

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.T. SANKARAN

&

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

MONDAY, THE 5TH DAY OF OCTOBER 2015/13TH ASWINA, 1937

WP(Crl.).No. 322 of 2015 (S)

PETITIONER:

ANITHAKUMARI, AGED 29 YEARS
W/O. UNNIKRISHNAN
THAKIDIYILVEEDU VISHUBHAVAN, KEEZHEPALARAKUNNU
PUZHANADU MURI, NEYYATTINKARA, THIRUVANANTHAPURAM.

BY ADVS. SRI.C.RAJENDRAN
SRI.K.R.RANJITH

RESPONDENTS:

1. STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY
GOVERNMENT OF KERALA (HOME DEPARTMENT)
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695 001.
2. DISTRICT MAGISTRATE,
THIRUVANANTHAPURAM DISTRICT-695 001.
3. DEPUTY COMMISSIONER OF POLICE,
THIRUVANANTHAPURAM CITY,
THIRUVANANTHAPURAM-695 001.
4. SUB INSPECTOR OF POLICE,
THIRUVALLAM POLICE STATION
THIRUVANANTHAPURAM DISTRICT-695 027.
5. THE SUPERINTENDENT, CENTRAL PRISON,
VIYYOOR, THRISSUR-680 010.

BY DIRECTOR GENERAL OF PROSECUTION SRI.ASAF ALI
BY GOVERNMENT PLEADER SMT.KOCHUMOL KADAVATH

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
5.10.2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER'S EXHIBITS

- EXT.P1: PHOTOCOPY OF THE DETENTION ORDER DATED 13/04/2015.
- EXT.P2: PHOTOCOPY OF THE GROUNDS FOR PASSING EXT.P1 ORDER.
- EXT.P3: PHOTOCOPY OF THE REPORT SUBMITTED BY THE 3RD RESPONDENT.
- EXT.P4: PHOTOCOPY OF THE ORDER DATED 13/04/2015 ISSUED BY THE 1ST RESPONDENT FOR EXECUTING THE DETENTION ORDER TO THE 4TH RESPONDENT.
- EXT.P5: PHOTOCOPY OF THE ORDER APPROVED BY THE 1ST RESPONDENT SHOWING THE DATE AS 27/04/2015.
- EXT.P6: PHOTOCOPY OF THE FIR ALONG WITH THE FIS IN CRIME NO.404/2011 OF VATTAPARA POLICE STATION.
- EXT.P7: PHOTOCOPY OF THE FINAL REPORT IN CRIME NO.404/2011 OF VATTAPARA POLICE STATION.
- EXT.P8: PHOTOCOPY OF THE FIR IN CRIME NO.532/2011 OF THIRUVALLAM POLICE STATION.
- EXT.P9: PHOTOCOPY OF THE FINAL REPORT IN CRIME NO.532/2011 OF THIRUVALLAM POLICE STATION.
- EXT.P10: PHOTOCOPY OF THE FIR IN CRIME NO.911/2011 OF KILIMANJOOR POLICE STATION.
- EXT.P11: PHOTOCOPY OF THE FINAL REPORT IN CRIME NO.911/2011 OF KILIMANJOOR POLICE STATION.
- EXT.P12: PHOTOCOPY OF THE FIR IN CRIME NO.2179/13 OF THE FORT POLICE STATION.
- EXT.P13: PHOTOCOPY OF THE FINAL REPORT IN CRIME NO.2179/13 OF THE FORT POLICE STATION.
- EXT.P14: PHOTOCOPY OF THE CONFIRMATION ORDER DATED 20/06/2015 ISSUED BY THE 1ST RESPONDENT.
- EXT.P15: PHOTOCOPY OF THE RELEVANT PORTION OF THE DEFINITION OF SECTION 2(a) IN KAA(P)ACT.

RESPONDENTS' EXHIBITS: NIL

//TRUE COPY//

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“C.R.”

