IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR. JUSTICE G.GIRISH

FRIDAY, THE 19TH DAY OF JULY 2024 / 28TH ASHADHA, 1946

WP(CRL.) NO.641 OF 2024

PETITIONER:

SARITHA K.P
AGED 42 YEARS
W/O KRISHNADAS, PLAYICKAL HOUSE,
MANNUR WEST, PALAKKAD, PIN - 678642

BY ADVS.
M.H.HANIS
P.M.JINIMOL
T.N.LEKSHMI SHANKAR
NANCY MOL P.
ANANDHU P.C.
NEETHU.G.NADH
CIYA E.J.

RESPONDENTS:

1 **STATE OF KERALA**
REPRESENTED BY THE ADDITIONAL CHIEF SECRETARY
TO GOVERNMENT,
HOME AND VIGILANCE DEPARTMENT,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001

2 **THE DISTRICT COLLECTOR & DISTRICT MAGISTRATE**
PALAKKAD DISTRICT, PIN - 678001

3 **THE DISTRICT POLICE CHIEF**
PALAKKAD DISTRICT, PIN - 678001

4 **THE CHAIRMAN**
ADVISORY BOARD, KAAPA, SREENIVAS,
PADAM ROAD, VIVEKANANDA NAGAR,
ELAMAKKARA,ERNAKULAM DIST, PIN - 682026

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5 THE SUPERINTENDENT OF JAIL
CENTRAL JAIL, VIYYUR, PIN - 670004

BY ADVS.
ADVOCATE GENERAL OFFICE KERALA
ADDL.DIRECTOR GENERAL OF PROSECUTION(AG-11)

OTHER PRESENT:

SRI K A ANAZ, PUBLIC PROSECUTOR

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR FINAL HEARING ON 19.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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"CR"

JUDGMENT

Raja Vijayaraghavan, J.

Sri.Krishnadas, the husband of the petitioner herein, was detained on 11.4.2024 pursuant to an order passed by the 2nd respondent under Section 3 of the Kerala Anti-Social Activities (Prevention) Act, 2007 ('KAAPA' for brevity). This Writ Petition is filed seeking issuance of a Writ of Habeas Corpus and to quash the order of detention.

2. **Facts:**

It is on account of the involvement of the alleged detenu in six cases, that proceedings under KAAPA were initiated against him. The details of the cases are as under:

A. Cases in which the final report has been laid.

a) O.R.No.5 of 2020 registered under Section 9 r/w. Section 2 (36), 39, 50, and 51 of the Wild Life Protection Act, 1972.

b) Crime No. 457 of 2020 registered inter alia under Section 452 and Section 27 of the Arms Act, 1959.

c) Crime No. 614 of 2022 registered inter alia under Section 307 r/w. Section 149 of the IPC.

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B. Cases under investigation:

a) Crime No. 1034 of 2023 registered under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

b) Crime No. 1048 of 2023 registered under Section 3 and Section 25(1-B)(a) of the Arms Act, 1959.

C. Settled Cases:

a) Crime No. 413 of 2021 inter alia under Section 308 r/w. Section 34 of the IPC.

3. Taking note of the predilection of the detenu to continue to involve himself in anti-social activity and to disrupt public order, a report was submitted by the District Police Chief on 26.1.2024 and a further report on 3.4.2024 before the authorized officer recommending the initiation of proceedings under the KAAPA. On its basis, Ext.P1 order dated 5.4.2024 has been issued. The detention order was executed on 11.4.2024.

4. **Submissions of the petitioner:**

a) O.R.No. 5 of 2020 and Crime No. 457 of 2020 have been registered in respect of the very same transaction. No specific overt act is alleged against the detenu.

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b) In Crime No. 614 of 2022, the detenu is not assigned any serious role and his rank has not been specified.

c) In Crime No. 1034 of 2023, the contraband was seized from a car driven by another person and the detenu was merely an occupant.

d) In Crime No. 1048 of 2023, the complainant is a Police Officer and the said crime was liable to be eschewed as the recovery has not been effected in the presence of independent witnesses.

e) There has been a long and inordinate time gap between the last prejudicial activity and the order of detention.

f) Insofar as the last two crimes are concerned, other than mentioning that the detenu is involved, no other documents are furnished before the detaining authority to pinpoint the role of the detenu.

g) Under Section 3(3) of the Act, any order made under Section 3(2) is required to be reported forthwith to the Government and the Director General of Police, Kerala together with a copy of the order and supporting records. However, in the instant case, the records obtained under the Right to Information Act, 2005 would disclose that despite the fact that the detention order was passed on 11.4.2024, it was only on 21.06.2024 that the detention order

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along with the accompanying documents were forwarded to the Government.

h) The detenu was detained on 11.6.2024 and a representation was submitted by him on 13.6.2024. Though the same was received by the Government, no orders have been passed. This would amount to a blatant violation of the rights guaranteed to the detenu under Articles 22 (4) & (5) of the Constitution of India.

