

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.06.2018

PRONOUNCED ON : 21.06.2018

CORAM

THE HON'BLE Mr. JUSTICE M.VENUGOPAL

And

THE HON'BLE Mr. JUSTICE M.NIRMAL KUMAR

H.C.P.No.643 of 2018

Kavitha Velmurugan

Vs

.. Petitioner

1.The Secretary to Government of Tamil Nadu
Home, Prohibition & Excise Department,
Fort St. George, Chennai – 600 009.

2.The District Magistrate and District Collector,
Namakkal District, Namakkal.

3.The Inspector of Police,
Namagiripettai Police Station,
Salem District.

.. Respondents

Petition filed under Article 226 of the Constitution of India, praying to issue a WRIT OF HABEAS CORPUS, to call for the records of the 2nd Respondent in C.M.P.No.20/Goonda/2017/M1 dated, 18.12.2017 and to quash the same as illegal, unconstitutional and direct the respondents to produce the detenu Mungiladi Prabhu @Prabhu son of Ganesan aged about 28 years who is now detained in the Central Prison, Salem and set him at liberty from detention.

For Petitioner : Mr.S.Sathiaseelan

For Respondents : Mr.R.Prathap Kumar

Additional Public Prosecutor

ORDER**M.VENUGOPAL, J.**

The Petitioner has preferred the instant Writ of Habeas Corpus praying for passing of an order by this Court to call for the records of the 2nd Respondent/District Magistrate and District Collector, Namakkal District in C.M.P.No.20/Goonda/2017/M1 dated 18.12.2017 and to quash the same as illegal, unconstitutional one. Further, she has sought for passing of an order in directing the Respondents to produce the Detenu Mungiladi Prabhu @ Prabhu, son of Ganesan, aged about 28 years, who is now detained in the Central Prison, Salem and set him at liberty.

2.Heard both sides.

3.The Learned Counsel for the Petitioner contends that the Order of Detention of the 2nd Respondent dated 18.12.2017 suffers from the vices of non-compliance of Statutory mandate under the Tamil Nadu Act 14 of 1982 and without application of mind to the materials and facts. Moreover, the Detention Order dated

18.12.2017 was passed by the 2nd Respondent in an arbitrary fashion and in violation of Article 14, 21 and 22 of the Constitution of India. Hence, the said order of detention is liable to be interfered with by this Court.

4.The Learned Counsel for the Petitioner submits that the Detenu was not served with the copy of the approval of the Detention Order by the State Government and as such, the impugned order of Detention is no longer in force to detain the Detenu.

5.The Learned Counsel for the Petitioner takes a stand that the detention order was passed without an application of mind by the 2nd Respondent/Detaining Authority and subjective satisfaction as to whether the Detenu cannot be tried under 'General Law'.

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6.The Learned Counsel for the Petitioner points out that the Order of Detention dated 18.12.2017 passed by the 2nd Respondent is bad in law because of the fact that the 2nd Respondent/Detaining

Authority had not considered whether the offences committed by the Detenu is a Law and Order problem or affects the public order in general etc. and furthermore, merely extracting the words contained in Section 2(f) and Section 3(1) of the Tamil Nadu Act, 14 of 1982 in the detention order would not suffice.

7. Advancing his arguments, the Learned Counsel for the Petitioner submits that the Detaining Authority had failed to appreciate that the Detenu had not obtained or moved any bail in the 2nd, 3rd, 4th, 5th, 6th and 7th adverse cases and that apart, the bail petition moved and granted in the 1st and 2nd adverse cases were not identical with the ground case in Crime No.458 of 2017 in which the Detenu was arrested on 14.11.2017.

8. The Learned Counsel for the Petitioner brings it to the notice of this Court that the ground case in Crime No.458 of 2017 relates to an offence under Section 395 r/w 397 I.P.C. on the file of the Namagiripettai Police Station. But the bail granted in the 1st adverse case pertains to the offence under Sections 341, 392, 397, 427 and

506(ii) I.P.C. However, these aspects were not considered by the 2nd Respondent/Detaining Authority and however, a mechanical order of detention was passed. Added further, the 2nd Respondent/Detaining Authority, by mentioning a bail granted by this Court on 01.06.2017 in CrI.O.P.No.9421 of 2017 (Crime No.66/2017), had passed the detention order without perusing any material.

9.The Learned Counsel for the Petitioner contends that the Detenu had not moved any bail application so far in the ground case and even though the Detenu had not filed any bail applications, the observation of the authority that the Detenu's relative is taking steps to file bail applications before the appropriate Court is not a correct one, because of the reason that no affidavit was obtained from the relatives and friends that they have been moving bail applications. In short, in the absence of any bail applications from the relatives and friends of the Detenu to the effect that they were moving the bail applications, the 2nd Respondent/Detaining Authority ought not to have come to the conclusion that there is a real possibility of Detenu coming out of bail in the ground case also.

10.The Learned Counsel for the Petitioner comes out with a plea that no complaint copy was furnished to facilitate the Detenu to make a valid representation before the Detaining Authority, the State Government and the Advisory Board.

11.The Learned Counsel for the Petitioner submits that in the instant case, there is no approval of the Detention Order from the State Government was communicated to the Detenu, after a lapse of 12 days and therefore, the Detention Order is no longer in force.

12.The Learned Counsel for the Petitioner contends that the Petitioner was arrested on 14.11.2017 and in the present case, the order of detention was passed on 18.12.2017 with a delay of 34 days and the said delay remains unexplained.

