

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

LPAHC No. 43/2017

Date of order: 09.06.2017

Tariq Ahmad Dar v. State of J&K & ors

Coram:

Hon'ble Mr. Justice Badar Durrez Ahmed, Chief Justice
Hon'ble Mr. Justice M. K. Hanjura, Judge.

Appearing counsel:

For the Appellant(s) : Mr. Wajid Haseeb, Advocate.
For the Respondent(s) : Mr. Asif Maqbool, GA.

i/	Whether to be reported in Press/Media	:	Yes/No
ii/	Whether to be reported in Digest/Journal	:	Yes/No

Per- Badar Durrez Ahmed-CJ (Oral)

1. This appeal is directed against the judgment dated 18.04.2017 passed by a learned Single Judge whereby the appellant's Habeas Corpus Petition No. 14/2017 was rejected.

2. The detenu (Tariq Ahmad Dar) was detained under detention order dated 22.12.2016 issued by the District Magistrate, Baramulla, in purported exercise of powers conferred by Clause (a) of Section 8 of the Jammu and Kashmir Public Safety Act, 1978. Prior to this detention order, the detenu is alleged to be involved in several criminal cases, including FIR No. 178/2016 and FIR No. 332/2016 registered at Police

Station, Baramulla. FIR 332/2016 pertained to an alleged incident which took place on 18.02.2016 and the said FIR has been registered under Sections 307, 148, 149, 336, 353 of RPC. In respect of that FIR the detenu was arrested on 17.11.2016. However, he has been granted bail on 24.11.2016. Immediately thereafter the detenu was arrested in respect of FIR 178/2016 which was registered under Sections 147, 148, 149, 332, 336, 307, 353 of RPC.

3. While he was in custody, the said detention order dated 22.12.2016 was passed by the District Magistrate, Baramulla. The detention order was executed on 24.12.2016 at Central Jail, Kot Bhalwal, Jammu. The grounds of detention were served upon him on the same date along with other relied upon documents. A communication was also addressed to him whereby in purported compliance of Section 13 of the Jammu and Kashmir Public Safety Act, 1978, the detenu was informed that he could make a representation to the Government in the Home Department against the said detention order, if he so desires.

4. On 28.12.2016 the Government approved the detention order made by the District Magistrate, Baramulla.

5. Several pleas have been urged before us by the learned counsel for the appellant but we are only considering one of the said pleas.

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, Samvat, 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 **Maharashtra and ors v. Santosh Shankar Acharya: (2000) 7 SCC 463**, wherein *pari meteria* 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. 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, 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.

(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 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:-

“ 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.”

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 Constitution 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.”

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.

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 Government'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.

19. Copies of this order be given to the learned counsel for the parties.

(M . K. Hanjura)
Judge

(Badar Durrez Ahmed)
Chief Justice

Srinagar
09.06.2017
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