

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 28.03.2005

Coram:-

The Hon'ble Mr. Justice P.SATHASIVAM
and
The Hon'ble Mr. Justice S.K.KRISHNAN

H.C.P. No.1133 of 2004
and
H.C.M.P. No.58 of 2005

K.Rahima Petitioner

vs.

1. The State of Tamilnadu
Rep. by the Secretary to the Government,
Public (SC) Dept.,
Fort St. George, Chennai.

2. The Union of India,
Rep. by its Secretary to the Government,
Ministry of Finance,
Department of Revenue,
New Delhi.

3. The Superintendent of Central Prison,
Central Prison, Chennai. ... Respondents

Petition under Article 226 of the Constitution of India for the issuance of a writ of habeas corpus to call for the records relating to the impugned detention order in G.O. No.SR.1/885-3/2004 dated 6.8.2004 passed by the first respondent, to quash the same and to direct the respondents to produce the body of the person of the detenu Ebrahim Mohammed Rasheed, son of Ebrahim, COFEPOSA detenu, now detained in Central Prison, Chennai, before this Hon'ble Court and set him at liberty forthwith.

For Petitioner : Mr.B.Kumar, Senior Counsel
for Mr.R.J.Kannan

For R-1 & R-3 : Mr.A.Kandasamy
Additional Public Prosecutor.

For R-2 : Mrs.Vanathi Srinivasan,
Addl. Central Govt. Standing Counsel

O R D E R

(Order of the Court was made by P.SATHASIVAM, J.)

Mother of the detenu challenges the order of detention dated 06.08.2004, detaining one Ebrahim Mohamed Rasheed under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974).

2. Heard Mr.B.Kumar, learned Senior Counsel for petitioner, Mr.A.Kandasamy, learned Additional Public Prosecutor for Respondents-1 and 3, and Mrs.Vanathi Srinivasan, learned Additional Central Government Standing Counsel for Respondent-2.

3. After taking us through the grounds of detention and all other connected materials, learned Senior Counsel appearing for the petitioner has raised the following contentions:-

a. Though the bail petition filed by the detenu came to be dismissed even on 06.08.2004, the date on which the impugned detention order was passed, the Detaining Authority has not considered the dismissal of the bail petition, which shows their non-application of mind in passing the order of detention.

b. In the absence of a covering letter along with the documents supplied to the detenu, the detenu was confused, and of the fact that he was not told of the additional materials, he could not make an effective representation, which violates Article 22(5) of the Constitution of India.

4. With regard to the first contention raised by the learned Senior Counsel for the petitioner, learned Additional Public Prosecutor appearing for respondents-1 and 3 would submit that the Detaining Authority was aware of the fact that the bail petition has been filed on 27.7.2004 and also further aware that there is likelihood of the detenu being released on bail. According to him, if we read ground Nos.1(xviii) and 5 together, there cannot be any ambiguity in the grounds of detention as claimed by the learned Senior Counsel for the petitioner.

5. We are unable to accept the said contention. Though in paragraph No.1(xviii) of the grounds of detention, there is a reference to the bail petition dated 27.7.2004, in paragraph No.5, the Detaining Authority has specifically stated that the State Government was aware of the fact that the detenu is eligible for bail and there is likelihood of the detenu being released on bail. On the other hand, it is brought to our notice that in the paper

book supplied to the detenu on 09.08.2004, copy of the order dated 06.08.2004, dismissing the detenu's bail petition, has been enclosed. It is not the case of the Detaining Authority that the said document enclosed in the paper book does not form part of the materials considered by the Detaining Authority. By enclosing order copy of the dismissal of the bail petition on 06.08.2004 in the booklet supplied to the detenu, it is presumed that the Detaining Authority was aware of the said fact and the same has not been reflected in the grounds of detention. As rightly said, this shows the non-application of mind on the part of the detaining authority while passing the order of detention.