13.In this connection, the Learned Counsel for the Petitioner fall back upon the ***Orders of this Court dated 14.03.2018 in H.C.P.No.2308 of 2017 [M.Amarajothi V. State of Tamil Nadu, represented by its Secretary to Government,***

Prohibition & Excise Department, Chennai and another] and H.C.P.No.2446 of 2017 [between Pathiyanathan V. The District Collector and District Magistrate, Tiruppur and another], wherein at paragraph 5, it is observed as under:

"5.In this case, the petitioner was arrested on 09.10.2017; whereas the detention order was passed on 16.12.2017 i.e., after more than 30 days. This inordinate delay in passing of detention order remains unexplained. Further, there is no counter filed in this case inspite of the notice taken by the learned Additional Public Prosecutor on 05.12.2017. In such view of the matter, the impugned detention order is liable to be quashed."

14.The Learned Counsel for the Petitioner refers to the ***Order dated 04.04.2018 in H.C.P.Nos.73 & 74 of 2018 [between M.Saranya and R.Kokila V. The Secretary to Government of Tamil Nadu, Home, Prohibition & Excise Departmental, Fort St. George, Chennai and others]*** wherein at paragraph 8, it is

observed as under:

"8.Also, the Learned Counsel for the Petitioner proceeds to point out that in the instant case there is no material to substantiate that there is a real possibility of detenu coming out of bail and therefore, the order of Detention dated 18.12.2017 passed by the 2nd Respondent in C.M.P.No.17/Goonda/2017/M1, dated 18.12.2017 stands vitiated."

15.The Learned Counsel for the Petitioner cites the decision of the Hon'ble Supreme Court in ***P.P.Rukhiya V. Joint Secretary, Government and another, 2016 SCC OnLine SC 490, wherein at paragraphs 4 to 8,*** it is observed and held as under:

"4.A neat submission which is made by the learned senior counsel appearing for the appellant is that when the husband of the appellant was in jail, he had not made any application for bail, there could not have been any apprehension the part of the

respondents/ detaining authority about him indulging in any activity as alleged in the detention order and thus, there was no occasion to pass any preventive detention order in respect of the husband of the appellant who was already in jail.

5.He has referred to various judgments in support of the aforesaid plea. For our purposes, it would be sufficient to rely upon the judgment of this Court in 'Rekha V. State of Tamil Nadu through Secretary to Government'[(2011) 5 SCC 244]. The law is discussed in the aforesaid judgment after taking note of various earlier judgments.

6.The court has, categorically, held that only in those cases where there is a real possibility of release of a person on bail who is already in custody, action can be taken for detention of such a person by passing orders of preventive detention under COFEPOSA Act. Otherwise, there is no occasion and justification to pass such an order.

7. We reproduce paragraph 27 of the said judgment which captures the aforesaid principle of law:-

"In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is were a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detainee being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed."

8. Since the fact situation is identical in the instant case, the detention order cannot be sustained. The impugned judgment of the High Court upholding such an order is also not in conformity with law. We, thus, allow this appeal, set aside the order of

the High Court and quash the detention order dated 06.10.2003."

16.The Learned Counsel for the Petitioner points out that the ***Order dated 04.12.2017 in H.C.P.No.1520 of 2017 reported in 2017 SCC OnLine Mad 10786 [between Dinesh @ Ottai Dinesh @ Dineshkumar V. The Principal Secretary to Government, Home, Prohibition and Excise Department, Chennai and another]***, wherein at paragraph 7, it is observed as under:

"7.We have perused the records and heard both, the learned counsel for the petitioner as well as the learned Additional Public Prosecutor. According to us, the impugned order cannot be sustained for the following reasons:

(i) First, the detenu was arrested as far back as on 22.05.2017, while the impugned order was passed on 04.07.2017. Notice in the petition was issued on 18.08.2017. To date, no counter affidavit has been filed. Resultantly, the

delay in passing the impugned order remains unexplained.

(ii) Second, even according to the Detaining Authority all three (3) bail petitions filed by the detenu, at the time when the order was passed, had been dismissed by the concerned Court. To be noted, these bail petitions were moved in the adverse cases and not in the subject case i.e. Crime No.953 of 2017. The Detaining Authority, according to us, had wrongly entertained an apprehension that the detenu would be released on bail, by adverting to the fact that in similar cases, bail was granted. According to us, this is not have been taken as the basis to come to such a conclusion. In granting bail the Court inter alia takes into account several aspects most of which are case specific. Those would include the gravity of the offence, the ability to suborn witnesses and the likelihood of the accused fleeing from justice. The similarity case yardstick applied by the Detaining Authority, based on the provisions of law under which an accused is booked, cannot be a satisfactory indicator for coming to the conclusion that the likelihood of the

detenu being enlarged on bail was real and imminent."

17. Apart from the above, the Learned Counsel for the Petitioner cites the decision of the Hon'ble Supreme Court in ***Ashok Kumar V. Union of India and others, (1988) 1 Supreme Court Cases 541 at special page 546 & 547, wherein at paragraph 13***, it is observed as follows:

"13. It is pertinent to refer here to the decision of this Court in Smt. Icchu Devi Choraria v. Union of India and ors., [1980] 4 SCC 531 wherein it has been held that the right to be supplied the copies of the documents, statements and other materials relied upon in the grounds of detention without any undue delay flows directly as a necessary corollary from the right conferred on the detenu to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available, the latter cannot be meaningfully exercised. It has been further held that it is necessary for the

*valid continuance of detention that subject to **Article 22(6)** copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. There are no exceptions or qualifications provided to this rule and if this requirement of **Article 22(S)** read with **Section 3(3)** of COFEPOSA Act is not satisfied, the continued detention of the detenu would be illegal and void. Similar observations have been made in the case of **Kamla Kanahiyalal Khushalani v. State of Maharashtra and Another**, AIR 1981 SC 814."*

