VIJAY KUMAR

v.

STATE OF J & K & OTHERS

March 17, 1982

[D.A. DESAI AND BAHARUL ISLAM, JJ.]

Jammu & Kashmir Public Safety Act, 1978—Section 13(1)—Detaining authority must give the detenu earliest opportunity of making representation—Forwarding detenu's representation to Government—Jail authorities—Mere channel of communication—Delay in transit—No excuse for delay in dealing with representation—Unexplained delay—Invalidates Order of detention.

The petitioner has arrested on June 26, 1981 under the Enemy Agent Ordinance. The Chief Judicial Magistrate rejected his application for bail on the ground that he had no jurisdiction to try him. The Addl. Sessions Judge rejected his bail appllcation on the ground that as he was by then ordered to be detained under the J & K Public Safety Act the bail application has become infructuous.

The detention order dated July 11, 1981 was served on the detenue in Jail on July 15, 1981. His representation dated July 29, 1981 was forwarded to the State Government on July 29, 1981 and simultaneously a wireless message was sent on the same day. The representation was received by the Government on August 12, 1981. After investigations the file was put up to the Chief Minister on August 28, 1981 for approval. The Chief Minister rejected the representation on August 31, 1981 which was communicated to the petitioner in jail on September 1, 1981. The detenu's case was referred to the Advisory Board on August 3, 1981. Its report was submitted on September 4, 1981.

In this petition under art. 32 of the Constitution it was contended before this Court on behalf of the petitioner that as section 13 (1) of the Jammu & Kashmir Public Safety Act 1978 imposes an obligation on the detaining authority to give the detenu the earliest opportunity of making a representation against the detention order the long unexplained delay in this case had invalidated the order of detention.

Allowing the petition,

HELD : The petitioner's representation had not been dealt with as expeditiously as possible. There was therefore contravention of section 13 of the Act which invalidated the detention. [532 D]

Preventive detention, unlike punitive detention, does not afford an opportunity to the detenu to explain his side of the matter before he is deprived

of his liberty and therefore the statute makes it obligatory on the authorities to afford him the earliest opportunity to represent his case and a corresponding obligation on the authority to consider the representation. The word "earliest" which qualifies the term "opportunity" must equally qualify the corresponding obligation of the State to deal with the representation if and when made as expeditiously as possible. [529 H; 530 A-B] A

The jail authorities who are merely a communicating channel have to move with promptitude so that sufficient guarantee of affording earliest opportunity of making the representation and the same reaching the Government is translated into action. The corresponding obligation of the State to consider the representation cannot be whittled down by merely saying that time was lost in transit. The State Government must gear up its own machinery to see that in these cases the representation reaches the Government as early as possible and is considered by the authorities with equal promptitude. Any unexplained delay would be denial of the statutory protection given to the detenu. [530 D-G] B C

In the instant case there were two time lags : the representation handed in to the Jail Superintendent on July 29, 1981 reached the Government on August 12, 1981 after a time lag of fourteen days and the representation was disposed of on August 31, 1981 after a time lag of nineteen days and the delay has not been explained on any convincing ground. [531 F, 532 B] D

Khudi Ram Das v. *State of West Bengal*, [1975] 2 SCC 81, referred to.

Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. Where there is need to order preventive detention of a person already in jail the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. [528 F-G] E

In the instant case there is nothing to indicate awareness of the detaining authority that the detenu was already in jail for more than 16 days and yet the impugned order was made. This clearly exhibits non-application of mind and would result in invalidation of the order. But the Court did not base its order on this ground. [528 G-H] F

ORIGINAL JURISDICTION : Writ Petition (Criminal) No. 9516 of 1981. G

(Under article 32 of the Constitution)

Bhim Singh, P.D. Sharma & Subash Sharma for the Petitioner. H

M.N. Phadke and Altaf Ahmed for the Respondents.

