

(2023) 04 J&K CK 0015

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 356 Of 2022

Zahid Nazir Dar

APPELLANT

Vs

Union Territory Of Jk & Ors

RESPONDENT

Date of Decision : 12-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 22, 22(5)

Jammu And Kashmir Public Safety Act, 1978 — Section 8(4)

Citation : (2023) 04 J&K CK 0015

Hon'ble Judges : Moksha Khajuria Kazmi, J

Bench : Single Bench

Advocate : M. A. Qayoom, Mubashir Malik

Final Decision : Allowed

Judgement

Moksha Khajuria Kazmi, J

1. In the instant Habeas Corpus petition, the petitioner has assailed the detention order No. 09/ DMK/PSA/2022 dated 29.03.2022, passed by respondent No. 2- District Magistrate, Kulgam (for short 'the detaining authority'), whereby one Zahid Nazir Dar S/O Nazir Ahmad Dar R/O Dar Mohalla Kujar Yaripora, District, Kulgam, (for short detinue), has been detained under the provisions of J&K Public Safety Act, 1978.

2. The detinue came to be detained by respondent No. 2 on the basis of communication dated 18.3.2022, addressed to respondent No. 3 whereby the material/ record, such as dossier and other connected documents in respect of the detinue have been produced before respondent no.3. However, neither copy of said communication nor any other document has been furnished to the detinue to enable him to make an effective representation; the detinue is shown to be involved in FIR No. 34/2020 of Police Station Yaripora, in which he has already been bailed out by the court of competent jurisdiction; the detinue after a period of about two years has again been arrested on the basis of the same FIR

and directed to be lodged in Central Jail, Srinagar wherefrom he has been shifted to Central jail, Varanasi, UP; the detainee was informed about his detention by way of communication dated 29.03.2022 and has been asked to make a representation to the Govt/Detaining Authority against his detention, if he so desires; the order of detention has to remain valid for 12 days as provided by Section 8(4) of the Act, unless same is approved by the Government within the said period and it is during the period of those 12 days that a representation can be made by the detainee before the District Magistrate. Therefore, the detainee has to be told to make a representation within a period of 12 days from the date of his detention, however in the communication dated 29.03.2022, detainee has not been informed that he can make a representation within a period of 12 days from the date of passing of the order of detention, therefore, a valuable right of the detainee stands defeated by the Detaining Authority.

3. Though the petitioner has challenged the detention order on various grounds, but the main ground of challenge is regarding the non-consideration of his representation filed against the detention order.

4. It is averred that because of non-consideration of the representation, the detention order is liable to be quashed. Copy of the representation having been received by the respondents are forming part of the writ petition as annexures IV & V.

5. The respondents have filed their objections and have tried to defend the order of detention, stating that the order of detention was passed by the detaining authority after being satisfied on the basis of the material available including the dossier submitted by Senior Superintendent of Police, Kulgam, that it was necessary with a view to prevent the detainee from acting in any manner prejudicial to the security of the State to place the detainee under preventive detention. It is averred that the detention of the detainee has been ordered strictly in accordance with the provisions of J&K Public Safety Act, 1978 (for short 'the Act') and the procedural safeguards prescribed under the provisions of the Act, have strictly been followed in the instant case.

6. It is further stated that from the grounds of detention it would transpire that the activities of the detainee are highly prejudicial to the security of the State and, therefore, there was no option left to the Detaining Authority, but to order detention of the detainee under the Act. It is also stated that the grounds of detention sufficiently connect the detainee with the activities which are highly prejudicial to the security of the State, as such, the detention of the detainee is legal.

7. The respondents have not denied that the detainee had addressed representation to them which has not been considered.

8. I have heard learned counsel for the parties and perused the material made available including the detention record.

9. It is quite evident that representation have been made by the detenu against his detention through his mother Mst. Mymoona Banoo which has been received by the respondents, but have not been considered by the respondents till date. The Xerox copy of a representation made to the Detaining Authority has been placed on record which bears the office stamp of the office of Deputy Commissioner proves that the representation has been received by the Detaining Authority. Furthermore, a postal receipt is also placed on record which shows that representation has also been made by the petitioner through his mother to the Government, i.e. Principal Secretary to Government, (Home) Department Civil Secretariat, Srinagar.

10. In these circumstances, this Court is left with no option, but to accept the stand of the petitioner that the detenu has made representation against his detention, but the same has not been considered. It is the bounden duty of the detaining Authority or the Government, as the case may be, to consider the representation of the detenu and pass appropriate orders thereon.

11. Article 22(5) of the Constitution of India, casts a legal obligation on the Government to consider the detenu's representation as early as possible. There should be no slackness, indifference and callous attitude in consideration of the representation of the persons who are detained. Any unexplained delay would be breach of constitutional imperative and it would render the continued detention of the detenu as illegal. Each day's delay in dealing with the representation has to be explained and the explanation offered must be reasonably indicating that there was no slackness or indifference.

12. In *Tara Chand vs State of Rajasthan and others*, 1980 (2) SCC 321, the Hon'ble Supreme Court has held that any inordinate and unexplained delay on the part of the Government in considering the representation renders the very detention illegal.

13. The Supreme Court in another case of *Rahmatullah vs State of Bihar*, AIR 1981 SC 2069 has held that clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. The obligation of the Government to afford to the detenu an opportunity to make representation is distinct from the Government's obligation to refer the case of the detenu along with representation to the Advisory Board to enable it to form its opinion and send a report to the Government. Therefore, it is implicit in clauses (4) and (5) of Article 22 that the Government, while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without getting influenced by any such view of the Board. The Supreme Court in the case of *Kundanbhai Dulabhai Sheikh vs. District Magistrate Ahmedabad and others*, 1996 CrL.J 1981 quashed the detention order only on the ground of delay in disposing of the representation. Having gone through the observations of the Supreme Court in the said case, I am of the considered view that the said decision with all force is applicable to the instant case. Therefore,

the detention order is liable to be quashed.

14. In view of the above settled proposition of law, I am of the view that non-consideration of the detenu's representation constitutes violation of the constitutional right guaranteed under Article 22 of the Constitution and also exhibits failure of the Government to discharge its statutory obligation/function. Therefore, for this reason alone, writ petition must succeed.

15. Accordingly, the writ petition is allowed and the impugned detention order No. 09/ DMK/PSA/2022 dated 29.03.2022, (supra) is quashed. The Jail Superintendent concerned is directed to release the detenu forthwith, if his detention is not required in connection with any other criminal case pending against him.

16. Record be returned to the concerned Government counsel against proper receipt.