

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.03.2019

Orders Reserved on 15.03.2019

Orders Delivered on 28.03.2019

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.No.1141 OF 2019

Momin @ Momimwar Hussain
@ Md.Monwar Hossain

...Petitioner

Vs.

1.State rep. by the Principal Secretary to
Government, Public (Foreigners-II)
Department, Government of Tamilnadu,
Secretariat, Chennai-9.

2.The Inspector General of Police
Internal Security,
Chennai.

3.The Commissioner of Police,
Thiruppur City,
Thiruppur.

4.The Inspector of Police,
Rural Police Station, सत्यमेव जयते
Tiruppur City, Tiruppur.
Cr.No.674 of 2018.

5.The Special Deputy Collector,
Refugee Camp,
Kottappattu,
Thiruchirappalli.

...Respondents

PRAYER: Writ Petition filed under Article 226 of the
Constitution of India for issuance of a Writ of certiorarified
mandamus to quash the G.O.No.4019 dated 10.11.2018 passed by the
first respondent and thereby direct the fifth respondent to
release the petitioner from the special camp at Thiruchirapalli.

For Petitioner : Ms.R.Shase
for Mr.M.Guruprasad

For Respondents : Mr.Vijay Narayan
Advocate General
Assisted by Mr.V.Shanmuga Sundar
Special Government Pleader

O R D E R

This writ petition is filed challenging the order of the first respondent made in G.O.No.4019 dated 10.11.2018 with a consequential prayer for direction to the fifth respondent to release the petitioner from the special camp at Trichirapalli.

2.The case of the petitioner is as follows:

The petitioner is the resident of the address mentioned in the writ petition. He is an Indian citizen and was born on 03.11.1986. He is working in reputed Companies in the localities of Tiruppur. He has obtained Aadhar and Pan cards. The petitioner is not well acquainted with other languages viz., Tamil and English. The communication problem had lead the fourth respondent to file an F.I.R. against the petitioner and others in Crime No.674 of 2018 for the alleged offences under Section 3(2)(c) read with Section 14 of the Foreigners Act, 1946, later altered to be under Section 3(2)(c) read with Section 14(A)(b) of the Foreigners Act read with 465, 466, 468, 471, 474 and 420 I.P.C. Consequently, the petitioner along with the other accused persons were arrested on 09.10.2018 and sent to judicial custody on 10.10.2018. The case of the prosecution is that the petitioner along with 7 others are natives of Bangladesh and are staying in India without any valid documents viz., Visa, Passport, etc., It is the further case of the prosecution that the petitioner along with the other accused have fabricated documents and got employment in India and accommodation. The petitioner was in judicial custody for a period of 60 days and got released on conditional bail on 17.12.2018. In the meantime, the impugned order was passed by the first respondent based on the request made by the Commissioner of Police, Tiruppur City to lodge the petitioner and other accused in the Special Camp after the period of conviction is over, in the event of the Court convicts the petitioner and other accused in Crime No.674 of 2018 and also for deporting the petitioner and other accused to their alleged home country viz., Bangladesh. Consequently, the petitioner was lodged in the Special Camp immediately after his release on conditional bail on 17.12.2018. The impugned order is punitive in nature and against the settled principles of law. There is no necessity to detain a person even before trial. The intention of the impugned G.O. is very clear to lodge the

petitioner only after his conviction period and not before that. The allegation made against the petitioner does not fall within the ambit of Section 3(2) of the Foreigners Act, 1946, as he is the citizen of India by birth. The detention of the petitioner through the impugned order, inspite of the bail granted by this Court, is clearly unconstitutional and thus deprived his personal liberty and other rights guaranteed under Articles 21 and 22 of the Constitution of India. Assuming but not accepting as if the petitioner is the citizen of Bangladesh, even in that case, the National Security Act, 1980 alone can be applied and not the Foreigners Act, 1946. Power to detain the foreigners is available only with the Central Government under Section 3(2) (g) of the Foreigners Act, 1946 and the same has not been delegated to the State Government. Hence, the impugned order cannot be sustained.

