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Mohammed Jaffer Khan Vs. The State of Karnataka

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Court : Karnataka

Decided On : Jul-09-2015

Judge : Mohan M. Shantanagoudar and Budihal R.B.

Appeal No. : WPHC 82/2015

Appellant : Mohammed Jaffer Khan

Respondent : The State of Karnataka

Judgement :

R1IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE9h DAY OF JULY, 2015 PRESENT THE HONBLE MR. JUSTICE MOHAN M. SHANTANAGOUDAR AND THE HONBLE MR. JUSTICE BUDIHAL R.B. WRIT PETITION (HABEAS CORPUS) NO.82/2015 BETWEEN: Mohammed Jaffer Khan S/o H.S.Raheem Khan Aged about 25 years Occ: Mobile Business R/o 2nd Cross, Lashkar Mohalla Shivamogga-577201 (By Sri Dinesh Kumar K. Rao, for Sri R.B.Deshpande, Adv.,) AND :

1. The State of Karnataka by its Secretary Department of Home Vidhana Soudha Bangalore-560001 .. Petitioner 2 2. Deputy Commissioner and District Magistrate Shivamogga District Shivamogga-577201 3. The Superintendent of Police Shivamogga District Shivamogga-577201 4. The Deputy Superintendent of Police Shivamogga District Shivamogga-577201 5. The Superintendent/Jailor Central Prison Bellary-583101 ..Respondents (By Sri D.Nagaraj, Addl. Government

Advocate.,) This Writ Petition (Habeas Corpus) is filed under Articles 226 and 227 of the Constitution of India praying to issue (a) A writ in the nature of Habeas Corpus by quashing of the order of detention dated 11.04.2015 passed by Respondent No.2 in No.MAG(1)CR/39/38184/14-15 produced at Annexure-A and B; (b) A writ in the nature of Habeas Corpus by quashing the confirmation order of detention dated 20.04.2015 passed by Respondent No.1 in No.HD211SST2015 Bangalore produced at Annexure-E; 3 (c) A writ in the nature of Habeas Corpus by quashing of the extention of order of detention dated 14.05.2015 passed by Respondent No.1 in HD211SST2015 produced at Annexure-F; (d) A writ of direction directing the Respondent No.5 to release the detenue Sri Yasin Khureshi s/o Ejaj Ahamed, forthwith. This Petition coming up for orders, this day, MOHAN M. SHANTANAGOUDAR .J., made the following.

ORDER

Brief facts leading to this Habeas Corpus Petition are as under: The initial order of detention vide Annexure-A dated 11.4.2015 was passed by the delegate i.e., the District Magistrate, Shivamogga under Section 3(2) r/w Section 3(1) of the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug offenders, Gamblers, Goondas, Immoral Traffic Offenders, Slum-Grabbers and Video or Audio Pirates Act, 1985 (the Act for short) on certain grounds. The 4 grounds of detention were served on the detenue as per Annexures-C and D dated 11.4.2015. Thereafter the order of approval was passed by the State Government under Section 3(3) of the Act vide Annexure-E dated 20.4.2015. The State Government has, after the affirmative opinion rendered by the Advisory Board, confirmed the detention order passed by the delegate under Sections 12(1) and 13 of the Act as per Annexure-F dated 14.5.2015.

2. As could be seen from the grounds of detention, it is clear that the detaining authority apart from furnishing the grounds to the detenue, has instructed him if he so desires, to make representation against the order of detention to the State Government and to the Advisory Board through the District Magistrate, Shivamogga or through Senior Superintendent of Central Prison, Bellary. The detenue is not made known about his right to make his representation to the

detaining authority. 5

3. An analysis of the provisions of the Act indicates that Section 3 empowers the State Government to issue an order of detention under sub-section

(1) of Section

3. The District Magistrate or Commissioner of Police on being authorized by the State Government could issue an order of detention under sub-section

(2) of Section

3. When an officer exercises power and issues orders of detention under sub-section (2), then he is duty bound to report forthwith the fact of detention and the grounds on which the order of detention is made and/or other particulars to the State Government. On receipt of the report, the grounds and the particulars from the concerned officer, the State Government is required to consider as to whether the order of detention could be approved or not and such consideration shall be within 12 days. If the detention order is not approved within 12 days, then it automatically lapses. Section 8 of the Act specifically provides that a detenue must be communicated the grounds on which the 6 order of detention has been made, as soon as may be, but not later than 5 days from the date of detention. This mandatory obligation is both on the authority who passes an order of detention either under sub-section

(1) or under sub-section

(2) of Section 3 of the Act. It is no doubt true that in latter part of sub-section

(1) of Section 8 of the Act, it has been categorically mentioned that an earliest opportunity of making a representation against the order to the State Government should be afforded. But that does not make the State Government the detaining authority as soon as the factum of detention is communicated by the person concerned exercising power sub-section

(2) as provided under sub-section

(3) thereof nor does it take away the power of entertaining a representation from a detenue so long as the order of detention has not been approved by the State Government. Despite the fact that Section 8(1) of the Act in terms, provides for a representation of being made to the State Government but, 7 in a case where an officer other than the State Government issues an order of detention under sub-section

