

VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR. JUSTICE G.GIRISH

THURSDAY, THE 3RD DAY OF OCTOBER 2024 / 11TH ASWINA, 1946

WP(CRL.) NO. 813 OF 2024

PETITIONER:

RISHIL FARHA C.P

AGED 26 YEARS

W/O MUNAVAR FAIROS P.K, BAITHUL NOOR, KATHIRUR

VILLAGE, PULLIYOD, UMMANCHIRA, KANNUR, PIN - 670649

BY ADVS.

M.H.HANIS

P.M.JINIMOL

T.N.LEKSHMI SHANKAR

NANCY MOL P.

ANANDHU P.C.

NEETHU.G.NADH

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
KANNUR DISTRICT, PIN - 670002
- 3 THE DISTRICT POLICE CHIEF
KANNUR CITY, PIN - 670002
- 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, THRISSUR DIST, PIN - 670004

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

SRI K.A.ANAS, PUBLIC PROSECUTOR

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR
ADMISSION ON 03.10.2024, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

**"CR"****JUDGMENT****Raja Vijayaraghavan, J.**

Munavar Fairos, the husband of the petitioner, was detained by Ext.P1 order dated 03.07.2024 passed by the 2nd respondent under Section 3(1) of the Kerala Anti-Social Activities (Prevention) Act, 2007 ('KAAP' Act for brevity). The detention order was executed on 09.07.2024 and he has been undergoing detention from 01.06.2024.

2. This Writ Petition is filed challenging Ext.P1 order and for issuance of a writ of habeas corpus to produce the body of the detenu and to set him at liberty.

3. Though various contentions have been raised in the Writ Petition to assail the order of detention, when the matter is taken up today, Sri. M.H Hanis, the learned counsel for the petitioner, submitted that further detention of the detenu, pursuant to Ext.P1 detention order, cannot be sustained under the law for the reason that the further detention of the detenu has been approved by the Advisory Board which cannot be said to



have been duly constituted in accordance with the law. It is pointed out by the learned counsel that the Advisory Board constituted under Section 8 shall consist of a Chairman, who is or had been a Judge, and two other members, who are qualified under the Constitution of India to be appointed as a Judge of the High Court. In the case on hand, a reference was made by the Government to the Advisory Board and as the office of the Chairman was lying vacant, the opinion was rendered by two members without the junction of the Chairman. The said opinion was accepted by the Government and the detention order was confirmed. It is submitted by the learned counsel that the confirmation order passed by the Government relying on the opinion submitted by an Advisory Board, which has not been constituted in accordance with the law, is a clear violation of the constitutional mandate and the statutory provisions. According to the learned counsel, the rights guaranteed to the detenu under Articles 21 and 22(5) of the Constitution of India have been infringed and on that sole ground, the detention order is liable to be interfered with.

4. Sri.K.A.Anas, the learned Public Prosecutor, would refer to the provisions, and it was argued that the members of the Advisory Board are



qualified to be appointed as Judges of the High Court, and in that view of the matter, no prejudice has been caused.

5. We have considered the submissions advanced and have gone through the records.

6. The Act 34 of 2007 is a law providing for preventive detention and was enacted to provide for the effective prevention and control of anti-social activities in the State of Kerala. As per the provisions of the Act, power has been conferred on the Government or an officer authorized under sub-section (2) of Section 3 to order the detention of the person if satisfied, on information received from a police officer not below the rank of Superintendent of Police with regard to the activities of any 'known goonda' or 'known rowdy', with a view to prevent such person from committing any anti-social activity within the State of Kerala. An order passed under Section 3 shall not remain in force for more than 12 days unless the same is approved by the Government or by the Secretary, Home Department, as authorized.