5. Since we felt that the contentions (g) and (h) raised by the detenu were formidable, we directed the learned Public Prosecutor to respond to the submissions.

6. **Submissions of the learned Public Prosecutor:**

a) Insofar as the non-compliance of Section 3(3) of the Act is concerned, the learned Public Prosecutor submits that the records reveal that the documents were actually forwarded only on 21.6.2024. The attempt to forward the documents through e-mail failed because the Addressee's mail ID was incorrect.

b) Insofar as the representation submitted by the detenu is concerned, it is submitted that the representation dated 13.6.2024 was received by hand by the Government on 15.6.2024. On 27.6.2024, all the other records, except the representation submitted by the detenu, were forwarded to the Advisory Board.

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Later, on 2.7.2024, the representation was separately forwarded to the Advisory Board. It is further stated that his representation was considered by the Government and the same was rejected by an order dated 18.7.2024.

7. **Our finding:**

A. **With regard to the non-compliance of the mandate under Section 3 (3) of the KAAPA**

a) Section 3(3) of KAAPA reads as under:

> Section 3: Power to make orders for detaining Known Goondas and Known Rowdies
>
> (1) …… …….. ……..
>
> (2) ……. …….. ……
>
> (3) When any order is made under this section by the authorised officer under sub-section (2), he shall forthwith report the fact to the Government and the Director General of Police, Kerala, together with a copy of the order and supporting records which, in his opinion, have a bearing on the matter and no such order shall remain in force for more than 12 days, excluding public holidays, from the date of detention of such Known Goonda or Known Rowdy, unless, in the meantime, it has been approved by the Government or by the Secretary, Home Department if generally so authorised in this regard by the Government.

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This provision outlines the procedure and requirements that an authorized officer must follow when making a detention order for a Known Goonda or Known Rowdy under a specific section of the law. It says that when an authorized officer makes a detention order, the authority must immediately report the action to both the Government and the Director General of Police, Kerala. The report should include a copy of the detention order and any supporting records that are relevant to the matter. The detention order issued by the authorized officer is temporary and can only remain in effect for a maximum of 12 days, excluding public holidays. This 12-day period begins from the date the person classified either as a Known Goonda or Known Rowdy is detained. For the detention order to remain in force beyond the initial 12-day period, it must be approved by the Government. In essence, this provision ensures that the power to detain individuals is exercised with oversight and within a limited timeframe unless further approval is granted by higher authorities. This mechanism provides a check to prevent the misuse of detention powers and ensures accountability.

b) As stated earlier, the detention order in the case of the detenu was issued on 11.4.2024. The detenu had requested for information under the Right to Information Act, seeking information about the date on which the authorities have complied with the mandate

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under Section 3(3) of the Act. The exact information sought by the detenu are as under:

1) സൂചന ഉത്തരവ് എന്നാണ് സർക്കാരിലേയ്ക്കും, സംസ്ഥാന പോലീസ് മേധാവിയ്ക്കും e-mail മുഖാന്തിരം അയച്ചത് ?
2) സൂചന ഉത്തരവ് നേരിട്ടോ, തപാൽ മുഖാന്തിരമോ അയച്ചിരുന്നോ? എന്നാണ് അയച്ചത് ?

The detenu sought information on whether the orders and supporting records were forwarded to the Government in compliance with the mandate under section 3(3) of the Act and the date on which they were forwarded.

c) In response, he has been informed that the documents were forwarded to the Government and the District Police Chief only on 21.6.2024.

d) In **Hetchin Haokip v. State of Manipur and Others**[1], the question before the Apex Court was with regard to the meaning and scope of the word "forthwith", occurring in Section 3(4) of the National Security Act, 1980. It was held that the expression "forthwith" must be interpreted to mean a reasonable time and without any undue delay. It was further held that the detaining authority must furnish the report at the earliest possible time. Any delay between the date of detention and the date of submitting the

[1] [(2018) 9 SCC 562]

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report to the State Government must be due to unavoidable circumstances beyond the control of the authority and not because of administrative laxity. In the said case, it was held that the delay of five days to report the detention would be violative of the rights guaranteed to the detenu and would vitiate the detention order.

e) In the case on hand, the delay occasioned is more than 2 months and 11 days. We have no doubt in our minds that the failure to comply with the mandate will vitiate the order of detention.