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18. Moreover, the Learned Counsel for the Petitioner draws the attention of this Court to the decision of the Hon'ble Supreme Court in **Abdul Nasar Adam Ismail V. State of Maharashtra and others**, (2013) 4 SCC 435 at special pages 443 & 444,

wherein at paragraph 13, it is observed and held as follows:

"13. We have carefully perused the affidavit of the detaining authority. The detaining authority has stated what steps were taken and how the proposal submitted by the sponsoring authority was processed till the detention order was passed. The sponsoring authority has also filed affidavit explaining steps taken by it till the proposal was submitted. The High Court has rightly held that the said explanation is satisfactory. In this connection, reliance placed by the High Court on the judgment of this Court in *Rajendrakumar Natvarlal Shah v. State of Gujarat* (1988) 3 SCC 153 is apt. We deem it appropriate to quote the relevant paragraph. (SCC pp. 162-63, para 10)

"10. Viewed from this perspective, we wish to emphasise and make it clear for the guidance of the different High Courts that a distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of *Article 22(5)* of the Constitution. It has been laid down by this Court in a series of

decisions that the rule as to unexplained delay in taking action is not inflexible. Quite obviously, in cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange and *Prevention of Smuggling Activities Act*, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence have been posing a serious threat to the economy and thereby to the security of the nation, the courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the court finds that the grounds are "stale" or illusory or that there is no real nexus between the grounds and the impugned order of detention. The decisions to the contrary by the Delhi High Court in *Anil Kumar Bhasin v. Union of India & Ors.*, Crl. 1987 CriLJ 1632 (Del) *Bhupinder Singh v. Union of India & Ors.*, (1985) 28 DLT 493, *Anwar Esmail Aibani V. Union of India*, Crl.Writ No.375 of 1986, decided on 11-12-1986 (Del), *Surinder Pal Singh v. M.L. Wadhawan & Ors.*, Criminal Writ No.444 of 1986, decided on 9.3.1987 (Del) and *Ramesh Lal v. Delhi Administration*, Criminal Writ No.43 of 1984 decided on 16.4.1984 (Del) and other cases taking the same view do not lay down good law and are accordingly

overruled."

In light of the above observations of this Court in our opinion, the order of detention cannot be quashed on the ground that there is delay in issuance of the detention order. So far as delay in execution of the detention order is concerned, it appears from the affidavit of the detaining authority that the detenu is a resident of Mangalore in the State of Karnataka. The affidavit of Ravindra Kumar Das, Deputy Commissioner of Customs, COFEPOSA Cell, CSI Airport, Mumbai, indicates that because the detenu was a resident of Mangalore in the State of Karnataka, the order of detention, grounds of detention and the accompanying documents were forwarded to the State of Karnataka and the order of detention, therefore, could be served on the detenu only on 10/5/2012. In the peculiar facts of this case, in our opinion, the High Court has rightly rejected this submission. We endorse the High Court's view on this point."

19.The Learned Counsel for the Petitioner relies on the decision of the Hon'ble Supreme Court in ***Sayed Abul Ala V. Union of India and others, (2007) 15 Supreme Court Cases 208 at special page 214 & 261 wherein at paragraphs 21 to 26***, it is observed as follows:

21.Proper application of mind on the

part of the detaining authority must, therefore, be borne out from the order of detention. In cases where the detenu is in custody, the detaining authority not only should be aware of the said fact but there should be some material on record to justify that he may be released on bail having regard to the restriction imposed on the power of the Court as it may not arrive at the conclusion that there existed reasonable grounds for believing that he was not guilty of such offence and that the detenu could not indulge in similar activity, if set at liberty.

22. The detaining authority furthermore is required to borne in mind that there exists a distinction between the "likelihood of his moving an application for bail" and "likelihood to be released on bail". While arriving at his subjective satisfaction that there is likelihood of the detenu being released on bail, recording of the satisfaction on the part of the detaining authority that merely because an application for grant of bail had been filed, would not be enough. It would also not be sufficient compliance of the legal obligation that the detaining authority

had informed himself that the detenu has retracted from his earlier confession.

*23. So far as the 2nd retraction of confession is concerned, the same is dated 1.6.2000, and thus the same could not have been within the knowledge of the detention authority. Refraction from confession by the detenu although may be one of the grounds for arriving at the conclusion with regard to the subjective satisfaction of the detaining authority, in our opinion, the detaining authority should have also informed himself about the implication of **Section 37** of the Act. If the detenu was involved in a large number of cases and the prosecution was aware of the same, it would invariably be brought to the notice of the court dealing with the application of bail filed by the detenu by the public prosecutor. Further more, the order of the Court granting bail would be passed only when the court dealing therewith forms an opinion that there are reasonable grounds for believing that he is not guilty of such offences that there was no likelihood to commit any offence while on bail.*

*24. In **Amritlal & Ors. vs. Union Govt.***

through Secy., Ministry of Finance & Ors., (2001) 1 SCC 341, wherein this Court, following the decision in Binod Singh Vs. District Magistrate, Dhanbad (1986 (4) SCC 416), held as under:

"6.The requirement as noticed above in Binod Singh Case that there is 'likelihood of the petitioners being released on bail' however is not available in the reasoning as provided by the officer concerned. The reasoning available is the 'likelihood of his moving an application for bail' which is different from 'likelihood to be released on bail'. This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

7.The emphasis however, in Binod Singh case (1986) 4 SCC 416 that before passing the detention order the authority concerned must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order."

The said decision is of no assistance to the learned counsel for the respondents.