6. Coming to the second contention, namely, that the document supplied to the detenu does not contain a covering letter indicating the purpose for which it was given etc., it is brought to our notice that the representation of the detenu dated 04.08.2004 was received by the Office of the Assistant Commissioner of Customs (COFEPOSA-AIR) on 10.8.2004 and a reply had been sent to the detenu on 12.8.2004 and the same was served on the detenu on 13.8.2004. As rightly pointed out, the said document has been supplied to the detenu without a covering letter, which according to the learned Senior Counsel, confused him in making a proper representation as provided under Article 22 (5) of the Constitution of India.

7. In support of the above contention, Mr.B.Kumar, learned Senior Counsel very much pressed into service the decision of the Supreme Court reported in 1999 SCC (Cri) 299 (State of Tamil Nadu v. Senthil Kumar). It is seen from the said decision that though three documents were placed before the Advisory Board as well as the Government at the time of confirmation of the order of detention and the same were sent to the detenu, the complaint was that there was no covering letter indicating as to who furnished them and the purpose for which they were given to him. It was contended before the High Court that had the purpose of giving the documents been made known to him (the detenu), he would have been in a position to make the necessary arrangements but as he was kept in the dark, he was prevented from so doing and as such, the authority violated the principles of natural justice and therefore, no specific prejudice need be shown by him to successfully challenge his detention. Accepting the said contention, the High Court allowed the said petition and quashed the impugned order of detention. Questioning the same, the State of Tamil Nadu preferred Special Leave to the Supreme Court. The Honourable Supreme Court, after noting the documents that were furnished to the detenu without a covering letter and the constitutional provision viz., Article 22(5) of Constitution of India, has concluded thus:-

" The provision extracted above obliges the detaining authority to communicate to the person detained the grounds on which the order of detention has been made and to afford him the earliest opportunity of making a representation against the order. The principle of natural justice of affording an opportunity of being heard is thus embedded in clause (5) of Article 22 of the Constitution, albeit opportunity of being heard is afforded after making the order of detention but before confirming the same as the authority has the power to revoke, cancel or confirm the order. Therefore, there is no necessity to invoke the principle of natural justice, de hors Article 22(5) of the Constitution in this case as the grievance of the first respondent can be dealt with under that provision. "

After holding so and after analysing the documents referred, the Honourable Supreme Court arrived at the conclusion that the documents in question given to the detenu are not supplemental or additional grounds but additional material in support of the grounds already conveyed to the detenu. It was further held in Paragraph No.12 as under:-

" Though the documents furnished to the detenu in this case fall in the "other types", as the state has acted in conflict with the safeguard of giving the earliest opportunity to the detenu to make an effective representation inasmuch as the documents were sent to him in a casual manner without a covering letter and without being told for what purpose they were sent to him and without mentioning that they would be placed before the Advisory Board as well as the Government in connection with the confirmation of the order of detention; consequently, he was deprived of his right to make an effective representation to the Government. Whereas punitive incarceration is after trial on the allegations made against a person, preventive detention is without trial into the allegations made against him. The courts, therefore, adhere to strict compliance of the procedural safeguards in every case of preventive detention. A casual or random approach in complying with procedural safeguards more often results in infringement of the safeguard and vitiates the detention. In this view of the matter, the fact that the wife of the detenu did file a representation is no answer to the complaint of the detenu that had he been informed that those documents were intended to

be placed before the Advisory Board and that they would also be taken into consideration for purposes of passing the order of confirmation under Section 8 (f) of the COFEPOSA Act, he would have made an effective representation. At any rate, he could not have complained that he did not have the opportunity to make an effective representation."

After satisfying the manner in which the documents were served on the detenu without a covering letter, Their Lordships arrived at the conclusion that it did cause confusion to the detenu as he was kept in the dark about the purpose of furnishing the documents and far from giving him the earliest opportunity to make an effective representation, it deprived him of the chance of making a representation which resulted in infringement of the right guaranteed under Article 22 (5) of the Constitution, ultimately, confirmed the order of the High Court, quashing the order of detention.