3. The respondents filed a counter affidavit, wherein it is stated as follows:-

On 09.10.2018, at 07.00 hours, when the Sub Inspector of Police, Rural Police Station, Tiruppur City along with his police team was patrolling at Sevanthampalayam, he found five persons by name Alamin, Md. Ashraful Islam, Md.Farhad Hossan, Palash Chandra Sorker and Md.Roni, moving under suspicious circumstances and secured all those five persons and enquired them. During enquiry, they disclosed that they are native of Bangladesh and arrived India without valid travel documents. An F.I.R. in Crime No. 674/2018 on the file of Tiruppur Rural Police Station under Sections 3(2) r/w 14 of Foreigners Act 1946 and 465, 466, 468, 471 and 420 of I.P.C. was registered against them on 09.10.2018. During investigation of the case, Md.Babul Hossen, whose name was referred by the above said Bangladeshi Nationals, was arrested on 09.10.2018. During enquiry, he revealed that he is a Bangladeshi National and he used to arrange for getting bogus documents with the assistance of the writ petitioner herein and Robin @ Md.Rafiqul Islam. Based on the confession statement of Md.Babul Hossen, the petitioner was secured and enquired. He also volunteered confession statement disclosing that he is a Bangladeshi National and his address in Bangladesh is "S/o.Mofazzil Hossain, Near Radha Nagar Mosque, Radha Nagar Village, Pabna (Po), Pabna Police Station, Pabna District, Rajshahi State, Bangladesh". He produced a document found in Bengali language, which was verified and found that the document produced by the petitioner was a Nativity Certificate issued to him by the Bangladeshi Government. During further enquiry, the petitioner produced Aadhaar Card, Indian Driving License, Tamil Nadu Government Ration Card, Andhra Bank Passbook Account and Pan Card, which are meant for Indian Citizens only. Later, on 10.10.2018, the petitioner along with the other accused were produced before the Judicial Magistrate No.IV,

Tiruppur and remanded. The petitioner was lodged at the Central Prison, Puzhal, Chennai. A proposal dated 27.10.2018 was sent by the Commissioner of Police, Tiruppur City through the office of the Inspector General of Police, Intelligence (Internal Security), Chennai to the Deputy Secretary to Government, Public (Foreigners) Department on 01.11.2018 with a request to issue orders under the relevant provisions of Foreigners Act, 1946 in order to lodge the above Bangladeshi Nationals in the Special Camp after the period of conviction is over, in the event of the Court convicting the above accused including the petitioner herein and also to deport them to their country. Accordingly, the first respondent, in exercise of the powers conferred by Section 3(2)(e) of the Foreigners Act, 1946 read with notification of the Government of India, Ministry of Home Affairs dated 19.04.1958 and Ministry of Home Affairs letter dated 24.04.2014, issued the present impugned order. The petitioner moved the Hon'ble High Court of Madras seeking bail. By an order dated 17.12.2018, this Court granted conditional bail to the petitioner. The petitioner herein was released on bail by the prison authorities and thereafter, he was taken and kept at the Special Camp at Trichirapalli on 28.12.2018 as per the impugned order for the purpose of regulating the continued presence of the petitioner till the case, which is pending against him, is disposed of. Regulating the presence of foreigners in a Special Camp would not amount to confinement. The petitioner has not produced due Birth Certificate for his claim to be citizen of India either before the Investigating Officer or before this Court. Instead his Nativity Certificate was seized from his residence at Tiruppur during the course of investigation by the Investigating Officer. Therefore, the petitioner deliberately obtained the bogus documents such as Aadhaar card, Indian Driving License, Tamilnadu Government Ration Card, Andhra Bank Passbook and Pan Card to continue his illegal stay in Tamilnadu without valid documents. Therefore, the claim of the petitioner that he is the citizen of India by birth is false and baseless. There are instances that some foreigners, who are released from the prison, had absconded and their whereabouts are yet to be identified, resulting in delay in interrogation and non implementation of the Foreigners Act, 1946 on them. However, the petitioner has all rights to go out of the Special Camp and return to the Camp with prior permission obtained from the authorities concerned. As per the instructions issued in paragraph 6 of the letter dated 24.04.2014 of the Government of India, Ministry of Home Affairs, the State Government has been delegated powers to restrict the movements of the foreigners who are awaiting deportation due to non possession of valid travel documents. Therefore, the order issued by the first respondent as per the delegated powers is correct.

