

(2018) 08 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition No.62 Of 2018

Hilal Ahmad Ganie @APPELLANT@Hash State Of Jammu & Kashmir & Ors

Date of Decision : 01-08-2018

Acts Referred:

Constitution of India — Article 21, 22, 22(5)
Jammu and Kashmir Public Safety Act, 1978 — Section 8, 8(4), 13, 19
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 377, 506
General Clauses Act, Samvat, 1977 — Section 21

Citation : (2018) 08 J&K CK 0002

Hon'ble Judges : M. K. Hanjura, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. By the dint of order bearing No. 193/DMB/PSA of 2018 dated 3rd of March, 2018, passed by the Respondent No.2/District Magistrate,

Baramulla, in exercise of the powers conferred in him under clause (a) of Section 8 of the J&K Public Safety Act, 1978 (for short â??The Act of

1978â?), one Hilal Ahmad Ganie S/o Ghulam Nabi Ganie R/o Nowpora, Jagir, Kreeri, District Baramulla, has been detained and lodged in District Jail,

Kathua.Â

2. The detainee has challenged the said order of detention, chiefly, on the grounds that the detaining authority has failed to apply his mind to the fact

whether the preventive detention of the detainee was imperative, notwithstanding his custody in a substantive offence. To this, it has been added, that

the Respondent No. 2 has passed the order of detention on the dictates of the sponsoring agency, i.e. the Officer who has prepared the police dossier

and no attempt has been made by the Respondent No.2 to scan and evaluate it before passing the order of detention.Â

3. Counter has been filed by the Respondents, wherein it is stated that the grounds of detention have been furnished to the detainee. The detaining authority has complied with the requirement of Clause 5 of Article 22 read with Article 21 of the Constitution of India. The detainee has failed to avail the remedy prescribed under the Act. He has not filed the representation against the order of detention. It has also been stated that the detainee is involved in case FIR No. 04/2018, registered in Police Station, Kreeri, for the commission of offences punishable under Sections 377, 506 of the RPC. In the end, it has been urged that since the order of detention has been passed on justifiable grounds, therefore, the instant Habeas Corpus petition merits dismissal, and it may, accordingly, be dismissed.

4. Heard and considered.

5. The main plank of the argument of the learned counsel for the detainee is that since the detainee was in custody of the police authorities for a substantive offence, therefore, there was no need to direct his preventive detention. It has been stated in the Counter Affidavit that the detainee is involved in FIR No. 04/2018, registered in Police Station, Kreeri, for the commission of offences punishable under Sections 377, 506 of the RPC. The arrest of the detainee in the said FIRs, at the time of the passing of the order of detention, has not been disputed.

6. Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, the question that arises for consideration is whether an order of detention could be passed on the face of such an eventuality?

The answer to this question is an emphatic "No", taking into consideration the law laid down by the Apex Court of the country in paragraph

No.24 of the judgment delivered in the case of "Sama Aruna v. State of Telangana & Anr.", reported in "AIR 2017 SC 2662", which may

be noticed :

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No. 221 of 2016. His

custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in

the year 2002-03. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In

Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenue 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.

7. The same view has been repeated and reiterated by the Hon'ble Supreme Court in paragraph No. 13 of the judgment delivered in the case of

V. Shanthav. State of Telangana & Others, reported in AIR 2017 SC 2625, that reads as under :

13. The order of preventive detention passed against the detenue states that his illegal activities were causing danger to poor and small farmers

and their safety and financial well being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to

prevent the detenu from indulging in further prejudicial activities in the business of spurious seeds, affecting maintenance of public order, and that there

was no other option except to invoke the provisions of the Preventive Detention Act as an extreme measure to insulate the society from his evil deeds.

The rhetorical incantation of the words 'goonda' or 'prejudicial to maintenance of public order' cannot be sufficient justification to invoke the

draconian powers of preventive detention. To classify the detenue as a 'goonda' affecting public order, because of inadequate yield from the

chilli seed sold by him and prevent him from moving for bail even is a gross abuse of the statutory power of Preventive Detention. The grounds of

detention are ex facie extraneous to the Act.