A The Judgment of the Court was delivered by

DESAI, J. On February 9, 1982 we made an order quashing the detention order dated July 11, 1981 made by the District Magistrate, Jammu in exercise of the power conferred by Section 8 of The Jammu and Kashmir Public Safety Act, 1978 ('Act' for short) B and we announced that the reasons would follow. Here are the reasons.

The detenu Vijay Kumar was arrested on June 26, 1981. A petition was moved on his behalf before the Chief Judicial Magistrate C Jammu praying for releasing the detenu, on bail. This petition for bail appears to have come up before the learned Magistrate on July 4, 1981 when the following order was made :

> "I have heard the advocate for the applicant and perused the C.D. File. Put up for orders on 6.7.81."

D

When the matter again came up on July 6, 1981, the learned Magistrate made the following order :

> "Although there was nothing in the C.D. File about E his (Petitioner) involvement in E.A.O. (Enemy Agents Ordinance) on 4.7.81, but today a detailed report has been presented in which one of the offences of which he is charged is u/s 3, E.A.O. which this Court is not competent to try. Hence this application is returned to the applicant for presentation to the proper court alongwith report."

F

The detenu thereupon moved an application for releasing him on bail before the learned Additional Sessions Judge, Jammu, who, we are informed, was competent to try the accused charged with an offence under Enemy Agents Ordinance. His petition for bail came up before the learned Additional Sessions Judge on July G 11, 1981 when the following order was made :

> "This application pertains to Vijay Kumar accused who is involved for an offence under the Enemy Agents Ordinance which is being investigated by the Counter H Intelligence Police, Jammu. The learned Chief Prosecuting Officer and the learned counsel for the accused have been heard,

During the course of arguments an order has been shown to me by the police that said Vijay Kumar accused has now been ordered to be detained under the Public Safety Act.

In view of this order, this bail application has become infructuous which is disposed of accordingly."

The detenu was served with the detention order dated July 11, 1981 on the same day in jail because he was already in jail from June 25, 1981. The grounds for detention were served on him on July 15, 1981. The detenu submitted his representation dated July 29, 1981 addressed to the Secretary the Government Home Department to the Superintendent, Central Jail, Jammu where the detenu was detained. One Shri K.D. Sharma, Incharge Superintendent, Central Jail Jammu has stated in his affidavit dated February 6, 1982 that the representation of the detenu dated July 29, 1981 was forwarded to the Government at Srinagar vide Office letter No. 2595 dated July 29, 1981 and simultaneously a wireless message No. 2596 on the same day was also sent to the Government intimating that the representation of the detenu had been forwarded to the Government for appropriate action. Mr. K.S. Salathia, Deputy Secretary to the Government of Jammu and Kashmir, Home Department, Jammu, in his affidavit dated February 9, 1982 has stated that the representation of the detenu was received from the Superintendent, Central Jail, Jammu in the office of the Home Department at Srinagar on August 12, 1981. The department also received the comments of S.P., C.I.D. Counter Intelligence, Jammu and thereafter the case was processed on August 24, 1981 in the office of the Home Department at Srinagar and the file was placed before the Home Secretary on August 25, 1981, who recommended the same for approval on August 28,1981 to the Chief Minister (Home) From the same affidavit, it further transpires that the Chief Minister rejected the representation on August 31, 1981 and the same was communicated to the detenu on September 1, 1981. In the meantime, the case of the detenu was referred to the Advisory Board on August 3, 1981. The Advisory Board submitted its report to the Government on September 4, 1981.

One Rattanlal, the brother of the detenu moved Petition No. 31 of 1981 for writ of Habeas Corpus in the High Court of Jammu and Kashmir at Jammu. The petition came up for hearing before

A the learned Single Judge, who by his judgment dated December 7, 1981 rejected the same. Thereafter the detenu by the present writ petition, moved this Court under Article 32 of the Constitution for a writ of Habeas Corpus.