25. Yet again, in Union of India vs. Paul Manickam & Anr. 2003 (8) SCC 342, whereupon Mr.B.B.Singh has placed strong reliance, noticing a large number of decisions, this Court held that:

"16. But at the same time, a person's greatest of human freedoms i.e. personal liberty is deprived, and, therefore, the

laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguard, however technical, is mandatory. The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a 'jurisdiction of suspicion', and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of the individual liberty. (See Ayya Vs. State of U.P.) To lose our country by a scrupulous adherence to the written law, said Thomas Jefferson, would be to lose the law, absurdly sacrificing the end to the means. No law is an end in itself and the curtailment of liberty for reasons of the State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No carte Blanche is given to any organ of the State to be the sole arbiter in such matters.'

26. No doubt antecedents of the detenu would be a relevant factor but the same by itself may not be sufficient to press and order of detention in as much as the principles which govern the field so as to enable the court to arrive at a decision that the order of detention can be validly passed despite the detenu being in custody are:

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he had a reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities; and

(3) it is felt essential to detain him to prevent him from so doing."

20. The Learned Counsel for the Petitioner cites the decision of the Hon'ble Supreme Court in ***K.K.Saravana Babu V. State of Tamil Nadu and another, (2008) 9 SCC 89 at special pages 97 to 99, at paragraphs 25 to 32,*** it is laid down as follows:

"25. Mr. Ahmadi, learned counsel for the detenu submitted that the detenu was in jail at the time when the detention order was passed. His three bail applications were rejected. Since there was no bail application pending, therefore, there was no imminent possibility of his being released by the court. The detenu's coming out on bail was merely ipse dixit of the detaining authority unsupported by any material

whatsoever. There was no cogent material before the detaining authority on the basis of which the detaining authority could be satisfied that the detenu was likely to be released on bail. In absence of any such material on record, the mere ipse dixit of the detaining authority is not sufficient to sustain the order of detention.

26. The learned counsel for the detenu also placed reliance on *Ramesh Yadav v. District Magistrate, Etah & Others* (1985) 4 SCC 232. In this case the court observed as under:-

"6.... The order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail an order of detention under the *National Security Act* should not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court

in a series of cases relating to preventive detention. The impugned order, therefore, has to be quashed."

27. Mr. Ahmadi, the learned counsel further placed reliance on *Binod Singh v. District Magistrate, Dhanbad, Bihar & Others* (1986) 4 SCC 416. In this case, the court observed as follows:-

"7. It is well settled in our constitutional framework that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence. If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order. A bald statement is merely an ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent. Eternal vigilance on the part of the authority charged with both law and order and public order is the

price which the democracy in this country extracts from the public officials in order to protect the fundamental freedoms of our citizens. In the affidavits on behalf of the detaining authority though there are indications that transfer of the detenu from one prison to another was considered but the need to serve the detention order while he was in custody was not properly considered by the detaining authority in the light of the relevant factors. At least the records of the case do not indicate that. If that is the position, then however disreputable the antecedents of a person might have been, without consideration of all the aforesaid relevant factors, the detenu could not have been put into preventive custody. Therefore, though the order of preventive detention when it was passed was not invalid and on relevant considerations, the service of the order was not on proper consideration."

28. In Commissioner of Police & Others v. C. Anita (Smt.) (2004) 7 SCC 467, this court again examined the issue of "public order" and "law and order" and observed thus:

"7.The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression "law and order" is wider in scope inasmuch as contravention of law always affects order, "public order" has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole

or even a specified locality. The distinction between the areas of "law and order" and "public order" is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of the public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting "public order" from that concerning "law and order". The question to ask is:

"Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed?"

This question has to be faced in every case on its facts."

29. In *R. Kalavathi v. State of Tamil Nadu* (2006) 6 SCC 14, this court while dealing with the case affecting the public order observed that even a single act which has the propensity of affecting the even tempo of life and public tranquillity would be sufficient for detention.

30. Mr. Ahmadi, the learned counsel for the detenu placed reliance on *T.V.*

Sravanan alias S.A.R. Prasana Venkatachaariar Chaturvedi v. State through Secretary & Another (2006) 2 SCC 664. In this case the court observed that when the detenu was already in custody, there was no imminent possibility of his being released. In that event it would not be appropriate to pass order of detention against him. This proposition of law also seems to be well-settled, but in view of the fact that the detenu succeeded in his threshold submission that the detention order passed against him was arbitrary, illegal and unsustainable because even assuming the allegation in both the cases relied on by the detaining authority are correct then also no case of disturbance of public order is made out.

31. We have tried to deal with the important cases dealing with the question of "law and order" and "public order" right from the case of Romesh Thappar (supra) to the latest case of R. Kalavathi (supra). This court has been consistent in its approach while deciding the distinction between 'law and order' and 'public order'. According to the

crystallized legal position, cases affecting the public order are those which have great potentiality to disturb peace and tranquillity of a particular locality or in the words of Hidayatullah, J. disturb the even tempo of the life of the community of that specified locality.

32. In the instant case, in the grounds of detention, two cases have been enumerated, one of which pertains to the offences punishable under sections 420, 465, 468 read with 471 and 120(B) IPC in Crime No.70 of 2006. Another case pertains to Crime No.364 of 2007 registered under sections 420, 465, 466, 467, 468 read with 471 and 120(B) IPC. The facts of these cases have been carefully examined and even assuming the allegations of these cases as true, even then by no stretch of imagination, the offences committed by the detenu can be called prejudicial to public order. The detenu can be dealt with under the ordinary criminal law if it becomes imperative."

21. The Learned Counsel for the Petitioner invites the attention of this Court to the decision of the Hon'ble Supreme Court in ***Rekha V. State of Tamil Nadu through Secretary to Government and another, (2011) 5 Supreme Court Cases 244, at special page 252, wherein at paragraphs 10 & 11***, it is observed as under:

10. In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. However, the respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipse dixit statement in the grounds

of detention cannot sustain the detention order and has to be ignored.

11. In our opinion, the detention order in question only contains ipse dixit regarding the alleged imminent possibility of the accused coming out on bail and there was no reliable material to this effect. Hence, the detention order in question cannot be sustained.

