**HIGH COURT OF JAMMU AND KASHMIR**
AT SRINAGAR

**HCP No. 84/2018**

Date of Order: 31st of July, 2018.

Owais Ahmad Bhat

Vs.

State of JK & Anr.

**Coram:**

**Hon'ble Mr Justice M. K. Hanjura, Judge.**

**Appearance:**

For the Petitioner(s): Mr Wajid Haseeb, Advocate.
For the Respondent(s): Mr B.A. Dar, Sr. AAG.

i) Whether approved for reporting in Law Journals etc.: Yes/No

ii) Whether approved for publication in Press: Yes/No

**01.** By the dint of order bearing No. 27/DMP/PSA/18 dated 05th of March, 2018, passed by the Respondent No.2/District Magistrate, Pulwama, in exercise of the powers conferred in him under clause (a) of Section 8 of the J&K Public Safety Act, 1978 (for short "The Act of 1978"), one Owais Ahmad Bhat @ Owais Shaproo S/o Abdul Rashid Bhat R/o Danak Mohalla Khrew, Tehsil Pampore, District Pulwama, has been detained and lodged in District Jail, Kathua.

**02.** The detenue has challenged the said order of detention, chiefly, on the grounds that the detaining authority did not inform him that he has the right to

make a representation before him against the order of detention. To this, it has been added that the detaining authority has failed to apply his mind to the fact whether the preventive detention of the detenue was imperative, notwithstanding his custody in a substantive offence. The detenue had not filed any application for the grant of bail in his favour in the FIRs referred to in the grounds of his detention nor were there any prospects of his release from the custody in the said FIRs. To this, it has been added, that the Respondent No. 2 has passed the order of detention 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 it before passing the order of detention.

**03.** Counter has been filed by the Respondents, wherein it is stated that the grounds of detention have been furnished to the detenue. The detaining authority has complied with the requirement of Clause 5 of Article 22 read with Article 21 of the Constitution of India. The detenue has failed to avail the remedy prescribed under the Act. He has not filed the representation against the order of detention. It has also been stated that the detenue is involved in case FIR No. 70/2016, registered at Police Station, Pampore, for the commission of offences punishable under Sections 147, 148, 34, 341, 336,353, 323, 427 RPC, FIR No. 187/2016, registered at Police Station Pampore, for the commission of offences punishable under Sections 147, 148, 336, 341, 323, 427 RPC, FIR No. 02/2018, registered at Police Station Khrew, for the commission of offence punishable under Sections 307 RPC and 3/5 Explosive Substances Act. In the end, it has been urged that since the order of detention has been passed on justifiable grounds, therefore, the instant Habeas Corpus petition merits dismissal, and it may, accordingly, be dismissed.

**04.** **Heard** and considered.

**05.** The main plank of the argument of the learned counsel for the detenue is that in the communication bearing No. 27/DMP/PSA/18 dated 05th of March, 2018, passed by the Respondent No.2/District Magistrate, Pulwama, addressed to the detenue, the Respondent No.2 has not informed the detenue that he can make a representation to the detaining authority. This infringement, it has been stated, renders the order of detention liable to be set aside.

**06.** To substantiate his argument, the learned counsel for the petitioner has placed explicit reliance on the law laid down by a Division Bench of the High Court of Jammu & Kashmir (of which I, Justice M. K. Hanjura, was a component) by order dated 09th June, 2017, passed in LPA No. 43/2017 titled ***"Tariq Ahmad Dar v. State of J&K & Ors."***, the relevant excerpts of which are reproduced below verbatim:

> ***"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 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."*

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 upset the order of detention.

**07.** Looking at the instant case from the other perspective, the detenue has pleaded, in his petition, that he was in custody of the police authorities for a substantive offence and, therefore, there was no need to direct his preventive detention. In the Counter affidavit, this plea of the petitioner has not been rebutted or proved otherwise. It has been stated in the Counter affidavit that he is involved in FIR No. 70/2016, registered at Police Station, Pampore, for the commission of offences punishable under Sections 147, 148, 34, 341, 336,353, 323, 427 RPC, FIR No. 187/2016, registered at Police Station Pampore, for the commission of offences punishable under Sections 147, 148, 336, 341, 323, 427 RPC, FIR No. 02/2018, registered at Police Station Khrew, for the commission of offence punishable under Sections 307 RPC and 3/5 Explosive Substances Act. The arrest of the detenue in the said FIRs, at the time of the passing of the order of detention, has not been disputed.

**08.** Since the detenue was in the custody of the police at the time of passing of the order of detention, therefore, the question that arises for consideration is whether an order of detention could be passed on the face of such an eventuality? The answer to this question is an emphatic *"No",* taking into consideration the law laid down by the Apex Court of the country in paragraph

No.24 of the judgment delivered in the case of ***"Sama Aruna v. State of Telangana & Anr."***, reported in ***"AIR 2017 SC 2662***", which may be noticed :

> *"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No. 221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-03. The detenue could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:*
>
> > *"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 carryon 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 in paragraph No. 13 of the judgment pronounced in the case of ***"V. Shantha v. State of Telangana & 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 instant case on the touchstone of the law laid down above, the detenue could not have been detained after taking recourse to the provisions of the Act of 1974, when he was already in the custody of the police authorities in the cases, the details whereof have been given hereinbefore. His custody in police for the offences stated above, has been converted into the custody under the impugned detention order. May be the detaining authority might have been laboring under the belief that if the detenue applies for bail, he may succeed in seeking his release but this apprehension of the detaining authority could have been guarded against by resisting and opposing the bail application. In the event of his release on bail, the State could have exercised its right to knock at the doors of the higher forum. This single infraction knocks the bottom out of the contention raised by the State that the detenue can be detained preventatively when he is already in custody and has not applied for bail. It cuts at the very root of the State action. The State could have taken recourse to the ordinary law of the land.

**11.** 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.

**12.** In the backdrop of what has been said and done above, the habeas corpus petition is **allowed**, as a consequence of which, the order of detention bearing No. 27/DMP/PSA/18 dated 05th of February, 2018, passed by the Respondent No.2/District Magistrate, Pulwama, is **quashed** with a further direction to the respondents to release the person of Owais Ahmad Bhat @ Owais Shaproo S/o Abdul Rashid Bhat R/o Danak Mohalla Khrew, Tehsil Pampore, District Pulwama, forthwith from the preventive custody, if not required in any other case.

**13.** The record, as produced by the learned AAG, be returned to him with utmost dispatch.

**(M. K. Hanjura)**
**Judge**

**SRINAGAR**
July 31st, 2018
"SHOWKAT"