B Section 8 of the Act prescribes grounds for detention, one such ground being to prevent any person from 'acting in any manner prejudicial to the security of the State. The impugned order of detention recites that the detenu is detained with a view to preventing him from 'acting in any manner prejudicial to the security of the State.' The expression 'acting in any manner prejudicial to the C security of the State' has been defined in Section 8 (3) of the Act to mean making preparations for using, or attempting to use, or using or instigating, inciting, provoking or otherwise abetting the use of force, to overthrew or overawe the Government established by the law in the State. The detenu contended before the High Court that accepting all the activities attributed to the detenu in D the grounds of detention at their face value. the alleged prejudicial activity would not fall within the ambit of the expression 'acting in any manner prejudicial to the security of the State.' The definition of the expression as hereinbefore extracted indicates that the person accused of 'acting in any manner prejudical to the security of the State' must be shown to be making preparations for using, or E attempting to use, or using or instigating, inciting or provoking or otherwise abetting the use of force, and the intention or motive for the activity must be to overthrow or overawe the Government established by law in the State. The learned judge of the High Court following an earlier Division Bench judgment of the same High Court in *Kharatilal* v. *State*,[1] negatived this contention ob- F serving that where the Government accusation against the detenu is that he had been indulging in supplying information for Pakistan Army Intelligence and was passing on vital information pertaining to the Army deplopment etc. to that Agency, such activities were likely to assist Pakistan in any armed aggression against the State and were a threat to the security of the State. This view needs examination G but as the argument was not pressed before us, we refrain from examining the same.

Number of contentions were advanced at the hearing of this petition but we propose to deal with only two of them which in our H

(1) 1981 K.L.H. 71.

opinion go to the root of the matter and which, wheh accepted, in our opinion, would result in invalidation of the order.

The first contention is that the order of the District Magistrate suffers from non-application of mind inasmuch as the date on which he passed the impugned order of detention dated July 11, 1981, the detenu was long before arrested and locked up in Jail on the allegation that he was suspected to have committed some offence under the Enemy Agents Ordinance 8 of Samvat Year 2005, and, therefore there was no present apprehension that the detenu, if not detained, was likely to act in any manner prejudicial to the security of the State. The District Magistrate passed the impugned order of detention on being satisfied that with a view to preventing the detenu from acting in a manner prejudical to the security of the State it was necessary to detain him. The order *ex facie* does not show that the detaining authority was aware that the detenu was already arrested and kept in jail. If the detaining authority was conscious of the fact that the detenu was already arrested and confined in jail, the order *ex facie* would have shown that even though the detenu was in jail, with a view to preventing him from acting in a manner prejudicial to the security of the State it was necessary to detain him. There is a foot note in the order that the order was forwarded to the S.P., C.I.D. Counter Intelligence, Jammu for execution of the order under section 3 of the Act. The further direction was that notice of the order shall be given to Vijay Kumar s/o Anant Ram, r/o H. No. 609, Peer Mitha, Jammu, by reading over and explaining the same to him in language he understands. The detention order does not give the slightest indication that the detaining authority was aware that the detenu was already in jail yet on the material placed before him he was satisfied that a detention order ought to be made. There is nothing in the order to show that to the knowledge of the detaining authority the detenu was already in jail for a period of more than 16 days before the date on which he passed the order and that such detention in the opinion of the detaining authority was not sufficient to prevent the detenu from acting in a manner prejudicial to the security of the State, and therefore power under section 8 of the Act is required to be exercised.