22. Also, in the aforesaid decision, at page 255 & 256, at paragraphs 30 to 34, it is held as follows:

"30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is : Was the ordinary law of the land sufficient to deal with the situation ? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Indian Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in

question was illegal.

31.In this connection, it may be noted that it is true that the decision of the 2 Judge Bench of this Court in Biram Chand Vs. State of Uttar Pradesh & Anr, (1974) 4 SCC 573, was overruled by the Constitution Bench decision in Haradhan Saha's case (supra) (vide para 34). However, we should carefully analyse these decisions to correctly understand the legal position.

32.In Biram Chand's case (supra) this Court held that the authorities cannot take recourse to criminal proceedings as well as pass a preventive detention order on the same facts (vide para 15 of the said decision). It is this view which was reversed by the Constitution Bench decision in Haradhan Saha's case (supra). This does not mean that the Constitution Bench laid down that in all cases the authorities can take recourse to both criminal proceedings as well as a preventive detention order even though in the view of the Court the former is sufficient to deal with the situation. This point which we are emphasizing is of

extreme importance, but seems to have been overlooked in the decisions of this Court.

33.No doubt it has been held in the Constitution Bench decision in Haradhan Saha's case (supra) that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). Articles 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal

law (Indian Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

34.Hence, the observation in para 34 in Haradhan Saha's case (supra) cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law."

23.The Learned Counsel for the Petitioner submits that the complaint in the ground case speaks of '*... that on 11.10.2017 upto 11.00 PM they were seeing T.V. and by locking Grill gate both of them slept in the Bedroom and by 1.30 AM on 12.10.2017 some unidentified 5 persons broken the locks of front grill gate and the door entered into the house wearing gloves and two persons pressed his mouth and one person pressed his wife's mouth and tied both of them with a Thundu their legs and hands two persons standing with knives in their hand' etc.* But, in the Detention Order,

it is, among other things, mentioned that '... the person who drove the Wego bike is Mungiladi Prabhu @ Prabhu, aged 28 years, S/o.Ganesan, Periya Andipatty Panankadu, Attayamapatty, Salem District and the three accused along with his four friends, broken the lock of a house at Vadugam, and tied the persons inside the house and accepted the offence of robbery and they were arrested etc.' Hence, there is a discrepancy in regard to the number of persons viz., 5 or 7 involved in the offence in the ground case and on this score, the Detention Order dated 18.12.2017 stands vitiated.

24.Per contra, it is the submission of the Learned Additional Public Prosecutor for the Respondents that there are corroborative records to prove the involvement of the detenu not only in the adverse cases but also in the ground case and that the confession statements furnished by the detenu on 24.12.2016, 17.11.2017, 21.11.2017, 26.11.2017 are the vital ingredients to speak of the involvement of the detenu in the offences.

25.The Learned Additional Public Prosecutor for the Respondents contends that the Government had approved the detention order passed by the 2nd Respondent on 29.12.2017, within the time determined. Moreover, the said order was served on the detenu when he was in Prison through the Superintendent, Central Prison, Salem. Apart from that, when the detenu was arrested on 14.11.2017 his arrest was informed to his friend Velmurugan through cellphone on 14.11.2017 (vide pages 170-171 of the booklet supplied to the detenu on 22.12.2017) and further that, the detention intimation was served to his mother Selvi on 20.12.2017.

26.The Learned Additional Public Prosecutor for the Respondents proceeds to point out that the recourse to normal Criminal Law will not have a desired effect of effectively preventing the detenu in indulging in prejudicial activities to the maintenance of Public Peace.

27.The Learned Additional Public Prosecutor for the Respondents takes a plea that though the detenu in the present case has not filed any bail application, the possibility of filing bail application at a later stage cannot be ruled out and that the mentioning of bail granted in Crime No.66 of 2017 of Elachipalayam Police Station in the Detention Order is only by way of an illustration. As a matter of fact, the Detaining Authority is not an Investigating Authority.

28.It is represented on behalf of the Respondents 1 to 3 that the copies of First Information Reports were supplied to the detenu and that all the required documents were furnished to the detenu as per rules and in any event, the non-furnishing of copies of the complaints made by the parties, will not in any way preclude the detenu from the offences in which he is involved. In fact, all the vital documents mentioned in the booklet were supplied to the detenu. If at all he requires any copies, it is contended on behalf of the Respondents that he should have taken steps by applying to the concerned authorities for the supply of the copies of records sought

for within the time allowed to him. Also that, the detention order passed by the 2nd Respondent was approved by the Government within the statutory period of 12 days.

29.The Learned Additional Public Prosecutor for the Respondents brings it to the notice of this Court that the present Habeas Corpus Petition was filed on 28.03.2018 and that the detenu has required to appear before the Advisory Board on 24.01.2018. The Government vide in their G.O.No.995, Home, P & E (XIV) Department, dated 17.03.2018 had approved the detention of the detenu.

30.It is to be pointed out that the Advisory Board is created as per Article 22 of the Constitution of India to find out whether there are any reasons for detention. Undoubtedly, the Advisory Board has a guarantee against baseless or malicious detention. In reality, the Board not only goes into the merits of the matter, but also, the technical aspects of the detention. The Advisory Board is directed to secure an assurance that there is every reason for the detention

and a continued detention for beyond three months. In Law, the order passed by the Advisory Board need not be a speaking or reasoning one, as per decision ***Selvaraj V. District Magistrate and District Collector, Nagai reported in 1995 MLJ (Cr) 686.***

31.It is to be noted that a Court of Law is independently considered by the available materials and reached its discretion what they have, de hors opinion of Advisory Board, as per decision ***Thangavelammal V. State of Tamil Nadu and another, 1996 (2) CTC 550.***

32.It may not be out of place for this Court to make a significant mention that the report of the Advisory Board other than the operative portion is a confidential one and the contents could not be disclosed. Besides this, the detenu will not have any right to go through the proceedings of the Advisory Board but the part of the report in which opinion of the Advisory Board is expressed, the same can be furnished.