B. **Failure to consider the representation and the consequent violation of Article 22 (5) of the Constitution of India.**

a) The next contention is with regard to the failure of the Government to consider the representation submitted by the detenu. Admittedly, the detention order was passed on 5.4.2024 and the detenu was detained on 11.6.2024. On 13.6.2024 itself, he had submitted a representation. The instant writ petition was filed before this Court on 14.6.2024 and it was when this Court sought instructions with regard to the disposal of the representation that it was submitted before this Court that orders have been passed on 18.7.2024.

b) Section 7 of KAAPA reads as under:

Section 7. Grounds of detention shall be disclosed.

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(i) When a person is arrested in pursuance of a detention order, the officer arresting him shall read out the detention order to him and give him a copy of such order.

(ii) The grounds of detention, specifying the instances of offences, with copies of relevant documents, as far as practicable, on the basis of which he is considered as a "known goonda" or "known rowdy" and giving such materials relating to his activities on the basis of which his detention has been found necessary, shall be furnished to him as soon as possible nevertheless, in any case, within five days of detention and he shall also be informed in writing, under acknowledgement, of his right to represent to the Government and before the Advisory Board against his detention:

Provided that nothing in this section shall require any authority to disclose to the detained person any fact, the disclosure of which will reveal the identity of any confidential source or the disclosure of which will be against the interests of internal security or national security.

(iii) The Superintendent of the Jail where such person is detained shall afford him reasonable opportunity to consult a lawyer and reasonable assistance in making a representation against the detention order to the Government or to the Advisory Board.

(iv) The order of detention shall not be deemed to be invalid merely because one or more of the facts or circumstances cited among the grounds are vague, non-existent, irrelevant or invalid for any reason whatsoever and such order shall be deemed to have been made by the Government or the Authorised officer after having been satisfied about the need for detention with reference to the remaining facts

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and circumstances, provided that the minimum conditions for being classified as a known goonda or known rowdy are satisfied.

Subsection (2) clearly says that the grounds for detention, detailing specific instances of offenses and including copies of relevant documents, must be provided to the detainee as soon as possible, but no later than five days after the detention. The detainee must be informed in writing of their right to make a representation to the Government and the Advisory Board against their detention. Subsection (3) says that the Superintendent of the Jail where the detainee is held must provide reasonable opportunities for the detainee to consult a lawyer. The detainee must be given reasonable assistance in making a representation against the detention order to the Government or the Advisory Board.

c) In **Pramod Singla v Union of India**[2], a Division Bench of the Apex Court had occasion to consider whether there is any conflict between the principles of law laid down in **K.M. Abdulla Kunhi & B.L. Abdul Khader v. Union Of India**[3] and **Ankit Ashok Jalan v. Union Of India**[4], both of which are Constitution Bench judgments, which state that the Central Government must wait for the decision of the Advisory Board, with the Constitution Bench

[2] 2023 SCC Online SC 374
[3] 1991 (1) SCC 476
[4] [2020) 16 SCC 127]

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judgments of the Apex Court Court in **Pankaj Kumar Chakrabarty v. State of West Bengal**[5] and the **Jayanarayan Sukul v. State of West Bengal**[6]. After considering the ratio of the law laid down in the judgments it was held that there is no friction between the judgments. The Apex Court held that the detention order under both laws can be passed either by the Government or by the specially empowered officer. However, under Section 3 of the Preventive Detention Act, the specially empowered officer, within 12 days of the detention, has to seek for approval from the Government for continued detention, and only if the Government approves the same can the detention be continued. This process of seeking approval from the Government is essentially a transfer of power from the empowered officer to the Government, making the Government the detaining authority after the initial lapse of 12 days. In the COFEPOSA Act however, no such approval is required from the Government, and hence the detaining authority and the Government remain to be two separate bodies independent of each other. The provisions of the Preventive Detention Act, 1980 is in pari materia the provisions of the KAAPA. **K.M. Abdulla Kunhi** was rendered in the context of the COFEPOSA Act. In that view of the matter, the principles laid down in **Pankaj Kumar Chakrabarty** (supra) and **Jayanarayan Sukul**