The detenu in para 3 of his petition before this Court has specifically averred that he was arrested on June 26 1981, the correct

A date being June 25, 1981, under a false and fabricated charge. Shri K.S. Salathia, Deputy Secretary to Government of Jammu & Kashmir, Home Department, who has filed the counter affidavit has with reference to the averments made in para 3 of the petition made a very very ambiguous statement that for the purpose of J and K Public B Safety Act the petitioner was arrested on July 11, 1981, pursuant to the detention order. It is no where suggested that the detaining authority was aware of the fact that the detenu was already in jail and that keeping in view the fact the detenu was already locked up in jail yet it was considered necessary for preventing him from acting in a manner prejudicial to the security of the State to pass the detention C order. It may further be pointed out that Shri A. Sahasranaman, the District Magistrate of Jammu who has made the impugned detention order, filed an affidavit on February 7, 1982. Of course, in fairness to him it must be stated that this affidavit was for the limited purpose of pointing out as to how he dealt with the case of Hans Raj, another detenu whose detention was quashed by this D Court subsequent to the order of this Court. It may be noticed in passing that Hans Raj and the detenu were involved jointly in the activity, which led to the detention of the detenu. Even though this affidavit was filed for the limited purpose, it came on record after the case was taken up for hearing by this Court and the affidavit at least does not throw any light on the vexed question whether E the detaining authority was aware of the fact that the detenu on being suspected of having committed a serious offence, was already in jail for a period of more than a fortnight before the date of the impugned detention order. Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner F prejudicial to the security of the State. May be, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awarness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preven- G tive detention order needs to be made. There is nothing to indicate the awareness of the detaining authority that detenu was already in jail and yet the impugned order is required to be made. This, in our opinion, clearly exhibits non-application of mind and would H result in invalidation of the order. We, however, do not base our order on this ground.

The second contention which in our opinion goes to the root of the matter is that there has been a violation of section 13 of the Act. Section 13 provides as under :

> "13. Grounds of order of detention to be disclosed to persons affected by the order :—(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but not later than five days from the date of detention, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the Government."

x x x

The provision contained in section 13 (1) is on par with the constitutional protection conferred by Article 22 (5) of the Constitution of India. The contention is that the obligation on the detaining authority to afford to the detenu the earliest opportunity of making representation against the order of detention, in order not to render it illusory simultaneously obliges the authority to whom the representation is made to consider the same expeditiously. Submission is that a statutory right conferred on the detenu enabling him to make a representation which of necessity must be giving an opportunity to point out to the Government as to why the detention order was not justified and that it must be revoked and the personal liberty deprived under the detention order must be restored, is to convince the Government to take into consideration the facts and contentions set out in the representation, which must imply that the Government must consider the same. The earliest opportunity to be afforded for making representation inheres the corresponding duty of the Government to consider the representation so received expeditiously. The reason behind enacting this provision is manifest. When power to detain without trial is exercised, the authority exercising the power must afford an opportunity to the detenu to convince the Government/detaining authority that the power was not justifiably exercised or no occasion arose for exercise of the power. In a punitive detention which is the end product of a trial in which the convict participates and has full opportunity to present his side of the case while preventive detention ordinarily described as jurisdiction based on suspicion does not afford any opportunity to the detenu to explain his side of the matter before

A he is deprived of the liberty and; therefore, so soon after the detenu is deprived of his personal liberty the statute makes it obligatory on the authorities concerned to afford him an earliest opportunity to represent his side of the case and which inheres the corresponding obligation on the authority to consider the same. The word 'earliest' which qualifies the opportunity must equally qualify the corresponding obligation of the State to deal with the representation if and when made, as expeditiously as possible. The opportunity contemplated by the section is the opportunity to make a representation against the detention order to the Government and therefore *ex hypothese* soon after the person is deprived of his personal liberty he must be afforded the earliest opportunity to make a representation. The representation is to be made to the Government. Therefore the detenu who has already been served with the detention order and thus deprived of his liberty would ordinarily be in a position to send his representation through the jail authorities. The jail authority is merely a communicating channel because the representation has to reach the Government which enjoys the power of revoking the detention order. The intermediary authorities who are communicating authorities have also to move with an amount of promptitude so that the statutory guarantee of affording earliest opportunity of making the representation and the same reaching the Government is translated into action. The corresponding obligation of the State to consider the representation cannot be whittled down by merely saying that much time was lost in the transit. If the Government enacts a law like the present Act empowering certain authorities to make the detention order and also simultaneously makes a statutory provision of affording the earliest opportunity to the detenu to make his representation against his detention, to the Government and not the detaining authority, of necessity the State Government must gear up its own machinery to see that in these cases the representation reaches the Government as quickly as possible and it is considered by the authorities with equal promptitude. Any slackness in this behalf not properly explained would be denial of the protection conferred by the statute and would result in invalidation of the order.