4. Learned counsel for the petitioner submitted as follows:

The petitioner is an Indian citizen having all valid documents such as Aadhaar card, Indian Driving License, Tamilnadu Government Ration Card, Andhra Bank passbook and pan card issued by the Income Tax Department. Therefore, the respondents are not justified in calling the petitioner as foreigner. Though a false criminal case is foisted against the petitioner in Crime No.674/2018 on the file of the Tiruppur City Police and the petitioner was arrested and lodged in prison, this Court, after considering the facts and circumstances, has enlarged the petitioner on bail subject to certain conditions. Therefore, when the petitioner's presence, pending investigation and trial of the criminal cases, is secured by imposing those conditions, absolutely there is no necessity for passing the present impugned order. Even the reasons stated in the impugned order is erroneous on the face of it, since the petitioner was not at all convicted by the Criminal Court so far. Only when he is convicted and released after imprisonment period, putting the petitioner under the camp confinement would arise as contemplated in the impugned order. The petitioner is in possession of the Birth Certificate issued by the West Bengal Government. In the charge sheet filed by the petitioner before the Criminal Court, he is shown as Indian only. Confining of the petitioner amounts to detention and therefore, it violates the fundamental rights of the petitioner. The petitioner is not questioning the power of the first respondent in issuing the impugned order and only the circumstances, under which the same was issued, is totally unwarranted. In support of the above contentions, the learned counsel for the petitioner relied on the decision of the Hon'ble Supreme Court reported in 2008(3) SCC 613, State of Maharashtra vs. Bhaurao Pubjabrao Gawande.

5. Per contra, the learned Advocate General Mr. Vijay Narayan appearing for the respondents submitted as follows:

Section 3 of the Foreigners Act, 1946 empowers the first respondent to exercise its power to impose restriction on a foreigner and his/her movements within this country. It is not necessary to state any specific reason for imposing such restriction, as Section 3 does not require so. Though the reasons stated in the impugned order is not happily worded, still this Court can consider, based on the facts and circumstances, as to whether the restrictions imposed on the petitioner is justifiable or not. The petitioner is Bangladeshi national and the documents recovered from his possession support the case of the prosecution. Moreover, under the Foreigners Act, 1946, burden of proof lies on the person that he is not a foreigner, as contemplated under Section 9 of the said Act. Therefore, unless and until, the petitioner establishes and proves that he is not a foreigner, the presumption, based on the circumstances under which the criminal case filed against the

petitioner, is that the petitioner is a foreign national. The order impugned in this writ petition is not in the nature of preventive detention as alleged by the petitioner. On the other hand, it is passed by exercising the power conferred in Section 3(2)(e) of the Foreigners Act, 1946 to restrict his movements. In support of the above submissions, the learned Advocate General relied on the following decisions:

a) A Full Bench decision of this Court made in H.C.P. No.1138 of 2006 dated 21.09.2007, Sree Latha vs. The Secretary to Government (Division Bench of Madras High Court)

b) 2014(1) LW 55 (DB), The State & Others vs. G.Karunairaj,

c) W.P. (MD) No.24132 of 2016, K.Arulinbathevar alias Ayya vs. The

State of Tamilnadu dated 13.07.2017.

d) 1995-2-LW (Crl) 690, Kalavathy vs State of Tamilnadu.

6. Heard the learned counsel for the petitioner and the learned Advocate General appearing for the respondents. Perused the materials placed before this Court.

7. The petitioner is aggrieved against the order of the first respondent dated 10.11.2018, issued by exercising the power conferred under Section 3(2)(e) of the Foreigners Act, 1946, read with notification of the Government of India, Ministry of Home Affairs dated 19.04.1958 for regulating the continued presence of 8 Bangladeshi Nationals, out of which, the petitioner is one among them. Through the impugned order, the first respondent Government ordered that all those 8 persons shall reside in the Special Camp at Trichirapalli till their deportation to Bangladesh in the event of their release from prison after the period of conviction, if any, is over.

8. There is no dispute to the fact that the petitioner and others were arrested by the respondent police on 09.10.2018 in respect of Crime No.674/2018 for the offences alleged to have been committed under Section 3(2) (c) read with 14 of Foreigners Act, 1946 and Sections 465, 466, 468, 471 and 420 I.P.C. It is further seen that the petitioner and others, after arrest, were remanded to the judicial custody and however, the petitioner and another person were granted bail by this Court on 17.12.2018 subject to the conditions, which reads as follows:

"6. Accordingly, the petitioners are ordered to be released on bail on each of them executing a separate bond for a sum of Rs.10,000/- (Rupees ten thousand only) with two sureties, each for a like sum to the satisfaction of the learned Judicial Magistrate No.IV, Tiruppur, and on further conditions that:-

(a) the sureties shall affix their photographs and Left Thumb Impression in the surety bond and the Magistrate may obtain a copy of their Aadhar Card or

bank pass Book to ensure their identity.