[5] [(1969) 3 SCC 400]
[6] [(1970) 1 SCC 219]

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(supra), would squarely apply. In **Pankaj Kumar** (supra), after careful consideration, a Constitution Bench of this Court held that the Government must act independently from the Advisory Board and that there exists no mandate on the Government to wait for the decision of the Advisory Board. The relevant paragraphs of the said judgment are being extracted herein:

> 10. "It is true that clause (5) does not in positive language provide as to whom the representation is to be made and by whom, when made, it is to be considered. But the expressions "as soon as may be" and "the earliest opportunity" in that clause clearly indicate that the grounds are to be served and the opportunity to make a representation are provided for to enable the detenu to show that his detention is unwarranted and since no other authority who should consider such representation is mentioned it can only be the detaining authority to whom it is to be made which has to consider it. Though clause (5) does not in express terms say so it follows from its provisions that it is the detaining authority which has to give to the detenu the earliest opportunity to make a representation and to consider it when so made whether its order is wrongful or contrary to the law enabling it to detain him. The illustrations given in Abdul Karim case [Abdul Karim v. State of W.B., (1969) 1 SCC 433] show that clause (5) of Article 22 not only contains the obligation of the appropriate Government to furnish the grounds and to give the earliest opportunity to make a representation but also by necessary implication the obligation to consider that representation. Such an obligation is evidently provided for to give an opportunity to the detenu to show and a corresponding opportunity to the appropriate

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Government to consider any objections against the order which the detenu may raise so that no person is, through error or otherwise, wrongly arrested and detained. If it was intended that such a representation need not be considered by the Government where an Advisory Board is constituted and that representation in such cases is to be considered by the Board and not by the appropriate Government, clause (5) would not have directed the detaining authority to afford the earliest opportunity to the detenu. In that case the words would more appropriately have been that the authority should obtain the opinion of the Board after giving an opportunity to the detenu to make a representation and communicate the same to the Board. But what would happen in cases where the detention is for less than 3 months and there is no necessity of having the opinion of the Board? If counsel's contention were to be right the representation in such cases would not have to be considered either by the appropriate Government or by the Board and the right of representation and the corresponding obligation of the appropriate Government to give the earliest opportunity to make such representation would be rendered nugatory. In imposing the obligation to afford the opportunity to make a representation, clause (5) does not make any distinction between orders of detention for only 3 months or less and those for a longer duration. The obligation applies to both kinds of orders. The clause does not say that the representation is to be considered by the appropriate Government in the former class of cases and by the Board in the latter class of cases. In our view it is clear from clauses (4) and (5) of Article 22 that there is a dual obligation on the appropriate Government and a dual right in favour of the detenu, namely, (1) to have his representation irrespective of the length of detention considered by the appropriate Government and (2) to have once again that representation

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in the light of the circumstances of the case considered by the Board before it gives its opinion. If in the light of that representation the Board finds that there is no sufficient cause for detention the Government has to revoke the order of detention and set at liberty the detenu. Thus, whereas the Government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the Board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention. The obligation of the appropriate Government to afford to the detenu the opportunity to make a representation and to consider that representation is distinct from the Government's obligation to constitute a Board and to communicate the representation amongst other materials to the Board to enable it to form its opinion and to obtain such opinion.

11. This conclusion is strengthened by the other provisions of the Act. In conformity with clauses (4) and (5) of Article 22, Section 7 of the Act enjoins upon the detaining authority to furnish to the detenu grounds of detention within five days from the date of his detention and to afford to the detenu the earliest opportunity to make his representation to the appropriate Government. Sections 8 and 9 enjoin upon the appropriate Government to constitute an Advisory Board and to place within 30 days from the date of the detention the grounds for detention, the detenu's representation and also the report of the officer where the order of detention is made by an officer and not by the Government. The obligation under Section 7 is quite distinct from that under Sections 8 and 9. If the representation was for the consideration not by the Government but by the Board only as contended, there was no necessity to provide that it should be addressed to the Government and not directly to

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the Board. The Government could not have been intended to be only a transmitting authority nor could it have been contemplated that it should sit tight on that representation and remit it to the Board after it is constituted. The peremptory language in clause (5) of Article 22 and Section 7 of the Act would not have been necessary if the Board and not the Government had to consider the representation. Section 13 also furnishes an answer to the argument of the counsel for the State. Under that section, the State Government and the Central Government are empowered to revoke or modify an order of detention. That power is evidently provided for to enable the Government to take appropriate action where on a representation made to it, it finds that the order in question should be modified or even revoked. Obviously, the intention of Parliament could not have been that the appropriate Government should pass an order under Section 13 without considering the representation which has under Section 7 been addressed to it.