Reverting to the facts of this case, the detenu who in jail from June 25, 1981, was served with a detention order on July 11, 1981, the very day on which the detention order was made. The grounds of detention were served upon him on July 15, 1981. Admittedly the detenu submitted his representation to the Superintendent of Jail on July 29, 1981. One K.D. Sharma, Medical Officer, Central Jail,

Jammu, Incharge Central Jail, Jammu who has filed his affidavit dated February 6, 1982, has admitted that the detenu submitted his representation addressed to the Secretary to the Government, Home Department, on July 29, 1981. He proceeds to assert that the said representation in original was forwarded by post to the Government in Srinagar vide his office No. 2595 dated July 29, 1981. He further adds that a wireless message No. 2596 dated July 29, 1981, was also sent to the Government to intimate that the representation of the detenu had been forwarded to the Government for appropriate action. Postal communication from Jammu to Srinagar hardly takes two days unless it is pointed out that there was some break down of communication. Nothing to that effect was brought to our notice. Now, Shri Salathia has stated in his counter affidavit that as no representation was received a wireless message was sent on August 6, 1981, making reference to the wireless communication from the Superintendent of Jail that the representation referred to in the wireless message of the Jail Superintendent has still not been received at Srinagar. He requested the Superintendent to send a duplicate copy of the same by air consignment, and gave a further direction that in future all such communications should be sent through air consignment. Be that as it may, he says that the representation was received in the office on August 12, 1981. The comments from S.P., C.I.D., Counter Intelligence were called for on August 14, 1981. He does not state the date on which they were received but he says that the case was examined and processed on August 24, 1981 in the office and the file was placed before the Home Secretary on August 25, 1981, who recommended the same for approval on August 28, 1981, and the Chief Minister (Home) rejected the representation on August 31, 1981, and the fact of rejection of the representation was communicated to the detenu on September 1, 1981. There are two time lags which may be noticed. Representation admittedly handed in the Superintendent of Jail on July 29, 1981 to at Jammu reached Srinagar, the summer capital of the State on August 12, 1981, which shows a time lag of 14 days. The second time lag is, from our point of view, more glaring. Even though the concerned office was made aware of the fact by the wireless message of the Superintendent of Jail, Jammu, dated July 29, 1981, that a representation of the detenu has been sent by post, the first query about its non-receipt came as per the wireless message dated August 6, 1981. That can be overlooked, but it has one important message. The concerned office was aware of the fact that a representation has

A already been made and a duplicate was sent for. With the background of this knowledge trace the movement of the representation from the date of its admitted receipt being August 12, 1981. If the representation was received on August 12, 1981, and the same office disposed it of on August 31, 1981, there has been a time lag of 19 days and the explanation in that behalf in the affidavit of B Shri Salathia is far from convincing. In our opinion, in the facts of this case this delay, apart from being inordinate, is not explained on any convincing grounds.

In *Khudi Ram Das* v. *State of West Bengal*,[1] this Court held that one of the basic requirements of clause (5) of Article 22 is that the C authority making the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention and this requirement would become illusory unless there is a corresponding obligation on the detaining authority to *consider the representation of the detenu as early as possible*. Thus, in the facts of this case we are not satisfied that the representation was dealt D with as early as possible or as expeditiously as possible, and, therefore, there would be contravention of section 13 of the Act which would result in the invalidation of the order.

These are the reasons which had prompted us to quash and E set aside the detention order.

P.B.R. *Petition allowed.*

(1) [1975] 2 S.C.C. 81.