33.It is to be pointed out that in order to bring the activities of a person within the term 'acting in any manner prejudicial to the

maintenance of public order', the fall out and the extent and reach of the alleged activities ought to be of such a nature that they travel beyond the capacity of the ordinary law to deal with a person or to prevent his subversive activities affecting the community at large, as per decision ***Mustakamiya Jabbarmiya Shaikh V. M.M.Mehta, Commissioner of Police and others, 1995 SC (Crl) 454.***

34.It would suffice for this Court to make a mention that it is sufficient if from the material available on record the detaining authority could reasonably feel satisfied about the necessity for detention of the person concerned in order to prevent him from indulging in activities prejudicial to the maintenance of public order. Also that, it is not desirable to catalogue the type of materials which can form the basis of a detention order under the Act, 14 of 1982. In fact, it will depend upon the facts and situation of the case, as per decision ***Smt.Phulwari Jagdambaprasad Pathak V. R.H.Mendonca & others, 2000 (6) SCC 75.***

35. One cannot ignore a relevant fact that every violation of law must essentially affect an order, however, an act affecting 'Law and Order' may not necessarily also affect the 'Public Order'. One act may affect only persons while the other, though of a similar kind, may have such an impact that it will dislodge the main routine life of the community. In a given case, it might affect specific persons only and therefore, touches the problem of 'Law and Order' only. In another case, it might affect 'Public Order'. In fact, 'Disturbance of Public Order' is to be differentiated from that of the acts directed, against persons, which do not disturb the Society to an extent of causing a general disturbance of Public Peace, as per decision of the Hon'ble Supreme Court in ***Arun Ghosh V. State of West Bengal, AIR 1970 SC 1228.***

36. To put it succinctly, the act by itself, therefore, is not determinant of its own seriousness of gravity. In its quality, it may not differ from other similar acts, but in its potentiality, in its impact on society it may be very different, as per decision of the Hon'ble Supreme Court in ***Commissioner of Police and others V. Smt.C.Anitha, 2004 (7) SCC 467.*** The Detaining Authority owes a

duty to arrive at a subjective satisfaction of the possibility of the detenu coming out and repeating the offence as per decision ***Thangam V. State of Tamil Nadu and another, 2001(1) LW (CrI) 68.***

37.It is to be pointed out that when there is a threat to the public in general by the Detenu's act, the provision of Section 2 of The Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Slum – grabbers and Video Pirates Act [Act 14 of 1982] would be attracted as per decision of the ***Sundari V. State of Tamil Nadu and another, 2003 MLJ (Cr) 706.***

38.It is to be noted that the term 'Habitually' does not refer to frequency of occasions but no invariability of the practice and habit has to be proved by totality of facts. Also that, one is said to be habitual, who by force of habit or inward disposition is accustomed to commit crime, as per decision ***R.Kalavathi V. The State of Tamil Nadu and others, 2006(4) CTC 566.***

39. Further, a 'Goonda' is a person whose acts in a manner prejudicial to the maintenance of public order when he engaged or making preparation for engaging in any of the activities of 'Goonda' which affects adversely or materially to act adversely, the maintenance of Public Order. Only if a detenu persistently repeats similar acts, it can be inferred to be termed as 'Habitual Criminal' to attract the definition of the term 'Goonda', as per decision ***Murugan @ Sakthivel @ Kumar V. District Collector & District Magistrate, Kanyakumari District, 2004 (2) LW 717.***

40. To make out a case under Section 2(f) of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand offenders, Slum-grabbers and Video Pirates Act, 1982 (Act 14 of 1982), 'Habituality' is an essential ingredient and the established fact. With a view to attract habitual commission of offences, the other cases (inclusive of the ground case) ought to have been committed with uniform interval of time and not after a gap of five years. Repeated, persistent and similar but not isolated, individual and dissimilar are necessary to an inference habit, as per decision

of the Hon'ble Supreme Court in ***Vijay Narai Singh V. State of Bihar, 1984 (3) SCC 14***. In the absence of any material to show that the detenu was habitually committing the crime, the detenu is not covered by the definition of 'Goonda'.

41.No wonder, Article 22(4) of the Constitution of India enjoins that no Law providing preventive detention shall authorise the detention of a person for a period longer within 3 months in its opinion on sufficient cause for such detention. By virtue of Article 22(4)(b) of the Constitution of India, a person can be detained for a longer period than three months without the necessity of consulting an Advisory Board if such a person is detained in accordance with the provisions of any Law made by Parliament under sub-clauses (a) and (b) of Clause (7) of Article 22 of the Constitution of India, as per decision ***Fagu Shaw etc. V. The State of W. Bengal, AIR 1974 SC 613***.

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42.It is to be borne in mind that substantive due process is now to be applied to the fundamental right to life and liberty. As a

matter of fact, the right to liberty is available to a *Homo-Sapien* as long as life lasts, as per decision of the Hon'ble Supreme Court in ***V.Sriharan V. Union of India reported in (2014) 4 SCC 242.***

43.Dealing with the plea of the Petitioner that there was 34 days delay [from the date of arrest of the detenu on 14.11.2017] in passing the order of detention on 18.12.2017 and there is no whisper in the counter affidavit of the 2nd Respondent as to the delay of 34 days, this Court points out that the detenu was arrested on 14.11.2017 and he was remanded till 29.11.2017 and that the remand was extended upto 29.12.2017 and that the detention order was passed on 18.12.2017 by the 2nd Respondent/Detaining Authority.