12. For the reasons aforesaid we are in agreement with the decision in Abdul Karim case [Abdul Karim v. State of W.B., (1969) 1 SCC 433]. Consequently, the petitioners had a Constitutional right and there was on the State Government a corresponding Constitutional obligation to consider their representations irrespective of whether they were made before or after their cases were referred to the Advisory Board and that not having been done the order of detention against them cannot be sustained. In this view it is not necessary for us to examine the other objections raised against these orders. The petition is therefore allowed, the orders of detention against Petitioners 15 and 36 are set aside and we direct that they should be set at liberty forthwith."

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d) In **Harardhan Saha v. State of West Bengal and Ors.**[7], yet another Constitution Bench of the Apex Court considered the distinction between the consideration of the representation made by the detenu in cases of preventive detention, and it was stated that if the representation was made before the matter is referred to the Advisory Board, the detaining authority must consider such representation, but if the representation is made after the matter is referred to the Advisory Board, the detaining authority would first consider it and then send it to the Advisory Board. It was held as under:

> 29. Principles of natural justice are an element in considering the reasonableness of a restriction where Article 19 is applicable. At the stage of consideration of representation by the State Government, the obligation of the State Government is such as Article 22(5) implies. Section 8 of the Act is in complete conformity with Article 22(5) because this section follows the provisions of the Constitution. If the representation of the detenu is received before the matter is referred to the Advisory Board, the detaining authority considers the representation. If a representation is made after the matter has been referred to the Advisory Board, the detaining authority will consider it before it will send representation to the Advisory Board."

e) The Apex Court has held that representation submitted by the detenu relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of

[7] [(1975) 3 SCC 198]

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Article 22 therefore, casts a legal obligation on the government to consider the representation as early as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflect the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. Though there is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with, there shall not be any supine indifference or slackness in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal. This is because the confirmation of detention does not preclude the government from revoking the order of detention upon considering the representation. Secondly, there may be cases where the government has to consider the representation only after confirmation of detention. Clause (5) of Article 22 suggests that the representation could be received even after confirmation of the order of detention. The words 'shall afford him the earliest opportunity of making a representation against the order' in clause (5) of Article 22 suggest that the obligation of the government is to offer the detenu an opportunity to make a representation against

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the order before it is confirmed according to the procedure laid down under the relevant statutory provisions.

f) In **Pramod Singla** (supra), it was held as under in paragraph 48 of the judgment:

> "48. As has been mentioned above, preventive detention laws in India are a colonial legacy, and as such, are extremely powerful laws that have the ability to confer arbitrary power to the state. In such a circumstance, where there is a possibility of an unfettered discretion of power by the Government, this Court must analyze cases arising from such laws with extreme caution and excruciating detail, to ensure that there are checks and balances on the power of the Government. Every procedural rigidity, must be followed in entirety by the Government in cases of preventive detention, and every lapse in procedure must give rise to a benefit to the case of the detenue. The Courts, in circumstances of preventive detention, are conferred with the duty that has been given the utmost importance by the Constitution, which is the protection of individual and civil liberties. This act of protecting civil liberties, is not just the saving of rights of individuals in person and the society at large, but is also an act of preserving our Constitutional ethos, which is a product of a series of struggles against the arbitrary power of the British state."

g) In the case on hand, we find that the failure of the Government to consider the representation with promptitude would clearly violate

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the constitutional right of the detenu under Article 22(5) of the Constitution of India.

h) As we hold that the detenu is entitled to succeed on grounds (g) and (h), which goes to the root of the matter, we do not think that it is necessary to advert to the other contentions.

8. Conclusion:

This Writ Petition will stand allowed. Ext.P1 detention order dated 5.4.2024 will stand quashed. The detenu is ordered to be released if his incarceration is not required in any other cases. The Registry shall forward a copy of this judgment to the Superintendent, Central Jail, Viyyur forthwith.

Sd/-

RAJA VIJAYARAGHAVAN V,
JUDGE

Sd/-
G. GIRISH,
JUDGE

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APPENDIX OF WP(CRL.) 641/2024

PETITIONER EXHIBITS

Exhibit P1	**A TRUE COPY OF THE ORDER DCPKD/1513/2024-SI DATED 05.04.2024 OF THE 2ND RESPONDENT**

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