8. Testing the instant case on the touchstone of the law laid down above, the detenue could not have been detained after taking recourse to the

provisions of the Act of 1978, when he was already in the custody of the police authorities in the cases, the details whereof have been given

hereinbefore. His custody in police for the offence stated above, has been converted into the custody under the impugned detention order. May be the

detaining authority might have been laboring under the belief that if the detainee applies for bail, he may succeed in seeking his release, but this apprehension of the detaining authority could have been guarded against by resisting and opposing the bail application. In the event of his release on bail, the State could have exercised its right to knock at the doors of a higher forum. This single infraction knocks the bottom out of the contention raised by the State that the detainee can be detained preventatively when he is already in custody and has not applied for bail. It cuts at the very root of the State action.Â The State could have taken recourse to the ordinary law of the land.Â

9. Life and liberty of the citizens of the State are of paramount importance. A duty is cast on the shoulders of the Court to enquire that the decision of the Executive is made upon the matters laid down by the Statute and that these are relevant for arriving at such a decision. A citizen cannot be deprived of personal liberty, guaranteed to him/her by the Constitution and of which, he/she cannot be deprived except in due course of law and for the purposes sanctioned by law.Â

10. In the communication bearing No. DMB/PSA/2018/1075-79 dated 3rd of March, 2018, attached to the writ petition, it has been detailed that the detainee can make a representation to the â??Governmentâ? or to the â??District Magistrate, Baramullaâ?, if he so desires. In the execution report, attested by the Assistant Superintendent of District Jail, Kathua, it has been emphatically stated that the detainee was informed that he can make a representation to the â??Governmentâ? only against the order of the detention. This has deprived the detainee to make an effective representation to the detaining authority as provided under the law. This infringement, too, it has been stated, renders the order of detention liable to be set aside.

11. To substantiate his argument, the learned counsel for the petitioner has placed explicit reliance on the law laid down by a Division Bench of the High Court of Jammu & Kashmir (of which I, Justice M. K. Hanjura, was a component) under order dated 9th June, 2017, passed in LPA No. 43/2017 titled â??Tariq Ahmad Dar v. State of J&K & Ors.â??, the relevant excerpts of which are reproduced below verbatim:Â

â??6. The submission of the learned counsel for the appellant is that prior to Governmentâ??s approval of the Detention order, which is to be done

within 12 days of the detention order, in terms of Section 8 (4) of the J&K Public Safety Act, 1978, the detaining authority also has the power to

revoke the detention order. This power is clearly relatable to Section 21 of the General Clauses Act, 1977, which has been saved by virtue of

Section 19 of the J&K Public Safety Act, 1978. It was further submitted that till the Government's approval of the Detention order is granted,

since the Detaining Authority had the power to revoke the detention order, a representation could have been made to the Detaining Authority for

revoking the detention order. Therefore, according to the learned counsel for the appellant, it was incumbent upon the Detaining Authority to have

informed the detenu that he could also make a representation to him (the Detaining Authority), if he so desired. It was further contended that since the

Detaining Authority did not communicate to the detenu that such a representation could be made to the Detaining Authority, this in itself amounted to

infringement of the provisions of Section 13 of the Jammu and Kashmir Public Safety Act, 1978 read with Article 22(5) of the Constitution of India. In

support of his submission, he placed reliance on a Supreme Court decision in the case of *State of Maharashtra and ors v. Santosh Shankar Acharya*: (

2000) 7 SCC 463, wherein provisions of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-

Offenders and Dangerous Persons Act, 1981, were considered by the Supreme Court. In that case also the Supreme Court came to the conclusion

that non-communication of the fact that the detenu could make a representation to the Detaining Authority would constitute an infringement of a valid

constitutional right guaranteed to the detenu under Article 22(5) of the Constitution of India and such failure would make the order of detention invalid.

7. On the strength of this decision of the Supreme Court, the learned counsel for the appellant submitted that the detention order in the present case

also became invalid because of the non-communication of the fact that the detenu could make a representation to the Detaining Authority till the

Government had approved the detention order.

8. The learned counsel for the respondents however submitted that all the technical requirements had been complied with and, particularly of Section

13, which required that the earliest opportunity of making a representation be provided to the detenu. He submitted that the communication dated

22.12.2016, issued by the District Magistrate, Baramulla, made it abundantly clear to the detenu that he could make a representation to the Home

Department of the Government, if he so desired. Consequently, it was submitted that what was required to be done under Section 13 of the J&K

Public Safety Act, 1978 and Constitution of India under Article 22(5) thereof, had been done and, therefore, the detention order cannot be regarded as

having become invalid. He further submitted that in any event, the detenu had not even availed the right of making the representation to the

Government even after the approval of the Government was granted on 28.12.2016. Therefore, according to the learned counsel for the

respondents, the detention order cannot be held to be invalid on the ground urged by the learned counsel for the appellant.