(2) of Section 3, his powers as the detaining authority to deal with the representation under the provisions of Section 21 of the Mysore General Clauses Act, 1899 (Karnataka Act) cannot be said to be taken away merely because Section 8(1) specifically provides for making a representation to the State Government. In this context, it is relevant to note the provisions of Section 21 of the Mysore General Clauses Act, 1899 (Karnataka Act), which reads thus: 21. Power to make to include power to add, to amend, vary or rescind notifications, orders, rules or bye-laws:- Where, by any enactment, 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. 8 A bare reading of Section 21 of the Mysore General Clauses Act, 1899 makes it clear that where, by any enactment, a power to issue orders is conferred on a particular authority, then that power includes the power to add, to amend, vary or rescind any order. Hence it can be said that Section 8(1) of the Act will not take away the power of the detaining authority to consider the representation.

4. Though Article 22(5) of the Constitution of India does not say to whom such representation is to be made, but the right to make a representation against the detention order undoubtedly flows from the constitutional guarantee enshrined therein. Such representation shall have to be made before a person who has power to approve, rescind or revoke the decision. We have already stated supra that the power of the detaining authority as provided under Section 21 of the General Clauses Act cannot be said to have been taken away merely because 9 Section 8(1) of the Act specifically provides for making representation to the State Government. Since the order of the detaining authority will survive for 12 days i.e.,

till it is approved by the State Government under Section 3(3) of the Act, the detaining authority has the power to revoke or rescind its order and therefore in view of the safeguards provided under Article 22(5) of the Constitution, the detenue if told, can make a representation within that period to the detaining authority in which case it would be under an obligation to consider the same.

5. Section 14 of the Act further makes it clear that without prejudice to the provisions of Section 21 of the Mysore General Clauses Act, 1899 (Karnataka Act), a detention order may, at any time, be revoked or modified by the State Government, notwithstanding that the order has been made by an officer mentioned in sub-section (2) of Section 3 of the Act. Hence the Legislature has make it amply clear that the provisions of Section 14 would be read 10 without prejudice to the provisions of Section 21 of the Mysore General Clauses Act, 1899. It is too well known a principle of construction of statutes that the legislature engrafted every part of a statute for a purpose and the legislative intention is that every part of the statute should be given effect. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. The only logical and harmonious construction of the provisions would be that in a case where an order of detention is issued by an officer under sub-section (2) of Section 3 of the Act notwithstanding the fact that he is required to forthwith report the factum of detention together with the grounds and materials to the State Government and notwithstanding the fact that the Act itself specifically provides for making a representation to the State Government under Section 8(1), the said detaining authority continues to be the detaining 11 authority until the order of detention issued by him is approved by the State Government i.e., until a period of 12 days from the date of issuance of detention order. Consequently, until the said detention order is approved by the State Government, the detaining authority can entertain a representation from a detenue and in exercise of its powers under the provisions of Section 21 of the Mysore General Clauses Act, 1899 (Karnataka Act) could amend, vary or rescind the order, as is provided under Section 14 of the Act. Such a construction of powers would give a full play to the provisions of Section 8(1) as well as Section 14 and also Section 3 of the Act. In view of the same, non-communication of the fact to the detenue 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 an order of detention is issued by an officer other than the State Government under sub-section (2) of Section 3 of the 12 Act would constitute an infraction of a valuable right of the detenue under Article 22(5) of the Constitution.

6. The right to make a representation to the detaining authority is a fundamental right. Failure to inform the detenue that he has such a right is fatal to the detention order. Such detention order is liable to be quashed. Since the detenue was not made known of his right to make representation against the detention order to the detaining authority himself, the detenue would not be in a position to make representation before the detaining authority. Hence the inaction on the part of the District Magistrate in not making known about the right of the detenue to make representation before the detaining authority is a clear violation of principles of law as mentioned supra.

7. The Apex Court in the case of KAMALESHKUMAR ISHWARDAS PATEL .vs. UNION OF INDIA reported in 13 (1995)4 SCC51and in the case of STATE OF MAHARASHTRA .vs. SANTOSH SHANKAR ACHARYA reported in AIR 2000 SC2504has clearly ruled that the right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make a representation and the failure to do so results in denial of the right of the person detained to make a representation. On the very ground of failure on the part of the delegate to inform the detenue to make representation to the detaining authority, number of writ petitions are allowed by this Court and consequently the detention orders are quashed. One such order is passed by this Court in the case of KUSUMA .vs. STATE OF KARNATAKA in Writ Petition (HC) No.64/2015 disposed of on 7th May 2015. 14 Following the aforementioned Judgments and in view of our discussion made supra, this writ petition also needs to be allowed. Accordingly, we pass the following order: Writ Petition is allowed. The order at Annexure-F dated 14th May 2015 stands quashed. The detenue - Yasin Khureshi s/o Ejaj Ahamed shall be set at liberty forthwith, if not required in any other case. It

is open for the State Government to take such steps as are open to it in law. Gss/- Sd/- JUDGE Sd/- JUDGE

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