7. Under Article 22 of the Constitution of India, no law providing for preventive detention shall authorize the detention of a person for a



period longer than three months, unless the Advisory Board, duly constituted, has reported before the expiration of the said period of three months that there is, in its opinion, sufficient cause for detention. Article 22(4)(a) clearly indicates that even if the order of detention does not prescribe any period, such an order of detention cannot be in force for a period beyond three months, unless the Advisory Board before the expiration of three months opines that there is sufficient cause for detention. In other words, if the Advisory Board does not give its opinion within a period of three months from the date of detention, the order of detention beyond the period of three months would become illegal and not otherwise. If within the period of three months, the Advisory Board opines that there was no sufficient cause for such detention, then the State Government would have to release the detenu forthwith.

8. In tune with the Constitutional provisions, an Advisory Board has been constituted for the purposes of the KAAP Act. Section 8 of the Act which deals with the Constitution of the Advisory Board reads as under:

8. Constitution of Advisory Board.--(1) The Government shall, constitute one or such number of Advisory Boards as may be necessary for the purposes of this Act, with such territorial or functional jurisdiction, as may be specified.



(2) Every such Board shall consist of a Chairman who is, or had been Judge of a High Court and two other members who are qualified under the Constitution of India to be appointed as a Judge of a High Court.

(3) The salary, allowances, tenure and service conditions of the Chairman and members of the Advisory Board may be such as may be prescribed.'

As can be seen from the provision, the Board shall consist of a Chairman, who is or had been a Judge of the High Court and two other members, who are qualified under the Constitution of India to be appointed as a Judge of a High Court.

9. Section 9 of the Act provides that in every case, where a detention order has been made under the Act, the Government shall, within three weeks from the date of detention of a person, place before the Advisory Board, the grounds on which the order has been made and the representation, if any, made by the person affected, and, in the case where the order has been made by an authorised officer, the report by such officer under sub-section (3) of Section 3 of the Act.

10. Section 10 of the Act provides for the procedure of the Advisory Board and further action. The said provision reads as follows:



(1) The Advisory Board to which a reference is made under the above section shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the Government or from any person called for the purpose through the Government, or from the person concerned and if, in any particular case, it considers necessary so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within nine weeks from the date of detention of the person concerned."

(2) When there is difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board. The absence of a member shall not invalidate the decision of the Board.

xxx xxxx xxx

(4) In every case where the Advisory Board has reported that there is in its opinion, sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of a person concerned, the Government shall revoke the detention order and cause the person to be released forthwith.

11. A reading of the above provisions would make it clear that it is a constitutional imperative to constitute an Advisory Board with a Chairman



and two members and in every case, where a detention order has been made the appropriate Government is bound under Section 9 to place before the Board the grounds on which the order has been made and the representation, if any, made by the detenu. The Advisory Board to which a reference is so made is bound under Section 10 of the Act to consider the materials placed before it and to decide the case of the detenu and to submit a report in writing whether or not, there is sufficient cause for the detention. The functions of the Advisory Board are (i) to consider the material placed before it, (ii) to call for further information, if deemed necessary, (iii) to hear the detenu, if he desires to be heard and (iv) to submit a report in writing within nine weeks from the date of detention of the detenu to the appropriate Government as to whether there is sufficient cause for "such detention" or whether the detention is at all justified.

12. The important functions of the Advisory Board are self-evident. Article 22(5) of the Constitution of India envisages a dual obligation of the Government and corresponding dual right in favour of a detenu namely, (1) to have his representation independently considered by the Government and (2) to have his representation, in the light of all the facts and circumstances of the case, considered by an Advisory Board. An Advisory Board is to report



whether there is sufficient cause for detention and whether the detention is at all justified. The setting up of an Advisory Board to determine whether such detention is justified is a constitutional safeguard against arbitrary detention. Without the intervention of an Advisory Board, an independent body with persons on it of judicial qualification of a high order, detention beyond the period prescribed, has to be held to be illegal. (See: **Puranlal Lakhanpal v. Union of India**¹, **Shibapada Mukharjee v. State of West Bengal**²; **Ranjit Dam v. State of West Bengal**³).

