

(2021) 03 J&K CK 0064

In the Jammu And Kashmir High Court

Case No : Writ Petition (Crl) No. 52 Of 2020, Criminal Miscellaneous No. 1833 Of 2020

Mohammad Akram

APPELLANT

Vs

Union Territory Of J&K And Ors

RESPONDENT

Date of Decision : 19-03-2021

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8, 13, 13(1), 19, 19(1)
Maharashtra Prevention Of Dangerous Activities Of Slumlords, Boot-leggers, Drugs Offenders And Dangerous Persons Act, 1981 — Section 3, 8, 8(1), 14, 14(1), 21
Constitution Of India, 1950 — Article 22(5)

Citation : (2021) 03 J&K CK 0064

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Muzaffar Iqbal, Bhanu Jasrotia

Final Decision : Disposed Of

Judgement

1. Through the medium of instant petition, the petitioner (hereinafter referred to as the 'detenue') has challenged the order of detention bearing No.DMR/INDEX-02 of 2020 dated 18.11.2020 passed by respondent No.2 (hereinafter referred to as the 'detaining authority') whereby the detenue has been detained in terms of the provisions of J&K Public Safety Act, 1978 (hereinafter referred to as the 'Act').

2. The detenue has challenged the impugned order of detention on the grounds that he has not been supplied the grounds of detention and the material in support thereof in the language that is understood by him as he is an illiterate person; that he has not been informed about his right to make an effective representation before the detaining authority against the impugned detention order; that there is complete lack of application of mind on the part of the detaining authority while framing the grounds of detention, inasmuch as the same are more or less xerox copy of the dossier submitted by the police; that the detenue's father had died in the year 1999 and in spite of this, the detaining

authority has forwarded the impugned order of detention to his father which shows complete non-application of mind on the part of the detaining authority and that the Statutory and the Constitutional safeguards required to be followed while passing an order of preventive detention, have not been complied with in the instant case.

3. The petition has been resisted by the respondents by filing a counter affidavit thereto. In their counter affidavit, the respondents have submitted that all the Statutory and the Constitutional safeguards have been taken care of while passing the impugned order of detention and that all the material including the copies of FIR etc., mention whereof is made in the grounds of detention, have been furnished to the detainee. It has been further submitted that the impugned order of detention stands confirmed by the Advisory Board. It has also been averred that the detaining authority, while passing the impugned order of detention, has minutely scrutinised the material and applied its mind. The respondents have also produced the detention record to support their version.

4. I have heard learned counsel for the parties and perused the material on record including the detention record.

5. During the course of arguments, learned counsel for the detainee confined his arguments to the contention that the detainee, in the instant case, has not been informed about his right to make an effective representation to the Detaining Authority against the impugned order of detention, thereby violating the Constitutional right guaranteed to him under Article 22 (5) of the Constitution of India.

6. A perusal of impugned order of detention shows that it has been passed on 18.11.2020 by respondent No.2 in exercise of its power under Section 8 of J&K Public Safety Act.

7. The covering letter dated 18.11.2020 to the impugned order of detention gives an information to the detainee that he can make a representation before the Government against the impugned order of detention, but it does not, at all, bear any reference to the fact that the detainee has a right to make representation to the Detaining Authority itself.

8. In the counter affidavit, the respondents have categorically submitted that the detainee, pursuant to the impugned order of detention, was detained on 18.11.2020 and the order of detention was approved by the Government on 27.11.2020 which means that from 18.11.2020 to 27.11.2020, it was open to the petitioner to make a representation to the Detaining Authority against the impugned order of detention.

9. Section 19 of J&K Public Safety Act provides that without prejudice to the provisions of Section 21 of the J&K General Clauses Act, a detention order may, at any time, be revoked or modified by the Government. Section 21 of J&K General Clauses Act provides that power to make an order includes the power to

revoke or modify it, which means that an Authority which is empowered to make an order is deemed to be vested with the power to revoke or modify the said order. Thus, the detaining authority until the order of detention passed by it is confirmed by the Government, is vested with the power to revoke it. Therefore, respondent No.2 was vested with the power to revoke the impugned order of detention until it was approved by the Government on 27.11.2020. The detenu, therefore, had a valuable right of making a representation before the Detaining Authority seeking revocation of the impugned order of detention until the same was approved by the Government.

10. The Supreme Court has, in the case of *State of Maharashtra vs. Santosh Shankaracharya*, (2000) 7 SCC 468, while interpreting the provisions of Section 8(1) and Section 14(1) of Maharashtra Prevention of Dangerous Activities of Slumlords, Boot-leggers, Drugs Offenders and Dangerous Persons Act, 1981, which are in pari materia with the provisions of Section 13(1) and Section 19(1) of J&K Public Safety Act respectively, observed as under:

"The only logical and harmonious construction of the provisions would be that in a case where an order of detention is issued by an officer under sub-section (2) of Section 3 of the Act, notwithstanding the fact that he is required to forthwith report the factum of detention together with the grounds and materials to the State Government and notwithstanding the fact that the Act itself specifically provides for making a representation to the State Government under Section 8(1), the said detaining authority continues to be the detaining authority until the order of detention issued by him is approved by the State Government within a period of 12 days from the date of issuance of detention order. Consequently, until the said detention order is approved by the State Government the detaining authority can entertain a representation from a detenu and in exercise of his power under the provisions of Section 21 of Bombay General Clauses Act could amend, vary or rescind the order, as is provided under Section 14 of the Maharashtra Act. Such a construction of powers would give a full play to the provisions of Section 8 (1) as well as Section 14 and also Section 3 of the Maharashtra Act. 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 an order of detention is issued by an officer other than the State Government under sub-section (2) of Section 3 of the Maharashtra Act would constitute an infringement of a valuable right of the detenu under Article 22(5) of the Constitution and the ratio of the Constitution Bench decision of this Court in *Kamlesh Kumar's case* (supra) would apply notwithstanding the fact that in *Kamlesh Kumar's case* (supra) the Court was dealing with an order of detention issued under the provisions of COFEPOSA".

11 Relying upon the aforesaid ratio laid down by the Supreme Court in *Santosh Shankaracharya's case* (supra), a Division Bench of this Court in *Tariq Ahmad Dar vs. State of J&K and ors*, 2017 (3) JKJ (HC) 684, has held that non-

communication of right of making a representation to a detainee before the Detaining Authority constitutes an infraction of valuable right accrued to a detainee which renders the order of detention unsustainable in law. The observations of the Division Bench in the aforesaid case are relevant to the context and the same are reproduced as under:

"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 material to the provisions of 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.

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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. Failure of such non-communication would invalidate the order of detention"

12 From the aforesaid enunciation of law on the subject, it is clear that non-communication of the fact that the detainee has a right to make an effective representation to the Detaining Authority against the detention order so long as the order of detention has not been approved by the Government constitutes violation of valuable right of the detainee under Article 22(5) of the Constitution. That being the position in the instant case, the impugned order of detention is not sustainable in law.

13 The cumulative effect of the aforesaid discussion leads to the only conclusion that in the instant case, the respondents have not adhered to the legal and Constitutional safeguards while passing the impugned detention order against the detainee. The impugned order of detention bearing No.DMR/INDEX-02 of 2020 dated 18.11.2020 issued by the District Magistrate, Rajouriis, therefore, unsustainable. Accordingly, the same is quashed. The detainee is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

14. The record, as produced, be returned to the learned counsel for the respondents.