at any time revoke the order of detention exercising the power under Section 13 of the Act. We are, therefore, not inclined to accept the submission made by the learned counsel for the petitioner that since the Government disposed of the representation submitted by the detenu promptly and without waiting for the opinion of the Advisory Board, the rights of the detenu are infringed. Point No.4 is also answered against the petitioner.

For the aforesaid reasons, we do not find any ground to hold either that the order of detention is illegal or the continued detention is illegal. The writ petition is accordingly dismissed.

Sd/-
K. T. SANKARAN
JUDGE

Sd/-
BABU MATHEW P. JOSEPH
JUDGE

kns/-

//TRUE COPY//

P.A. TO JUDGE