44.In this connection, a perusal of the affidavit filed by the Inspector of Police, Namagiripettai Police Station, Namakkal District before the 2nd Respondent/District Collector and District Magistrate, Namakkal District, Namakkal shows that it was solemnly affirmed on 17.12.2017. After filing of the affidavit by the Inspector of Police, Namagiripettai Police Station, the 2nd Respondent had passed the

order of detention in respect of the detenu on 18.12.2017. Further, the date of complaint in Crime No.458/2017 under Section 395 read with 397 I.P.C. on the file of Namagiripettai Police Station in the ground case was on 12.10.2017. The name of the Complainant is Muthusamy. In the instant case, within 34 days, from the date of arrest of the detenu, the detention order was passed on 18.12.2017 by the 2nd Respondent. The 34 days taken for passing the detention order on 18.12.2017, after scrutinising the relevant materials placed before the 2nd Respondent, in the considered opinion of this Court, cannot be termed as 'Delay'. Considering the fact that the Inspector of Police, Namagiripettai Police Station, Namakkal District before the 2nd Respondent had filed a sworn affidavit on 17.12.2017, as such, the contra plea taken on behalf of the Petitioner is not acceded to by this Court.

45.As a matter of fact, the Government had approved the detention order passed by the 2nd Respondent in G.O.Rt.6207, Home P&E (XIV) Department, dated 29.12.2017 within the time determined. In the present case, the Advisory Board on 24.10.2018 had expressed his unanimous opinion that there is sufficient cause

for the detention of the detenu Mungiladi Prabhu @ Prabhu. Further, as per G.O.No.995, Home, P&E (XIV) Department, dated 17.03.2018 had confirmed the detention order dated 18.12.2017 passed by the 2nd Respondent.

46.As far as the present case is concerned, the matter was placed by the Government before the Advisory Board within 14 days from the date of detention order of the detenu dated 18.12.2017, the Advisory Board also had tendered his opinion on 24.01.2018 stating that there is sufficient cause for the detention of the detenu. As such, the contra pleas taken on behalf of the Petitioners are not accepted by this Court.

47.In so far as the plea of the Petitioner is concerned, the 2nd Respondent/Detaining Authority had relied a criminal complaint on 12.10.2017 for detaining the detenu and the same being not furnished along with the booklet by the detaining authority, it is to be pointed out that the copy of the F.I.R. in respect of the criminal complaint dated 12.10.2017 find a place in the booklet at page 79 and when the xerox copy of F.I.R., in respect of criminal complaint dated 12.10.2017, is furnished to the detenu, then, no prejudice is

caused to the detenu in regard to the non-furnishing of criminal complaint dated 12.10.2017 to him. Moreover, the F.I.R. copy supplied to the detenu very well speak themselves of the complaints made by the complainant and from the said F.I.R. copies, the detenu could have made representations within the time mentioned in the detention order. Apart from that, the detenu or his relatives or his friends had not applied before the concerned authority(s) for supply of copies of records which he was in any of much, but such a procedure was not resorted to either by the detenu or by his relatives or friends or by himself.

48.As regards the stand of the Petitioner that the alleged offence under Section 395 read with 397 I.P.C. against the detenu is a robbery purportedly took place on 12.10.2017 at 1.30 a.m., the said offence had not happened in the midst of busy hours where the public movements of the area was very much alive and the said offence was never visible except to the alleged victims and as such, there was absence of sense of insecurity in the minds of the general public etc. and further, the existing ordinary Criminal Law of the Land is good enough to deal with the situation and there was no need to pass an order of detention under the Tamil Nadu Act 14 of 1982.

49.It is to be noted that in the present case, the detenu Mungiladi Prabhu @ Prabhu has six adverse cases to his credit, which runs as under:

S.No.	Police Station Cr.No.Date	Sec. Of Law
1	Attaiyampatty P.S.Cr.No.284/2016 D.O.31.08.2016	392 I.P.C.
2	Attaiyampatty P.S.Cr.No.551/201 D.O.24.12.2016	457, 511 I.P.C.
3	Kolathur P.S.Cr.No.233/2017 D.O.02.10.2017	395, 397 I.P.C.
4	Salem District Mallur P.S.Cr.No.524/2017 D.O.03.11.2017	454, 380 I.P.C.
5	Vennandur P.S.Cr.No.469/2017 D.O.05.11.2017	457, 380 I.P.C.
6	Vennandur P.S.Cr.No.472/2017 D.O.05.11.2017	380 I.P.C.

Further, he was involved in the ground case in Crime No.458/2017 under Section 395 read with 397 I.P.C. on the file of the Namagiripettai Police Station. Because of the repeated acts of the detenu involving himself in the aforesaid offences, the 2nd Respondent/Detaining Authority, while passing the detention order, had opined that the recourse to normal Criminal Law would not have a desired effect in preventing the detenu in indulging in such

prejudicial activities to the maintenance of Public Peace. Viewed in that perspective, the plea taken on behalf of the Petitioner that normal Criminal Law would suffice to deal with the Petitioner, is not accepted by this Court.