(b) the petitioners shall report before the respondent police daily at 10.30 a.m. for a period of two weeks and thereafter, as and when required for interrogation.

(c) the petitioners shall not abscond either during investigation or trial.

(d) the petitioners shall not tamper with evidence or witness either during investigation or trial.

(e) on breach of any of the aforesaid conditions, the learned Magistrate/Trial Court is entitled to take appropriate action against the petitioners in accordance with law as if the conditions have been imposed and the petitioners released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in P.K.Shaji vs. State of Kerala [(2005) AIR SCW 5560].

(g) If the accused thereafter absconds, a fresh FIR can be registered under Section 229A IPC."

9. Though such bail was granted to the petitioner by stipulating the above conditions on 17.12.2018, the first respondent, in the meantime, has already passed the impugned order on 10.11.2018, by exercising his power conferred under Section 3(2)(e) of the Foreigners Act, 1946. Learned counsel for the petitioner is not questioning the power and competency of the first respondent to issue the impugned order. On the other hand, it is her contention that such order is not at all warranted under the facts and circumstances of the case. Moreover, it is the specific claim of the petitioner that the impugned order is in the nature of preventive detention and thus, it violates his fundamental rights.

10. Before considering the merits of the present case, it is better to understand as to how various judicial pronouncements made by this Court has dealt with the scope and ambit of the relevant provisions of law under the Foreigners Act, 1946.

11. In Kalavathy vs. State of Tamilnadu, the Division Bench of this Court has specifically observed that the State Government has the power to require foreign nationals under Section 3(2)(e) of the said Act not only to reside in a particular place, as a special refugee, but also has the power to impose restrictions on their movements and that such power to pass order under Section 3(2)(e) of the said Act, indisputably has been delegated by the Central Government to the State Government. In the very same decision, the Division Bench has also turned down the contention of the appellant therein that such confinement in the special camp violates Article 21 of the Constitution of India. After discussing the above aspect in

detail from paragraphs 16 to 19, the Division Bench held at paragraph 20 that there has been no detention and the State has power reasonably to restrict the movements of foreign nationals and direct them to reside in a particular place. It was also observed therein that it may not be possible to prescribe a particular length of stay of those foreign nationals in the special refugee camp and that for various factors relating to security of State, will necessarily govern further decisions to be taken from time to time. The Division Bench in the said decision also observed at paragraph No.22 that prior to passing of the order under Section 3(2)(e), it cannot be expected that any notice should be issued to the concerned foreigner. The Division Bench thus found that the survival of the State is paramount and to preserve the security and integrity of the country, certain restrictions have to be imposed on the foreigners and therefore, it will be difficult to hold that there has been violation of the mandate of Article 21 of the Constitution of India.

12. The above said decision of the Division Bench was subsequently approved by the Full Bench decision of this Court in HCP No.1138 of 2006 dated 21.09.2007 (Sree Latha vs. The Secretary to Government) by holding that Kalavathy's case had been correctly decided. While holding so, the Full Bench has observed at paragraph No.16 that Section 3(2) of National Security Act, which contemplates detention of a foreigner with a view to regulate his continued presence in India or with a view to make arrangements for his expulsion from India, cannot be said to be in any way inconsistent with the provisions contained in Section 3(2)(e) of the Foreigners Act.

13. Under similar set of facts and circumstances as that of the present case, the Division Bench of this Court in a case reported in 2014(1) LW 55, The State rep. by the Secretary to Government, Public (Foreigners III) Department and Others vs. G.Karunairaj, upheld the order passed under Section 3(2)(e) of the Foreigners Act therein. In the said case also, the concerned writ petitioner was arrested and granted bail and that he was also in possession of the voters I.D. card, Driving License, Pan Card coupled with Saving Bank Account. The Division Bench found that long stay in the country and obtaining of voters identity card and other documents such as driving license, pan card and saving bank account will not confer the right on the person to declare him as a citizen of this Country. The Division Bench elaborately considered the scope of Section 3(2)(e) and also taken note of the Full Bench decision of this Court in Sree Latha's case and upheld the order passed under Section 3(2)(e) thereby reversing the finding of the Writ Court. At paragraph Nos.19,25, 28, 29, 30 and 45, it has been observed as follows:

"19.It has been further laid down in the above said decision, that long stay in the country and obtaining of voters' identity card will not confer the concerned person any right to get himself declared as a citizen of this country.

