

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.12.2018

CORAM:

THE HONOURABLE Mr. JUSTICE C.T.SELVAM
AND
THE HONOURABLE Mr. JUSTICE B.PUGALENDHI

H.C.P.No.1040 of 2018

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Petitioner

-Vs-

1. The State of Tamil Nadu,
Rep. by the Secretary to Government,
Public (Law and Order.F) Department,
Secretariat, Chennai-600 009.
2. The Secretary to Government of India,
Ministry of Home Affairs,
(Department of Internal Security)
North Block, New Delhi-1.
3. The Commissioner of Police,
Detaining Authority,
Coimbatore City.

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Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Habeas Corpus, calling for the records relating to the order of detention C.NO.01/NSA/IS/2018 dated, 14/05/2018 passed by the 2nd respondent and to quash the same and also to direct the detainee Y.Mohammed Rafique @ Rafique, M/A 53 years, S/O.A.R.M.Yusuf, who is presently detained in the Central Prison, Coimbatore to be produced before this Hon`ble court and set at liberty.

For Petitioner : Mr.C.D.Sugumar

For Respondents : Mr.A.Natarajan
Public Prosecutor Asst. by
Mr.R.Prathap Kumar
Additional Public Prosecutor
for RR 1 and 3

Mr.V.Ashok Kumar,
CGSC for R2

ORDER

[Order of the Court was made by C.T.SELVAM, J]

Petitioner, who is the wife of the detenu herein, viz. Y.Mohammed Rafique @ Rafique, Son of A.R.M.Yusuf, aged 53 years, challenges the order of detention passed by the third respondent under order in C.No.01/NSA/IS/2018, dated 14.05.2018.

2. In a line, the offending act attributed to the detenu is that he had communicated intent of doing away with the Hon'ble Prime Minister of the Country and the same led to disturbance of communal violence between Nadar Religious Groups. A case in Crime No.381/2018 for offence u/s 153(A) and 506(ii) IPC was registered on the file of Inspector of Police, D-4, Kuniamuthur Police Station, Coimbatore. Assailing the order of detention, the present Habeas Corpus Petition has been filed.

3. We have heard learned counsel for petitioner as also Mr.A.Natarajan, learned Public Prosecutor assisted by Mr.R.Prathap Kumar, learned Additional Public Prosecutor for respondents.

4. Learned counsel for petitioner submits that the order of detention is liable to be set aside among other grounds also for the reason that there was a delay in considering the representation made by the petitioner. The representation dated 21.05.2018, has been disposed of only on 01.06.2018. Further, the Detaining Authority has erred in relying upon the similar case theory particularly since even the second bail application moved on behalf of the detenu had been dismissed by the concerned Court.

5. Counter affidavit of third respondent informs the manner in which the representation was dealt with as follows:-

"D. I submit that the representation of the petitioner dated 21.05.2018 was received by the 1st respondent on 22.05.2018. It was forwarded to me on 23.05.2018 and I received the same on 25.05.2018. I called for the remarks of the Sponsoring Authority and received the same. After a careful consideration I rejected the representation and informed the same to the petitioner in my letter dated 01.06.2018 to the petitioner with a copy to the detenu. Hence, the Detention Order is not liable to be quashed on such ground. Hence, there is no violation on my part of the provisions of Article 22(v) of the Constitution of India and the representation was duly considered."

6. Learned Public Prosecutor relied on decision of Apex Court in K.M.Abdulla Kunhi and B.L.Abdul Khader Vs. Union of India & Others [(1991) 1 SCC 476], particularly paragraph 16, which reads as follows:-