13. In **Abdul Karim v. State of West Bengal**⁴, the Apex Court has held that Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and if such requirements are not observed, the detention infringes the fundamental right of the detenu guaranteed under Articles 21 and 22 of the Constitution of India. It has been further held that all the procedural requirements of Article 22 are mandatory in character and even if one of the procedural requirements is not complied with the order of detention would be rendered illegal.

¹ [AIR 1958 SC 163]

² [(1974) 3 SCC 50]

³ [(1972) 2 SCC 516]

⁴ [(1969) 1 SCC 433]



14. In the case on hand, the reference was heard and orders were passed by two members of the Board. The Chairman was not a party to the Board. Section 10(2) provides that when there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board. The said provision only says that when the deliberation is carried out by the Chairman and two members and if there is a difference of opinion, the majority shall prevail. Though Section 10(2) provides that the absence of a member shall not invalidate the decision of the Board, it goes against the first part of the Section. At any rate, as the word 'member' and not 'Chairman' is used, we hold that for a 'duly constituted Advisory Board' under Section 8 of the Act, the presence of the Chairman is a constitutional imperative. We are of the view that Sections 8 and 10 do not empower two members to constitute an Advisory Board and hear the reference made under Section 10. In **Kishori Lal v. State**⁵, a Single Judge of the Gauhati High Court had occasion to hold that where a detenu's case was considered only by two members and not by three members of the Advisory Board, the fundamental right of the detenu guaranteed under Article 21 of the

⁵ [AIR 1951 Assam 169]



Constitution was infringed. The said view was followed by a Division Bench of the Gauhati High Court in **Tarun Kumar Das and etc. v. State of Assam and Ors.**⁶.

15. In the case on hand, the reference was heard by two members without the presence of the Chairman of the Board. Based on the opinion received from the Board, a confirmation order was passed by the Government on 13.9.2024. The opinion given by the Board as well as the confirmation order is vitiated as the reference was not considered by a duly constituted Advisory Board and therefore, violative of the fundamental rights of the petitioner under Articles 21, 22(4) and 22(5) of the Constitution of India r/w Sections 8 and 10 of the KAAP Act.

16. Though various other contentions are raised to assail the order, we do not think that it is necessary to delve into the same as the detention order is liable to be set aside on the above ground alone. Those contentions are left open.

Resultantly, this writ petition is allowed. It is held that the continued detention of the detenu on the strength of Ext.P1 order is illegal. There will

⁶ [1982 Cr.L. J. 1054]



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be a direction to the Superintendent of Central Prison, Viyyur to release the detenu, Sri. Munavar Fairoos P.K., forthwith, if his detention is not required in connection with any other case.

The Registry is directed to communicate the order to the Superintendent of Central Prison, Viyyur, forthwith.

Sd/-

**RAJA VIJAYARAGHAVAN V
JUDGE**

Sd/-

**G. GIRISH
JUDGE**



APPENDIX OF WP(CRL.) 813/2024

PETITIONER'S EXHIBITS:

- Exhibit P1 A TRUE COPY OF THE ORDER
NO.DCKNR/7988/2024-SSL DATED 03.07.2024 OF
THE 2ND RESPONDENT
- Exhibit P2 A TRUE COPY OF THE REPRESENTATION DATED
18.07.2024 SUBMITTED BEFORE THE 4TH
RESPONDENT
- Exhibit P3 A TRUE COPY OF THE ACKNOWLEDGMENT CARD
EVIDENCING THE RECEIPT OF EXT P2 BY THE 4TH
RESPONDENT
- Exhibit P4 TRUE COPY OF THE REPRESENTATION DATED
18.07.2024 SUBMITTED BEFORE THE 1 ST
RESPONDENT
- Exhibit P5 TRUE COPY OF THE ACKNOWLEDGEMENT CARD
EVIDENCING THE RECEIPT OF EXT P4