..25.The learned Single Judge in the impugned order, mainly proceeded on the footing that immediately, on the writ petitioner's enlargement on bail, within 24 hours, the impugned Government Order came to be passed against him and he has not been afforded with any opportunity to prove that he is an Indian citizen. In the considered opinion of this Court, the said reasoning assigned in the impugned order, is unsustainable for the reason that except the driving licence and the PAN card, coupled with the Savings Bank Account, the writ petitioner has not furnished any documents in the typed-set of documents, to substantiate his claim that he is a citizen of India. Under Section 5(1) of the Citizenship Act, 1955, the person, who seeks citizenship by registration, has to submit an application.

..28.The scope of Section 3(2)(e) and 3(2)(g) of the Foreigners Act, 1946, came up for consideration before a Full Bench of this Court reported in (2007) 2 MLJ (CRL.) 1320 (SREE LATHA V. SECRETARY TO GOVERNMENT, PUBLIC (SC) DEPARTMENT, GOVERNMENT OF TAMIL NADU AND OTHERS). In KALAVATHY V. STATE OF TAMIL NADU ((1995) 2 LW (CRL.) 690(2)), it has been held that the order regarding confinement in the Special Camp, would not amount to an order of preventive detention, whereas in the decision reported in (2003) 1 LW (CRL.) 352 (YOGESWARI V. THE STATE OF TAMIL NADU), it has been held that such an order would amount to confinement. In view of the conflicting decisions rendered by two Division Benches, it was referred to the Larger Bench.

29.The Full Bench of this Court in the above cited decision, held as follows:

"12. Section 3(1) of the Foreigners Act is by very nature of things is a general power conferred on the Central Government to make provisions by way of order. In other words, it is an enabling provision empowering the Central Government to make orders. Such orders can be made either generally or with respect to all foreigners or even with respect to any particular foreigner or any prescribed class or description of

foreigner. Such orders can contain provisions prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein. Section 3(2) is without prejudice to the generality of the power contained under Section 3(1). Clause (e) envisages inter alia that by such order conditions may be prescribed or specified requiring the foreigner to reside in a particular place or imposing any restrictions on his movements.

13. A careful reading of Section 3 makes it clear that it gives power to the Central Government to frame subordinate legislation in the shape of statutory orders which could be general or particular in nature and may be in respect of foreigners or in respect of any individual foreigner. Clause (g) envisages that the order made under Section 3 may provide that the foreigner shall be arrested and detained or confined. It is not in dispute that power under Section 3(2)(a) to (f) has been delegated whereas power under Section 3(2)(g) which was included by amendment later on has not been subsequently delegated.

14. The main question is therefore whether the order passed by the State Government directing the husband of the petitioner to remain within the Special Camp amounts to an order of detention or confinement as envisaged in Section 3(2)(g) of the Act. In this context, the submission of the learned counsel for the petitioner to the effect that the provisions contained in Section 3(2), particularly Section 3(2)(e) can be said to be impliedly repealed by the provisions contained in the National Security Act, is required to be considered at the threshold.

....

16. A perusal of the aforesaid provision makes it clear that such order of detention can be passed with a view to regulating the continued presence of a foreigner in India or with a view to making arrangements for his expulsion from India. The Central Government or the State Government, as the case may be, is required to come to the conclusion that is necessary to do so. The specific power envisaged under Section 3(2)(e) appears to cover many other facets rather than detention of a foreigner. Under sub-clause (i) of Section 3(2)(e), a condition can be imposed requiring the foreigner to reside in a particular place. Under (ii) restriction can be imposed on his movement. The other sub clauses in Section 3(2)(e) refer to various other aspects which are distinct from the aspect of detention of such

foreigner. Therefore, it cannot be said that Section 3(2) of the National Security Act which contemplates detention of a foreigner with a view to regulate his continued presence in India or with a view to making arrangements for his expulsion from India cannot be said to be in any way inconsistent with the provisions contained in Section 3(2)(e) of the Foreigners Act. If at all there is any inconsistency, it can be said that the provisions contained in Section 3(2)(g) relating to arrest and detention of a foreigner can be said to be covered by the provisions contained in the National Security Act. However, the contention in this case is not that Section 3(2)(g) should be held to be impliedly repealed by the National Security Act. The specific contention is to the effect that the provisions contained in Section 3(2)(e) of the Foreigners Act shall be deemed to have been repealed by the provisions contained in the National Security Act. This later contention, according to in our opinion, is not acceptable. Since there is no specific contention relating to Section 3(2)(g), it is not necessary to express any final opinion on this aspect."