**K.T.SANKARAN &
RAJA VIJAYARAGHAVAN V., JJ.**

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Dated this the 5th day of October, 2015

JUDGMENT

K.T.Sankaran, J.

The District Magistrate, Thiruvananthapuram passed Ext.P1 order of detention dated 13.4.2015 under Section 3(1) of the Kerala Anti-Social Activities (Prevention) Act, 2007 (hereinafter referred to as the 'KAAPA'), to detain Unnikrishnan @ Thiruvallam Unni, the husband of the writ petitioner. It was alleged that the husband of the writ petitioner is a 'known rowdy' as defined in the KAAPA and with a view to prevent him from committing anti-social activities, it is necessary to make an order directing him to be detained.

2. The order of detention was executed on 19.4.2015. As per the order dated 20.6.2015, the Government confirmed the order of detention. The petitioner challenges in this Writ Petition Ext.P1 order of detention and his continued detention.

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3. Ext.P1 order of detention shows that the detenu was involved in eighteen crimes registered at various police stations. In all the crimes the common offence is either under Section 379 or under Section 380.

4. In Ext.P1 it is stated that the crimes which were described as SI.Nos.12 and 14 to 18 were under investigation and, therefore, those cases were not considered for arriving at the subjective satisfaction and for passing an order of detention. This view taken by the detaining authority is clearly against the dictum laid down by this Court in two Division Bench decisions, namely, **Beji v. State of Kerala [2012 (3) KLT 255]** and **Elizebath George v. State of Kerala [2008(4) KLT 425]**. However, since the detaining authority had excluded these cases from the purview of consideration, it is not necessary to consider that aspect for the purpose of disposal of this Writ Petition.

5. Learned counsel for the petitioner challenged the validity of the detention order and the continued detention on three grounds:

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(1) Since the name of the detenu is not available in the FIRs registered in the cases considered for passing the preventive detention order, the detaining authority should have satisfied himself that there were materials to arrive at the conclusion that it was the detenu who committed the offence. (2) It is clear from Ext.P1 order of detention that the detenu was arrested in Crime No.748/2011 of Adoor Police Station and, while questioning, he disclosed about the commission of offence relating to three other crimes mentioned as item Nos. 1 to 3 in Ext.P1 order. Likewise, the disclosure made by the detenu in certain other cases were also referred to while registering some of the crimes mentioned in Ext.P1 order. The learned counsel submits that the disclosure statement in Crime No.748 of 2011 and in the other crimes in which similar disclosure statements were made by the detenu should have been made available by the sponsoring authority before the detaining authority to found the subjective satisfaction of the detaining authority. These vital documents having not been placed before the detaining authority, the subjective satisfaction arrived at by the detaining authority is vitiated and consequently, the order of detention is liable to be struck down. (3) The detenu has a right to make a

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representation before the Government as well as the Advisory Board. Section 7(2) of the KAAPA mandates that within five days of detention, the detenu shall be informed in writing, under acknowledgment, of his right to represent to the Government and before the Advisory Board against his detention. According to the learned counsel for the petitioner, this information in writing should be made available separately and a statement in the grounds of detention supplied to the detenu that he would have a right to make a representation before the Government and the Advisory Board is not a substitute for satisfying the specific requirement of Section 7(2) of the KAAPA.

6. Point No.1: It is true that the name of the detenu is not mentioned in the First Information Statements in respect of the crimes referred to in Ext.P1 order. The cases registered against the detenu are cases either under Sections 379 or 380 with combination of Sections 457, 411 or 461 IPC. The First Information Statements were given by the persons whose properties were stolen and they stated that they had no information about the person who committed the offences. On investigation, it was found that the detenu was

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involved in the crimes and final reports were filed accordingly.