9. Section 8 of the Jammu and Kashmir Public Safety Act, 1978, and, in particular, sub Section (2) thereof, provides that a detention order can be

passed by inter alia a District Magistrate. Sub-Section (4) of Section 8 of the said Act stipulates that when any order is made under the said Section

by a person mentioned in sub-section (2), he shall forthwith report the fact to the Government together with the grounds on which the order has been

made and such of the particulars as in his opinion have a bearing on the matter, and no such order shall remain in force for more than twelve days

after the making thereof unless in the meantime it has been approved by the Government. This clearly implies that though the District Magistrate can

make a detention order, such detention order requires to be approved by the Government not later than 12 days from the date of the order. Section 19

of the Jammu and Kashmir Public Safety Act, 1978, reads as under:-

19. Revocation of detention orders.-

(1) Without prejudice to the provisions of section 21 of the General Clauses Act, Smtvat 1977, a detention order may, at any time, be revoked or

modified by the Government, notwithstanding that the order has been made by any officer mentioned in sub- section (2) of section 8.

(2) There shall be no bar to making of a fresh order of detention against a person on the same facts as an earlier order of detention made against such

person in any case where -

(i) the earlier order of detention or its continuance is not legal on account of any technical defect or

(ii) the earlier order of detention has been revoked by reason of any apprehension, or for avoiding any challenge that such order or its continuance is not legal on account of any technical defect

Provided that in computing the maximum period for which a person against whom such fresh order of detention has been issued may be detained, the period during which such person was under the earlier order of detention shall be excluded.

10. Sub-Section (1) clearly indicates that without prejudice to the provisions of Section 21 of the General Clauses Act, Samvat 1977, a detention order

may, at any time be revoked or modified by the Government notwithstanding that the order has been made by the Officer mentioned in sub-section (2)

of Section 8 of the Act. What subsection (1) of Section 19 provides is that, apart from the Detaining Authority, the Government is also entitled to

revoke or modify the detention order made by the Detaining Authority, who happens to be inter alia a District Magistrate. It also implies that till the

approval is granted by the Government under Section 8 (4), the Detaining Authority retains jurisdiction to revoke the detention order in terms of

Section 21 of the General Clauses Act, Samvat 1977. The said Section 21 reads as under:-

21. Power to make, to include power to add to, amend, vary or rescind, orders, rules or bye-laws.

Where, by an Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in

the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or byelaws so

issued.

11. It is further evident that till the Government grants approval to the detention order in terms of Section 8(4) of the Jammu and Kashmir Public

Safety Act, 1978, the Detaining Authority has the power to add to, amend, vary or rescind inter alia any order issued by him which includes a

detention order.

12. On examining the Supreme Court decision in the case of Santosh Shankar Acharya (supra), we find that the relevant provisions of the

Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders and Dangerous Persons Act, 1981 are in pari materia to

the provisions of the Jammu and Kashmir Public Safety Act, 1978. For example, Section 3 of the Maharashtra Act is almost identical to Section 8 of

the J&K Act, Section 8 of the Maharashtra Act corresponds to Section 13 of the J&K Act and, similarly Sections 14 and 21 of the Maharashtra Acts

correspond to Sections 19 and 21 of the J&K Act.

13. The Supreme Court in the said decision was considering the case which had arisen from a Full Bench decision of the Bombay High Court. The

question before the Full Bench of Bombay High Court had been one which had been referred for its decision and that was "whether in case of an

order of detention by an officer under Section 3(2) of the said Maharashtra Act, non-communication to the detenu that he has a right of making a

representation to the detaining authority constituted an infraction of a valuable right of the detenu under Article 22(5) of the Constitution and, as such,

vitiated the order of detention? This question was answered in the affirmative, meaning that unless and until the detenu was communicated that he has

a right to make a representation to the Detaining Authority, there would be an infraction of the Constitutional right under Article 22(5) of the

Constitution of India and the detention order would be vitiated.

14. The Supreme Court, after considering the Constitutional Bench decision in *Kamleshkumar Ishwardas Patel v. Union of India* (1995) 4 SCC 51,

came to the conclusion that until the detention order is approved by the State Government, the Detaining Authority can entertain the representation

from the detenu in exercise of powers of the Bombay General Clauses Act and annul revoke or modify the order, as is provided under Section 14 of

the Maharashtra Act. The Supreme Court held that, this being the position, non-communication of the fact to the detenu that he could make a

representation to the Detaining Authority so long as the order of detention has not been approved by the State Government in a case where the

order of detention is issued by an officer other than the State Government under Section 3(2) of the Maharashtra Act would constitute an infraction

of a valuable right of the detenu under Article 22(5) of the Constitution and that the ratio of the Constitutional Bench decision in case of

Kamleshkumar's case (supra) would apply notwithstanding the fact that in *Kamleshkumar's* case (supra) the Court was dealing with an order

of detention issued under the provisions of COFEPOSA Act. Ultimately the

Supreme Court held as under:-

â??This being the position, it goes without saying that even under the Maharashtra Act a detenu will have a right to make a representation to the detaining authority so long as the order of detention has not been approved by the State Government and consequently non-communication of the fact to the detenu that he has a right to make representation to the detaining authority would constitute an infraction of the valuable constitutional right guaranteed to the detenu under Article 22(5) of the Constitution and such failure would make the order of detention invalid. We, therefore, see no infirmity with the impugned judgment of the Full Bench of the Bombay High Court to be interfered with by this Court. These appeals accordingly fail and stand dismissed.â??