30. Therefore, the Full Bench held that Kalavathy's case reported in (1995) 2 LW (CRL.) 690(2), has been correctly decided. As per the ratio laid down in the above cited decision, an order directing a person to stay in a Special Camp with a restriction cannot be construed as a detention or confinement as envisaged under Section 3(2)(g) of the Foreigners Act.

...45. In the light of the Full Bench decision reported in Sree Latha's case ((2007) 2 MLJ (CRL.) 1320) (cited supra), this Court is of the considered opinion that the impugned order allowing the writ petition, is liable to be set aside."

14. Further, a learned Single Judge of this Court in W.P. (MD) No.24132 of 2016 by order dated 13.07.2017 has rejected the writ petition filed against an order passed under Section 3(2)(e) of the Foreigners Act, 1946, by following the Division Bench decision made in Kalavathy's case and the Full Bench decision made in Sree Latha's case.

15. Keeping the above settled legal position in mind, let me now consider the merits of the present case.

16. There is no dispute to the fact that the present impugned order was passed by taking note of the fact that a criminal case is registered against the petitioner and others in Crime No.674/2018 under section 3(2)(c) read with 14 of the

Foreigners Act, 1946 and under sections 465, 466, 468, 471 and 420 of IPC and that the petitioner and other accused were produced before the Judicial Magistrate-IV, Tiruppur on 10.10.2018 and remanded to Central Prison, Puzhal at Chennai and that the case is under investigation. Therefore, it is evident that on the date of passing the impugned order, admittedly the petitioner was remanded to judicial custody and not released on bail. Therefore, it is evident that the impugned order was not passed without any basis or justifiable reason. It is true that at paragraph No.4 of the impugned order, it is stated that the same was passed for regulating the continued presence of the petitioner and others in the event of their release from prison after the period of conviction if any, is over, till their deportation to Bangladesh. It is contended by the learned counsel for the petitioner that the first respondent is not justified in passing the impugned order even before the criminal Court has taken a decision to convict the petitioner. It is true that the criminal court has not completed the trial and passed any judgment to convict the petitioner and others. But at the same time, the offences alleged against the petitioner and others are under the Foreigners Act, 1946 as well as Indian Penal Code. Under Section 9 of the Foreigners Act, the burden lies on a person to prove that he is not a foreigner. Therefore, when such onus is yet to be discharged by the petitioner, the first respondent is entitled to pass the present impugned order for regulating the continued presence of the petitioner and others.

17. No doubt, the learned counsel for the petitioner sought to rely on a Birth Certificate said to have been issued by the West Bangladesh Government and other documents alleged to have been issued by the competent authorities viz., Aadhaar card, Driving License, Bank Pass book, Pan Card and Ration Card. I do not think that this Court, at this stage, can go into the validity of those documents and express any view on the same, since the criminal case filed against the petitioner is pending before the concerned Court, where the charge sheet is also stated to have been filed against him. Moreover, as stated supra, the burden of proving as not a foreigner lies on the petitioner as contemplated under Section 9 of the Foreigners Act, 1946, which reads as follows:

"9.Burden of proof:- If in any case not falling under Section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall notwithstanding anything contained in the Indian Evidence Act, 1872 (1

of 1872), lie upon such person."

18. Under such circumstances, it is for the petitioner to prove that he is not a foreigner, as contemplated under Section 9 of the said Act, especially when the petitioner is charged with an offence alleged to have been committed under Section 3 (2) (c) read with Section 14 of the Foreigners Act, 1946 along with other IPC offences. As I have already expressed that so long as the presumption that the petitioner is a foreign national exists, until and unless the petitioner proves the contra, the petitioner cannot succeed in questioning the impugned order passed under Section 3(2)(e) of the said Act, since it is the paramount consideration of the State to protect the security and integrity of this country.