7. The submission of the learned counsel for the petitioner is that the detaining authority should satisfy himself that there were materials to arrive at the conclusion that it was the detenu who committed the offence. In other words, the submission is that apart from the investigation conducted by the investigating officer the detaining authority also should have arrived at the conclusion whether the detenu had committed the crime. To consider this contention, it is necessary to advert to the scheme of the KAAPA in the matter of issuing an order of preventive detention under Section 3. An order under Section 3 can be issued either by the Government or by an officer authorised under sub-section (2) of Section 3. The government or the officer authorised must arrive at the satisfaction on information received from a police officer not below the rank of Superintendent of Police. That information should be with regard to the activities of any 'known goonda' or 'known rowdy'. 'Known goonda' and 'known rowdy' are defined respectively under clauses (o) and (p) of Section 2 of the KAAPA. The requirement to satisfy the definition of 'known goonda' or 'known rowdy' is either finding of

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guilt of the detenu by a competent Court or finding in any investigation or enquiry by a competent police officer or other authority that the detenu had committed any offence within the meaning of 'goonda' as defined in clause (j) of Section 2 or the particular sub-clause in clause (t) of Section 2. When a person is made guilty by a competent Court, no other authority can look into the case to find out whether the person concerned is guilty or not. Likewise, where it is found, on investigation or enquiry by a competent police officer or authority, that the detenu has committed any offence mentioned in the respective clauses, a further scrutiny by the detaining authority under Section 3 as to the complicity of the detenu in the offence is not contemplated. The detaining authority has to arrive at the objective satisfaction that the person concerned was convicted or found, on investigation or enquiry, to have committed the offence alleged. In other words, the satisfaction in this regard is only with respect to just verifying that the person sought to be detained is the person who is reported to be involved in the offence. The objective satisfaction further requires that the detaining authority must be satisfied that the offence alleged comes within the purview of clause (j) of Section 2 in the case of 'known

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goonda' and clause (t) of Section 2 in respect of a 'known rowdy'. The detaining authority has also to satisfy that any of the provisos to clause (p) of Section 2 applies so that if the proviso applies in respect of a particular case, that case shall be omitted from the computation of the number of offences to be taken into account for deciding whether a person is a 'known rowdy'. In the case of a 'known goonda', the detaining authority has also to satisfy whether the proviso to clause (o) of Section 2 is satisfied and that the offence in respect of which a report was filed by a police officer before a lawful authority was consequent to the seizure of any of the items mentioned in the proviso. When the aforesaid tests are applied and requirements are satisfied, it can be said that the detaining authority has arrived at the objective satisfaction. Then comes the question of subjective satisfaction under Section 3(1) of the KAAPA as to whether with a view to prevent the person concerned from committing any anti-social activity within the State of Kerala in any manner, it is necessary to make an order directing that the person concerned be detained. Though it is the duty of the detaining authority, namely, the Government or the officer authorised, to arrive at the objective as well as subjective satisfaction, it is not within the

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domain of the detaining authority to make an enquiry as to whether the person concerned has really committed the offence, whether there is sufficient evidence to arrive at a conclusion that he is guilty of the offence or whether any plausible defence is available to the accused in the particular case. Those are all matters beyond the jurisdiction of the detaining authority.

8. A Division Bench of this Court in **Safiya v. State of Kerala** [2009(1) KLT 7] (in which one of us was a party to the judgment), considered the question whether the District Magistrate is expected to scrutinize the records leading to the final report under Section 173 (2) before passing an order of preventive detention under Section 3 (1) of the KAAPA. The Division Bench held thus:

“4. Once the investigating officer has come to a conclusion that the accused person has committed an offence referred to in cl.(j) or cl.(t) of S.2 as the case may be and when that finding (police report) is forwarded along with the information by the police officer not below the rank of the Superintendent of Police to the detaining authority under the Act, the detaining authority cannot look into the sufficiency or otherwise of the materials leading to the finding by the police officer

regarding the commission of the offence. That is within the exclusive jurisdiction of the criminal court. The detaining authority cannot and shall not appreciate the materials leading to the police report and come to a different finding or comment on the finding as to whether on the materials thus made available by the police officer a report under S.173(2)(i)(d) regarding the commission of offence could have been made or not. As held by the Supreme Court in Union of India v. Paul Manickam (2004(1) KLT 364 (SC) = AIR 2003 SC 4622) “In case of preventive detention no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence” (para 14). Thus if the detaining authority cannot go beyond the finding of the investigating officer, it is not necessary for the Superintendent of Police to furnish the materials leading to the police report to the detaining authority in a situation of S.173(2) report.

5. Therefore in circumstances where the detaining authority has furnished the police report under S.173(2)(i)(d) of the Code of Criminal Procedure, the competent officer need not furnish materials leading to the finding of the investigating officer to the detaining authority since the detaining authority cannot make a

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different assessment as to the sufficiency of the materials leading to the finding in the report. The satisfaction of the detaining authority need only be based on the final report and the further information furnished by the police officer not below the rank of the Superintendent of Police regarding the need for preventive detention under the Act.”

9. Point No.2:- The detenu was arrested in Crime No.748 of 2011. While questioning, he disclosed to the investigating officer about his complicity in three other crimes, which are referred to as item Nos.1 to 3 in Ext.P1 order. Likewise, in certain other cases also, the detenu disclosed about his complicity in respect of some other crimes. The contention of the petitioner is that since the sponsoring authority did not submit the relevant records leading to the disclosure statements to the detaining authority, the subjective satisfaction arrived at by the detaining authority is vitiated. It was contended that these disclosure statements are vital documents and non-submission of the same before the detaining authority would amount to suppression of material facts. To a great extent, the answer given to point No.1 would answer point No.2 as well. As to how the investigating officer arrived at the conclusion about the

complicity or otherwise of the detenu in the offence is not a matter for further scrutiny by the detaining authority. If so, the sponsoring authority need not make available the records for the purpose of such scrutiny before the detaining authority. The sponsoring authority is bound only to furnish such information to the detaining authority to enable the detaining authority to arrive at the objective satisfaction as well as the subjective satisfaction as stated above while answering point No.1. The disclosure statement made by the detenu in a case is not a material at all to arrive at either the objective satisfaction or the subjective satisfaction by the detaining authority. Once the conclusion is arrived at in the “investigation or enquiry”, it could be relied on by the detaining authority to arrive at the satisfaction. Even a final report is not required for arriving at the satisfaction, as held in **Beji v. State of Kerala [2012 (3) KLT 255]** and **Elizebath George v. State of Kerala [2008(4) KLT 425]**. The investigation made by the investigating officer need not be verified by the detaining authority. In fact, the detaining authority has no jurisdiction to arrive at any conclusion which is within the domain of the Court, investigating officer or authority, as the case may be, as mentioned in Section 2(o) and 2(p). The detaining authority is not

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expected to sit in judgment over the conclusion arrived at by the Court, investigating officer or authority.

10. For the reasons mentioned above, we are not inclined to accept the submission made by the learned counsel for the petitioner in respect of points 1 and 2.

11. Point No.3:- Article 22(5) of the Constitution of India provides that when any person is detained in pursuance of an order made under 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. The Supreme Court interpreted in various cases as to how the earliest opportunity of making a representation should be provided and what is the scope and ambit of such an opportunity as contemplated under Article 22(5). In cases coming under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, the Supreme Court took the view that the right of the person detained to make a representation against the order of