50. In so far as the aspect of the 2nd Respondent/Detaining Authority mentioning in the grounds of detention order dated 18.12.2017 at paragraph 3, inter alia, to the effect that '*... He has not filed bail application so far. Even though he is not filing bail applications, his relatives takes steps to file bail application before the appropriate court. In a similar case registered at Elachipalayam Police Station Cr.No.66/2017, u/s.394 r/w 397 IPC bail was granted to the accused in CrI.No.9421 on 01.06.2017 by the High Court Madras. Hence, there is a real possibility of Thiru.Mungiladi Prabhu @ Prabhu coming out on bail in this case also. If he comes out on bail, he will indulge in further activities, which will be prejudicial to the maintenance of Public Peace. Further the recourse to normal Criminal law will not have the desired effect of effectively preventing him from indulging in such activities, which are prejudicial to the maintenance of Public Peace*', it is to be pointed

out that in the instant case, according to the Learned Counsel for the Petitioner, the detenu had not filed any bail application and his relatives had not taken steps to file bail application before the appropriate Court. Further that, the reference to Crime No.66/2017 on the file of Elachipalayam Police Station under Section 394 read with 397 I.P.C. wherein bail was granted to the accused therein by this Court, is not a similar case, because of the reason that the accused in that case is different [other than the Detenu]. As such, to say that there is a real possibility of Thiru Mungiladi Prabhu @ Prabhu coming out on bail in this case also, as mentioned by the Detaining Authority in the detention order is legally untenable one, in the absence of any cogent materials in this regard. In short, the apprehension/observation of the Detaining Authority that there is a real possibility of the detenu coming out on bail in this case also in the absence of any material and also when the detenu had not filed any bail application and these would constitute non-application of mind on the part of the Detaining Authority, which necessarily vitiates the order of detention dated 18.12.2017.

51.Suffice it for this Court to point out that in the absence of

tangible/substantial materials, the bald statement of the Detaining Authority in the detention order to the effect that there is a real possibility of the detenu Mungiladi Prabhu @ Prabhu coming out on bail exhibits the non-application of mind and also, there is lack of subjective satisfaction in passing the detention order. To put it emphatically when no bail application was filed on behalf of the detenu, then, it will logically follow that there is no likelihood of the person in custody being released on bail. As such, the detention order dated 18.12.2017 passed by the 2nd Respondent is an illegal one.

52. Be that as it may, in view of the fact that in respect of the ground case in Crime No.458/2017 under Section 395 read with 397 I.P.C., no bail application admittedly was filed on behalf of the detenu and in the absence of tangible materials to show before this Court that even though the detenu is not filing bail applications, his relatives take place to file bail application before the appropriate Court, there is absence of subjective satisfaction about the possibility of the detenu coming out on bail and in this regard, there is lack of subjective satisfaction by the Detaining Authority at the

time of passing the detention order dated 18.12.2017 and on this score, this Court sets aside the detention order dated 18.12.2017 to prevent an aberration of Justice and to promote substantial cause of Justice.

53. In fine, the Habeas Corpus Petition is allowed. The detention order dated 18.12.2017 passed by the 2nd Respondent is set aside. The Detenu Mungiladi Prabhu @ Prabhu is directed to be set at liberty forthwith, unless his presence is required in any other case.

[M.V., J.] [M.N.K., J.]
21.06.2018

Speaking Order

Index : Yes

Internet : Yes

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To

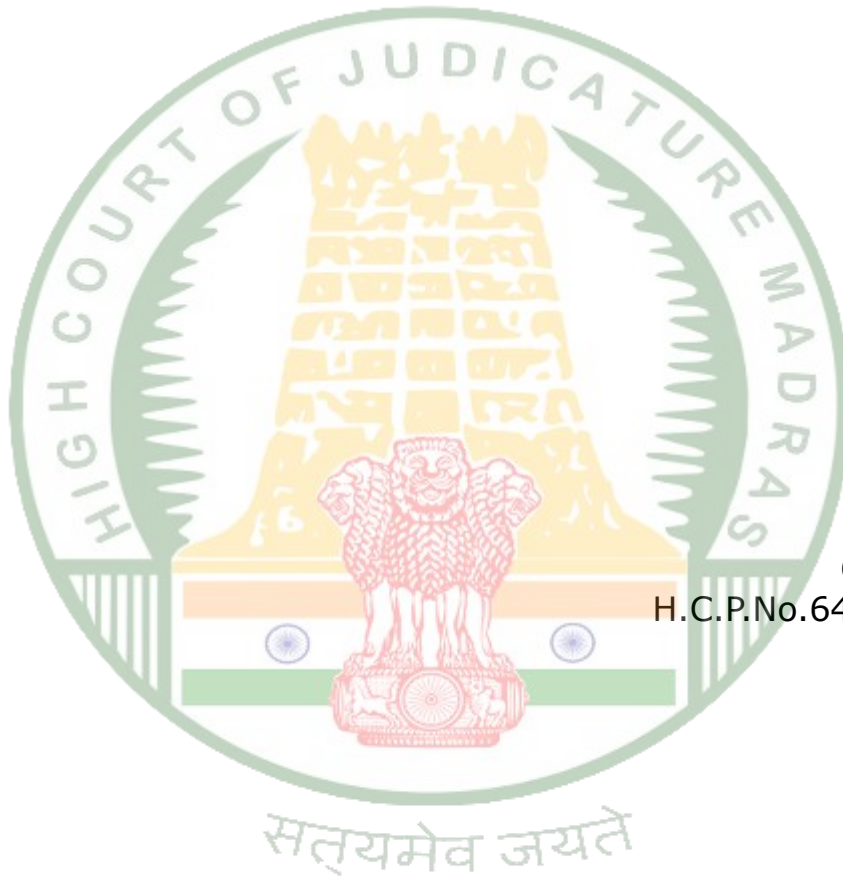
- 1.The Secretary to Government of Tamil Nadu
Home, Prohibition & Excise Department,
Fort St. George, Chennai – 600 009.
- 2.The District Magistrate and District Collector,
Namakkal District, Namakkal.
- 3.The Inspector of Police,
Namagiripettai Police Station,
Salem District.
- 4.The Public Prosecutor,
High Court, Madras.



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M.VENUGOPAL, J.
AND
M.NIRMAL KUMAR, J.

Sgl



ORDER in
H.C.P.No.643 of 2018

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21.06.2018