

(2018) 08 J&K CK 0080

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition No.102 Of 2018

Manzoor Ahmad Ganai @APPELLANT@Hash State of J&K & ors

Date of Decision : 29-08-2018

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Jammu and Kashmir Public Safety act, 1978 — Section 8(a), 8(4)
Arms Act, 1959 — Section 7, 25
Unlawful Activities (Prevention) Act, 1967 — Section 20

Citation : (2018) 08 J&K CK 0080

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1) In terms of order bearing No.3/DMP/PSA/18 dated 24.04.2018, passed by respondent No.2-District Magistrate, Pulwama, in exercise of the

powers conferred in him under Clause (a) of Section 8 of the Jammu and Kashmir Public Safety act, 1978, one Manzoor Ahmad Ganie S/o Habibullah

Ganie R/o Nowpora Payeen Tehsil Litter District Pulwama, has been detained and lodged in District Jail Kathua

2) The petitioner has challenged the said order of detention, mainly, on the grounds that the detaining authority has failed to apply its mind to the fact

whether the preventive detention of the detainee was imperative, notwithstanding his custody in a substantive offence, the detaining authority did not

inform the detainee that he has a right to make a representation before him against the order of detention. The detainee had not filed any bail

application in the FIR referred to in the grounds of detention nor were there any prospects of his release from the custody in the said FIR. Two

successive detention orders were quashed by this Court but despite that detainee

was not released, instead third detention order, which is impugned herein, has been slapped again him. It has also been added that the order of detention impugned has been passed by the respondent No.2 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 the record before passing the order of detention.

3) In the counter affidavit filed by the respondents it is stated that the grounds of detention have been furnished to the detainee. The detaining authority has complied with the requirements of law. It has also been stated that the detainee is involved in case FIR No.31/2017 registered at Police Station, Pulwama, for the commission of offences punishable under Section 7/25 Arms Act and Section 20 ULA(P) Act. The detainee has failed to avail the remedy prescribed under the Act as he has not filed the representation against the order of detention. The order of detention has been passed on justifiable grounds.

4) The main plank of the argument of the learned counsel for the petitioner is that the detainee was never released from preventive custody after the earlier two orders of detention were quashed by this Court and, therefore, there were no fresh activities attributable to the detainee. Further it is contended that in the communication bearing No.8-11/DMP/PSA/18 dated 24.04.2018, addressed to the detainee, the respondent No.2 has not informed the detainee that he can make a representation to the detaining authority. This infringement, it is stated, renders the order of detention liable to be set aside.

5) To support his argument, learned counsel for the petitioner placed reliance on the judgment rendered by a Division Bench of this Court in LPA No.43/2017 titled *Tariq Ahmad Dar v. State of J&K & Ors*, the relevant paras of which are extracted below:

¶6. The submission of the learned counsel for the appellant is that prior to Government'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 infraction 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 *pari materia* 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 infraction 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.Â 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.Â 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:- â??19. Revocation of detention orders.-

(1) Without prejudice to the provisions of section 21 of the General Clauses Act, Smvat 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.Â Â

(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 defectÂ Â Â

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.â??

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 sub-section (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:-

â??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 bye-laws so

issued.â??

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 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:-

"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 noncommunication 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 Detaining 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 itself.

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 non-communication 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, since the detenue has not been informed that he has a right to make a representation to the detaining authority, therefore, this by itself, is sufficient to

set aside the order of detention.

6) 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.

7) In the backdrop of what has been said above, the instant Habeas Corpus petition is allowed, as a consequence of which, the order of detention

bearing No. 3/DMP/PSA/18 dated 24.04.2018, passed by the Respondent No.2-District Magistrate, Pulwama, is quashed with a further direction to

the respondents to release the person of Manzoor Ahmad Ganaie, forthwith from the preventive custody, if not required in connection with any other

case.

8) The record, as produced by the learned Government Advocate, be returned to him with utmost dispatch.