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detention comprehends the right to make such representation to the authority which can grant the relief, that is, the authority which can revoke the order of detention and set him at liberty. The Supreme Court had noticed in several decisions that Article 22(5) does not, however, indicate the authority to whom the representation is to be made. Still, since the object and purpose of the representation that is to be made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such relief. It was held that the expressions “as soon as may be” and “the earliest opportunity” in Article 22(5) would clearly indicate that the grounds are to be served and the opportunity to make the representation is to be provided to enable the detenu to show that his detention is unwarranted. Since no other authority who should consider such representation is mentioned, it can only be the detaining authority to whom it is to be made. (See the Constitution Bench decision in **Pankaj Kumar Chakrabarty and others v. The State of West Bengal** [(1969) 3 SCC 400], **Sk.Abdul Karim and others v. State of West Bengal** [(1969) 1 SCC 433 = AIR 1969 SC 1028], **Jayanarayan Sukul v. State of West Bengal** [(1970) 1 SCC 219], **Kamileshkumar**

Ishwardas Patel v. Union of India and others [1995 SCC (Crl) 643] and The State of Bombay v. Atma Ram Shridhar Vaidya [AIR (38)1951 SC 157].

12. In **Amir Shad Khan v. L.Hmingliana and others [(1991) 4 SCC 39]**, a three Judge Bench of the Supreme Court held that “once it is realised that Article 22(5) confers a right of representation, the next question is to whom must the representation be made. The grounds of detention clearly inform the detenu that he can make a representation to the State Government, the Central Government as well as the Advisory Board. There can be no doubt that the representation must be made to the authority which has the power to rescind or revoke the decision, if need be”.

13. In so far as the KAAPA is concerned, the authority to whom the representation could be made is clearly laid down in Section 7(2). Section 7(2) of the KAAPA insists that the detenu shall also be informed in writing, under acknowledgment, of his right to represent to the Government and before the Advisory Board against his detention. Sub-section (2) of Section 7 indicates what materials

are to be provided while supplying the grounds of detention. For the sake of convenience, Section 7(2) is extracted below:

“7. Grounds of order of detention to be disclosed.--

(2) 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.”

14. There is no dispute that Ext.P2 grounds of detention

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supplied to the detenu in the present case states that the detenu, if aggrieved by the detention order, can make a representation either to the Additional Chief Secretary, Home Department, Government Secretariat, Thiruvananthapuram or to the Chairman, Advisory Board, KAAPA. The submission of the learned counsel for the petitioner is that the statement made in Ext.P2 as to whom the representation is to be made does not satisfy the requirement of Section 7(2) and that the information contemplated under Section 7 (2) of the KAAPA must be separately furnished to the detenu in writing and acknowledgment should be obtained. The detenu has no case that he has not received Ext.P2 grounds of detention or that he has not acknowledged receipt of the same. His only case is that the information required under Section 7(2) should be in writing and it should be supplied other than by way of the grounds of detention. The purpose of Section 7(2) of the KAAPA and Article 22(5) of the Constitution of India is to provide an opportunity to the detenu to make a representation to the authority concerned to invoke its power for the purpose of facilitating revocation of the order of detention under the KAAPA. An order of detention can at any time be revoked or modified by the Government. That is why a right is given to the

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detenu to make a representation to the Additional Chief Secretary. The Advisory Board, while submitting its report and opinion, should indicate whether there is sufficient cause for the detention of the person concerned. If the opinion of the Advisory Board is that there is no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order. Thus the requirement of Section 7(2) is to give intimation to the detenu that he has a right to make a representation to the Government and to the Advisory Board. The detenu is free to make a representation to the Government as well as to the Advisory Board. When the matter is intimated to the detenu that he has such a right to make a representation, the legal requirement under Section 7(2) is satisfied. Whether such information is given in the grounds of detention or in a separate paper is not quite relevant. In fact, going by the wording of Section 7, the information should be provided in the grounds of detention. The contention of the petitioner that the information with respect to the right of the detenu to make a representation should be separately provided does not find support in any of the provisions of the KAAPA. We do not find any force in the submission and, accordingly, reject the same.

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For the aforesaid reasons, the Writ Petition is dismissed.

K.T.SANKARAN
Judge

RAJA VIJAYARAGHAVAN V.
Judge

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