HIGH COURT OF JAMMU AND KASHMIR-
SRINAGAR

Case No: HC(p) 134/2017 **Dated** : 28TH of Sept. 2017

ALI MOHAMMAD DAR ***VERSUS*** *STATE AND ORS.*

ORDER SHEET

CORAM:

HON'BLE *MR. JUSTICE M.K.HANJURA- JUDGE*

i. Whether to be approved for reporting in NET : Yes/No

ii. Whether to be approved for reporting in Digest/Journal : Yes/No

FOR THE PETITIONER/s : MR. NAASIR QADIRI

FOR THE RESPONDENT/s: . MR. Q.R.SHAMAS, Dy.AG

(M.K.HANJURA-J)

1/ One Shri Ali Mohammad Dar, appears to have been detained by dint of order bearing No. 62/DMB/PSA/2016-17 dated 23-03-2017, passed by the respondent No.2 – District Magistrate, Bandipora, in exercise of powers vested in him under clause (a) of section (8) of the Jammu & Kashmir Public Safety Act, 1978 (for short Act of 1978).

2/ It is pleaded in the petition that the detenue was earlier also detained under the provisions of the Public Safety Act and kept in preventive custody, but the said order of detention was revoked by the Government. However, instead of releasing him, he was booked in terms of the subsequent order of detention, impugned herein and lodged at Central Jail Kotebalwal. Learned counsel for the petitioner has submitted that the detenue continues to be in jail at the moment.

03/ The respondents have pleaded in their Counter affidavit that the grounds of detention were read over, explained and served to the detenue and he was told that he has a right to make a representation to the Government against the order of his detention, which, it appears,

has not been filed by him. The arguments have also been advanced on similar lines.

04/ The order of detention bearing No. 62/DMB/PSA/2016-17 dated 23-03-2017 has been challenged, inter alia, on the grounds that the respondent No.2, while informing the detenue of his detention under the provisions of the Act of 1978, also informed him that he can make a representation to the Government against the said detention order, if he so desires. The respondent No.2 has not, however, informed the detenue that he can make a representation to the Detaining Authority and this infraction renders the order of detention liable to be set aside. The other ground urged by the learned counsel for the petitioner is that the detenue could not have been detained under the PSA when he was already involved in substantive offences and was arrested on 20-02-2017 in the case bearing F.I.R No. 49/2016 of Police Station, Hajin, and was on remand, as gets revealed from the grounds of detention.

05/ **Heard** and considered.

06/ Preventive detention, as has been held in the cases of **A.K.Gopalan v. State of Madras (1950) SCR 88** and **Rekha vs. State of Tamil Nadu (AIR 2011 SCW 2262)**, is, by nature, repugnant to democratic ideas and an anathema to the rule of law. The Supreme Court in Rekha's case (supra) while emphasizing that article 22 (3) (b) Constitution of India is to be read an exception to article 21 of the Constitution of India and not allowed to nullify the right to personal liberty guaranteed under article 21. The Supreme Court further observed that since article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty

guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It has, therefore, to be understood that if the ordinary law of the land (India Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal. The Supreme Court added that it must be remembered that if, in the case of preventive detention, no offence is proved and there is no conviction, which can only be sanctioned by legal evidence, preventive detention is often described as "jurisdiction of suspicion." To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital. The Supreme Court, after putting reliance on the law laid down in Kamleshwar Ishwar Prasad Patel vs. Union of India and others (1995) 2 SCC 51 (para 49) observed that the history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigor cannot be allowed to be diluted on the basis of the nature of alleged activities of the detenue. The Supreme Court quoted with approval the observation made in **Ratan Singh Vs. State of Punjab and others 1981 (4) SCC**, emphasizing the need to ensure that the constitutional and statutory safeguards available to a detenue are followed in letter and spirit. It observed, *but the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set up, it is essential that at least those safeguards are not denied to the detenues.*

07/ The procedural requirements are the only safeguards available to a detenue since the Court is not expected to go behind the

subjective satisfaction of Detaining Authority. As laid down by the Apex Court in **Abdul Latif Abdul Wahab Sheikh v. B.K.Jha and anr. (1987) 2 SCC 22**, the procedural requirements are, therefore, to be strictly complied with, if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard.

08/ looking at the instant case from the above perspective, case FIR No. 49/2016 of Police Station, Hajin, for an offence u/s 13 ULA(P) Act was registered against the detenue in Police Station, Hajin, which, it is said, was under investigation at the time of the passing of the order of detention and the detenue was in custody in the said F.I.R and was on remand as detailed in the grounds of detention. This F.I.R forms the baseline of the order of the detention of the detenue. The question for consideration, therefore, is can an order of detention be passed on the face of such an eventuality? The answer to this question can be a big ***"No"*** taking into consideration the law laid down by the Apex Court of the Country in para 24 sub para (6) of the judgment delivered in the case of Sama Aruna Vs. State of Telangana and another, reported in AIR 2017 SC 2662, which reads as under:-

> *"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."*

09/ The same view has been repeated and reiterated by the Hon'ble Supreme Court paragraph 13 of the judgment pronounced in

the case of V.Shanta Vs. State of Telangana and 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."*

10/ Testing the case on hand on the touchstone of the law laid down above, the detenue could not have been detained after taking recourse to the provision of PSA, when he was in custody. Had he applied for bail, the proper course would have been to challenge the order of bail if granted to him. The detenue could not have been detained preventatively when he was already involved in the commission of substantive offences. This single infraction renders the order of detention liable to be set aside.

11/ The other aspect of the case, that cannot be lost sight of, is that the detenue has not been informed that he has a right to make a representation to the detaining authority also. Negation of this inalienable right renders the order of detention liable to be quashed. A cue can be had , in this behalf, from the law laid down in the case of Tariq Ahmad Dar versus State of J&K and others (LPA No. 43/2017), the relevant excerpts of which are reproduced 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, 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 State 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 arlier 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."

12/ The judgement cited above has a pellucid simplicity 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 detenue, 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 detenue, has the effect of invalidating the order of detention.

13/ In the backdrop of what has been said and done above, the petition is allowed, as a consequence of which, the order of detention bearing No. 62/DMB/ PSA/2016-17 dated 23rd of March, 2017, passed by the respondent No.2 – District Magistrate, Bandipora, is **quashed** with a further direction to the respondents to release the person of Ali Mohammad Dar S/O Mohammad Maqbool R/O

Danger Mohalla, Hajin, Tehsil Hajin District Bandipora, forthwith from the preventive custody, unless required in any other case.

14/ The petition is, accordingly, **disposed** of along with connected IAs. The record is returned to the learned counsel for the respondents in the open Court.

TARIQ Mota
SRINAGAR.

28-09 -2017

(M.K.HANJURA)
JUDGE


HIGH COURT
JAMMU & KASHMIR