19. Further, a careful perusal of Section 3 does not stipulate anywhere that the Authority, who passes the order under the said provision has to hear the person before passing such order, since it is more in the nature of regulatory than in the nature of prohibiting. The order itself is not a punitive action. The object behind exercising the power conferred under Section 3 of the Act, is undoubtedly to safeguard the security and integrity of the country, as the exercise of such power is aimed against the foreigners to make provision for prohibiting, regulating or restricting the entry or the departure of such foreigner in and out of this country under the given facts and circumstances. The Government is undoubtedly having such vast power to restrict the movements of the foreigners and also to require them to reside in a particular place, when it is so warranted to be exercised.

20. Learned counsel for the petitioner heavily relied on the reasons stated at paragraph No.4 of the impugned order by contending that even before the event of conviction has taken place, the first respondent has erroneously passed the impugned order by presuming as if the petitioner was convicted. I have already pointed out that for passing a prohibitory or regulatory order under Section 3 of the Foreigners Act, the Authority is not bound to hear the person before passing such order. I have also pointed out supra that the impugned order was not passed without any basis and on the other hand, the allegation made against the petitioner and others in Crime No.674/2018 certainly would give rise to a cause of action for the first respondent to pass the impugned order. When the impugned order was passed based on the above stated facts and circumstances, it cannot be termed as an outcome of arbitrary exercise of power.

21. It is well settled that the order passed under Section 3 (2)(e) is not an order of preventive detention, as claimed by the petitioner. In fact, paragraph No. 5 of the impugned order

would show that the petitioner and other persons against whom such order was passed, shall not leave the boundaries of special camp at Trichirapalli except with prior permission of the District Collector, Trichirapalli District. Therefore, their movements are not restricted within four walls of a room and on the other hand, it would show that such restriction is not an absolute prohibition. The above aspect has also been considered by the Division Bench in Kalavathy's case, wherein at paragraph No.24, it has been observed as follows:

"24. There is no absolute prohibition to move from one place to another. The orders say that the inmates shall not leave the camp except with permission of the District Collector. In other words, they can move on grant of permission. The dimensions of freedom to move throughout the territory of India available for a citizen, is not the same for a foreigner. Having regard to the particular explosive situation prevalent in the country, it is only reasonable that restrictions of this sort are sought to be imposed. Such imposition can never be stated to be arbitrary or capricious exercise of power, violating the mandate of Articles 14 and 21 of the Constitution. As already stated, there is a fallacy in the argument that the orders become bad in the absence of fixation of definite periods of stay in the special refugee camps, for each order is not one of detention but only one of reasonable restriction."

22. Learned counsel for the petitioner relied on the decision of the Apex Court reported in 2008(3) SCC 613, State of Maharashtra vs. Bhaurao Pubjabrao Gawande, to contend that the right conferred on the petitioner under Article 21 and 22 of the Constitution of India is violated.

23. First of all, it is to be borne in mind that the facts and circumstances of the present case and the case before the Apex Court in the above decision are not one and the same. On the other hand, the challenge before the Apex Court was against a preventive detention order under Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 against the persons, who are admittedly not foreigners. Therefore, the observations made by the Apex Court in respect of those detenus, while considering the case of preventive detention, cannot be applied to the present case, since the impugned order in this case, admittedly, is the one passed under the Foreigners Act, 1946 and when it is a settled position that such procedure is not in the nature of the preventive detention.

24. Considering the above stated facts and circumstances, this Court is of the firm view that the petitioner has not made

out any case for interfering with the impugned order passed by the first respondent. Accordingly, the writ petition fails and the same is dismissed. No costs.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

vri

To

- 1.State rep. by the Principal Secretary to Government, Public (Foreigners-II) Department, Government of Tamilnadu, Secretariat, Chennai-9.
- 2.The Inspector General of Police Internal Security, Chennai.
- 3.The Commissioner of Police, Thiruppur City, Thiruppur.
- 4.The Inspector of Police, Rural Police Station, Tiruppur City, Tiruppur.
- 5.The Special Deputy Collector, Refugee Camp, Kottappattu, Thiruchirappalli.

+1cc to Mr.M.Guruprasad, Advocate SR.No.30411

PPA(CO)
GMY(26/04/2019)

W.P.No.1141 of 2019