15. From a reading of the said decision, it is abundantly clear that non-communication of the fact that the detenu can make a representation to the Detaining Authority, till the detention order is not approved by the Government, would constitute an infraction of a valuable Constitutional right guaranteed under Article 22(5) of the Constitution of India as also of the right under Section 13 of the Jammu and Kashmir Public Safety Act, 1978.Â Failure of such noncommunication would invalidate the order of detention.

16. The plea of the learned counsel for the respondents, that the detenu could make a representation to the State Government and that such an opportunity had been provided, would be of no consequence for the simple reason that the Governmentâ??s approval of the detention order came later i.e., on 28.12.2016 whereas, the detention order was executed upon the detenu on 24.12.2016 and between that date and 28.12.2016 he had a right to make a representation to the DetainingÂ Authority i.e., the District Magistrate, Baramulla, to revoke the detention order. That opportunity not having been given, vitiated the detention order. In other words, the detention order stood vitiated and invalidated on 22.12.2016 it self.

17. In view of the foregoing, we need not to consider any of the other pleas sought to be raised by the learned counsel for the appellant, inasmuch as the detention order has been invalidated because of noncommunication of the fact that the detenu could make a representation to the Detaining Authority. The detention order having become invalid, the detenu is liable to be released forthwith insofar as this detention order is concerned.

18. The appeal is allowed. The impugned order is set aside.â??

Applying the ratio of the law laid down above to the facts of the instant case, the detinue has not been informed that he has a right to make a

representation to the detaining authority and this, by itself, is sufficient to upset the order of detention, as it admitted of no exception.

12. The learned counsel for the detinue has also argued that the Officer, who handed over the detinue to the jail authorities of the District Jail,

Kathua, along with the relevant documents, should have filed an affidavit in the mater, which has not been done. From a bare glimpse of the execution

report (annexed with the detention record), what gets revealed is that the detention warrant has been executed on the 6th of March, 2018. It also

states that the contents of the detention warrant and the grounds of detention were read over to the detinue in Urdu and Kashmiri language, which

language he understood fully well and, in token thereof, his signature was attained on the Execution Report itself. To eradicate all doubts, it was

incumbent on the part of the officer, namely, SI Khursheed Ahmad, who did the exercise of handing over the documents and conveying the contents

thereof to the detinue, to file an affidavit in order to attach, at least, a semblance of fairness to his statement. Resort can, in this behalf, be had to the

law laid down by the apex Court of the country in the case of â??State Legal Aid Committee, J&K v. State of J&K & Ors.â?, reported in â??AIR

2005 SC 1270â??. wherein it has been held as under:Â

â??1/ Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite

material to show that the requirements of section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of

order of detention to be disclosed/communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State,

it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assessee and he was

informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand.

It is stated in the affidavit that the detinue refused to receive copy of the detention order and also refused to put his signatures on the documents. The

least the State could have done is to file an affidavit of the person who wanted to

serve the relevant documents and an endorsement to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of section 13 of the Act.â??

13. The judgement cited above is lucid and clear and applying its ratio to the facts of the instant case, what can be said is that it is an open and shut case of the deprivation of an inalienable right of the detainee, inasmuch as, he has not been informed that he can make a representation to the Detaining Authority till such time that the detention order is not approved by the Government. This permitted no option as it is a right guaranteed under Article 22(5) of the Constitution of India and Section 13 of the Act of 1978. It is incapable of being taken away and the failure, in providing this information to the detainee, has the effect of invalidating the order of detention.

14. In the backdrop of what has been said and done above, the instant Habeas Corpus petition is allowed, as a consequence of which, the order of detention bearing No. 193/DMB/PSA of 2018 dated 3rd of March, 2018, passed by the Respondent No.2/District Magistrate, Baramulla, is quashed, with a further direction to the respondents to release the person of Hilal Ahmad Ganie S/o Ghulam Nabi Ganie R/o Nowpora, Jagir, Kreeri, District Baramulla, forthwith from the preventive custody, if not required in any other case.

15. The record, as produced by the learned Additional Advocate General, be returned to him with utmost dispatch.