8. In similar circumstances, a Division Bench of this Court (to which one of us was a party (PSJ)), in HCP No.1435 of 2003, by order dated 29.3.2004, following the above referred to decision of the supreme Court, viz., 1999 SCC (Cri) 299 (cited supra), quashed similar order of detention.

9. In the light of what is stated above, the Habeas Corpus Petition is allowed and the order of detention is set aside and the detenu is directed to be set at liberty forthwith from the custody unless he is required in connection with any other case. H.C.M.P. No.58 of 2005 stands closed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

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JI.

To

1.The Secretary to the Government of Tamil Nadu,
Public (SC) Dept.,
Fort St. George, Chennai.

2.The Secretary to the Government of India,
Ministry of Finance,
Department of Revenue,
New Delhi.

3. The Superintendent of Central Prison,
Central Prison, Chennai.

4.The Sub Assistant Registrar,
COFEPOSA, High Court, Madras.

5. The Joint Secretary to the
Government of Tamil Nadu,
Public (Law & Order) Dept.,
Fort St. George, Chennai. 600 009.

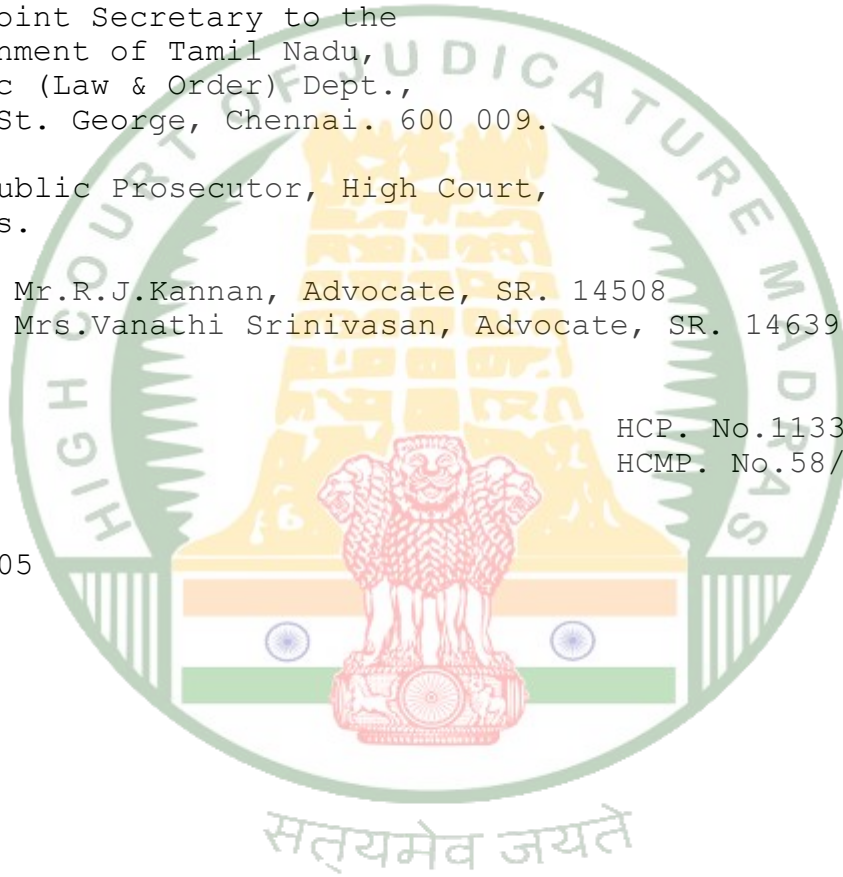
6.The Public Prosecutor, High Court,
Madras.

1 cc to Mr.R.J.Kannan, Advocate, SR. 14508

1 cc to Mrs.Vanathi Srinivasan, Advocate, SR. 14639

HCP. No.1133/2004 &
HCMP. No.58/2005.

NG (CO)
kk 1.4.05



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