HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

HCP No. 289/2017

Date of Order: 30th of March, 2018.

Irshad Ahmad Chopan

Vs.

State of JK & Ors.

Coram:

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

Appearance:

For the Petitioner(s): Mr Shakqat Nazir, Advocate.
For the Respondent(s): Mr R. A. Khan, 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. 10/DMA/PSA/DET/2017 dated 5th of August, 2017, passed by the Respondent No.2/District Magistrate, Anantnag, 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 Irshad Ahmad Chopan S/o Late Gh. Nabi Chopan R/o Kokagund, Verinag, Tehsil Doru, District Anantnag, has been detained and lodged in District Jail, Kathua.

02. The detenue has challenged the said order of detention, chiefly, on the ground that the detaining authority has failed to apply its mind to the fact

whether the preventive detention of the detenue was imperative, notwithstanding his custody in a substantive offence. The detenue had filed a bail application in the FIRs registered against him, which was allowed, but despite that, he was not released from the custody in the said FIRs.

03. Counter has been filed by the Respondents, wherein it is stated that 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. 97/2016, registered in Police Station, Dooru, for the commission of offences punishable under Sections 147, 148, 149, 436/511, 427 RPC; case FIR No. 108/2016, registered in Police Station, Dooru, for the commission of offences punishable under Sections 307, 147, 148, 149 RPC and case FIR No. 56/2017, registered in Police Station, Dooru, for the commission of offences punishable under Sections 307, 147, 148, 336, 332, 341 RPC. 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, since the detenue was admitted to bail, though not released from custody, in the FIRs cited above that formed the baseline of the order of the detention, therefore, he could not have been detained under the provisions of the Act of 1978. Testing this argument and the question on the touchstone of the law, such

a course could not be adapted in view of 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."*

06. The same view has been repeated and reiterated by the Hon'ble Supreme Court in paragraph No. 13 of the judgment delivered 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."

07. Looking at the instant case on the parameters 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 admitted to bail in the cases, the details whereof have been given hereinbefore. The State could have exercised its right to knock at the doors of a higher forum and seek the reversal of the order of bail so granted to the detenue by the Court. This single infraction knocks the bottom out of the contention raised by the State that the detenue can be detained preventatively when he was admitted to bail. It cuts at the very root of the State action. The State ought to have taken shelter under the ordinary law of the land.

08. In the communication bearing No. 48-53/DMA/PSA/JC/2017 dated 5th of July, 2017, it has been stated that the detenue can make a representation to the "Government" or to the "District Magistrate, Anantnag", if he so desires. In the execution report, attested by the Deputy Superintendent of District Jail, Kathua (attached with the detention record), it has been emphatically stated that the detenue was informed that he can make a representation to the "Government" only against the order of the detention. This has deprived the detenue to make

an effective representation to the detaining authority as provided under the law. This infringement, too, renders the order of detention liable to be set aside.

09. 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) under 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."

10. The judgement cited above is lucid and clear 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.

11. The learned counsel for the petitioner has also argued that the Officer, who handed over the detenue to the jail authorities of the District Jail Kathua, along with the relevant documents, should have filed an affidavit in the matter, which has not been done. From a bare glimpse of the execution report (annexed with the detention record), what gets revealed is that the detention warrant has been executed on the 10th of August, 2017, at District Jail, Kathua. It also states that the contents of the detention warrant and the grounds of detention were read over to the detenue in English and explained to him in Urdu/Kashmiri languages, which languages he understood fully well and in token thereof, his signature was attained on the Execution Report itself. To eradicate all doubts, it was incumbent on the part of the officer, namely, SI Mohd Ashraf, who did the exercise of handing over the documents and conveying the contents thereof to the detenue, to file an affidavit in order to attach, at least, a semblance of fairness to his statement. Resort can, in this behalf, be had to the law laid down

by the apex Court of the country in the case of ***"State Legal Aid Committee, J&K v. State of J&K & Ors."***, reported in ***"AIR 2005 SC 1270"***, wherein it has been held as under :

> *"1/ Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to show that the requirements of section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of order of detention to be disclosed/communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assesse and he was informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detenue refused to receive copy of the detention order and also refused to put his signatures on the documents. The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of section 13 of the Act."*

Applying the ratio of the law laid down above to the facts of the instant case, the detenue has not been informed that he has a right to make a representation to the detaining authority and this, by itself, is sufficient to upset the order of detention as it admitted of no exception.

12. 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, except in due course of law and for the purposes sanctioned by law.

13. In the backdrop of what has been said and done above, the instant Habeas Corpus petition is **allowed**, as a consequence of which, the order of detention

bearing No. 10/DMA/PSA/DET/2017 dated 5th of August, 2017, passed by the Respondent No.2/District Magistrate, Anantnag, as extended vide Government order No. Home/PB-V/119 of 2018 dated 7th of February, 2018, is **quashed** with a further direction to the respondents to release the person of Irshad Ahmad Chopan S/o Late Gh. Nabi Chopan R/o Kokagund, Verinag, Tehsil Doru, District Anantnag, forthwith from the preventive custody, if not required in any other case.

14. Registry is directed to return the record relating to the detention of the detenue, as produced by the learned Additional Advocate General, to him with utmost dispatch.

(M. K. Hanjura)
Judge

SRINAGAR
March 30th, 2018
"TAHIR"