"16. We agree with the observations in Frances Coralie Mullin case. The time imperative for consideration of representation can never be absolute or obsessive. It depends upon the necessities and the time at which the representation is made. The representation may be received before the case is referred to the Advisory Board, but there may not be time to dispose of the representation before referring the case to the Advisory Board. In that situation the representation must also be forwarded to the Advisory Board along with the case of the detenu. The representation may be received after the case of the detenu is referred to the Board. Even in this situation the representation should be forwarded to the Advisory Board provided the Board has not concluded the proceedings. In both the situations there is no question of consideration of the representation before the receipt of report of the Advisory Board. Nor it could be said that the government has delayed consideration of the representation, unnecessarily awaiting the report of the Board. It is proper for the Government in such situations to await the report of the Board. If the Board finds no material for detention on the merits and reports accordingly, the Government is bound to revoke the order of detention. Secondly, even if the Board expresses the view that there is sufficient cause for detention the Government after considering the representation could revoke the detention. The Board has to submit its report within eleven weeks from the date of detention. The Advisory Board may hear the detenu at his request. The Constitution of the Board shows that it consists of eminent persons who are Judges or person qualified to be Judges of The High Court. It is therefore, proper that the Government considers the representation in the aforesaid two situations only after the receipt of the report of the Board. If the representation is received by the Government after the Advisory Board has made its report, there could then of course be no question of sending the representation to the Advisory Board. It will have to be dealt with and disposed of by the Government as early as possible. "

7. It is the submission of learned Public Prosecutor that the representation of the petitioner dated 21.05.2018, which had been sent to the State Government, had been duly considered by it after submission of report by the Advisory Board (NSA) on 22.06.2018 and reply had been sent to the detenu by Government letter dated 05.07.2018 and such action was well in keeping with the judgment relied upon and thus no ground for setting aside the order of detention on the ground of delay in consideration of representation arose. Learned Public Prosecutor would also submit that the Detaining Authority had duly taken note of the position that in similar case, the concerned court or higher Courts granted bail after lapse of time and thus he is justified in considering the imminent release of the detenu on bail.

8. We have considered the rival submissions. We may explain that a proper reading of the extract in the judgment of Supreme Court in K.M.Abdulla Kunhi and B.L.Abdul Khader's case cited supra would show that delay in disposal of representations could be countenanced only in two situations. (i) where the representation is so close to the last date on which the reference to the Advisory Board is to be made that the time available before doing so is insufficient to consider the same. For instance under the National Security Act, the Government concerned is to make a reference to the Advisory Board within three weeks of the date of the order of detention. In the instant case, the order of detention is dated 14.05.2018. Three weeks from the said date would expire on 04.06.2018. Should the representation have been received on date immediately prior, the time gap would not be sufficient for consideration of representation before forwarding the detention order for confirmation of the Advisory Board. In such circumstance, Supreme Court informs that the representation is also to be forwarded to the Advisory Board. Again there could be a situation where after seeking confirmation of the Advisory Board, a representation is received. In such event also the Supreme Court requires the representation be forwarded to the Advisory Board. It is only in these two circumstances that the concerned Government necessarily must await the decision of the Advisory Board. Hon'ble Supreme Court has further clarified that it is open to decide upon representations in such case even in the fact of the Advisory Board confirming the order of detention. It is clear that the dictum of the Supreme Court in K.M.Abdulla Kunhi and B.L.Abdul Khader's case cited supra is not of universal application. In the instant case there has been admittedly a delay of 41 days [21.05.2018 to 01.07.2018] and each day's delay has not been explained. Further, the present is a case where the concerned Court viz., Judicial Magistrate No.VII, Coimbatore has twice dismissed bail applications. Therefore, to inform that there was imminent likelihood of the

detenu being released on bail is incorrect and particularly by placing reliance on 'similar case' theory, which this Court under orders in HCP No.1520/2017 [Dinesh @ Ottai Dinesh @ Dineshkumar Vs.The Principal Secretary to Government] has informed to be erroneous.

6. For the aforesaid reasons, this Habeas Corpus Petition is allowed and the order of detention in C.No.01/NSA/IS/2018, dated 14.05.2018, passed by the third respondent is set aside. The detenu, namely Y.Mohammed Rafique @ Rafique, Son of A.R.M.Yusuf, aged 53 years, is directed to be released forthwith unless his detention is required in connection with any other case.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

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To:

- 1.The Secretary to Government,
Public (Law and Order.F) Department,
Secretariat, Chennai-600 009.
- 2.The Secretary to Government of India,
Ministry of Home Affairs,
(Department of Internal Security)
North Block, New Delhi-1.
- 3.The Commissioner of Police,
Detaining Authority,
Coimbatore City.
- 4.The Public Prosecutor,
High Court, Madras.

+1 cc to Mr.V.Ashok Kumar, Advocate, S.R.No.83788

SSM(22/02/2019)

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