

Ashok Kumar Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : May-03-2001

Reported in : 2002(1)AWC318

Judge : S.H.A. Raza and R.D. Shukla, JJ.

Acts : [Constitution of India](#) - Articles 22, 22(5) and 141; [National Security Act, 1980](#) - Sections 3(2)

Appeal No. : Writ Petition No. 79 of 2001 (H/C)

Appellant : Ashok Kumar

Respondent : State of U.P. and ors.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Imtiyaz Murtaza, Adv.

Disposition : Petition allowed

Judgement :

S. H. A. Raza and R. D. Shukla, JJ.

1. Being aggrieved against the order of detention dated 27.11.2000 passed by the District Magistrate, Sitapur under Section 3(2) of the National Security Act, the petitioner has invoked the extra-ordinary jurisdiction of this Court by filing the writ

petition in the nature of habeas corpus under Article 226 of the [Constitution of India](#).

2. The grounds of detention disclose that on 14.11.2000 at 9.05 a.m., an information was received by the police, through some body that at mill gate No. 98B, a passenger train, which was going to Lakhimpur, was stopped by some of the workers of Subhas Sena having red banners in their hands and were creating disturbance. On receiving such information, an entry was made in the case diary and Inspector incharge Shailendra Kumar along with other police personnel reached the spot to maintain peace. During that period, the Station-Master informed that Train No. 172 down was standing at mill gate crossing, upon which certain persons were throwing stones. Another information was also received by the police that on the same day some persons armed with various weapons like lathi, danda, ballam and even sword stopped the train and they were hurling stones. On this activity, the passengers including ladies, children and old people started crying. The traffic was dead-locked. They were shouting that the train be burnt. A case at Crime No. 305 of 2000 under Sections 141, 145, 151 and 174 of the Railways Act was registered against the accused persons. It was also stated that the processionists also assaulted some of the passengers of the train and created such an atmosphere that the people started running here and there.

3. The main thrust of the learned counsel for the petitioner is firstly that it was simply a law and order problem that a train was stopped and some passengers were assaulted and beaten and due to intervention of the police, the train was allowed to move after half an hour. It is not such a case where public order can be said to have been disturbed warranting invocation of Section 3(2) of the National Security Act. We need not delve into that question because the writ petition can be decided on other aspects as well.

4. The second argument that has been advanced is that the report of the sponsoring authority was not made available to the detenu, with the result of which he could not make an effective representation. In that regard, the petitioner cited decision of Hon'ble the Supreme Court in M. Ahamed Kutty v. Union of India and Anr., 1999 SCC (Cr) 258, wherein Hon'ble the Supreme Court observed in paras

19 and 20, which are reproduced as under :

'19. The next submission is that of non-supply of the ball application and the ball order. This Court, as was observed in *Manga Bhai Motiram Patel v. State of Maharashtra*, (1980) 4 SCC 470, has 'forged' certain procedural safeguards for citizens under preventive detention. The constitutional imperatives in Article 22(5) are two fold : (i) The detaining authority must, as soon as may be, i.e., as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making the representation against the order of detention. The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. The detenu has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those documents, it would amount to denial of the right to make an effective representation. This has been settled by a long line of decisions : *Ramachandra A. Kamat v. Union of India* ; *Frances Coralie Mullin v. W. C. Khambra* ; *Ichhu Devi Choraria v. Union of India* ; *Pritam Nath Hoon v. Union of India* : *Tushar Thakker v. Union of India* ; *Lallubhai Jogibhai Patel v. Union of India* ; *Kirit Kumar Chaman Lal Kundaliye v. Union of India* and *Ana Carolina D'Souza v. Union of India*, 20. It is immaterial whether the detenu already knew about their contents or not. In *Mehru-nissa v. State of Maharashtra*, it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure-list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in jail and has no access to his own documents. In *Mohd. Zakir v. Delhi Administration*, it was retereated that it being a constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention *pari passu* the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violatve of constitutional safeguards enshrined in Article 22(5).'

5. In *Sophia Gulam Mohd. Bham v. State of Maharashtra and Ors.* 1999 (2) AcrR 1798 (SC) : 1999 SCC (Cri) 1160. (para 13), it was observed :

'The word 'grounds' used in clause (5) of Article 22 means not only the narration or conclusion of facts, but also all materials on which those facts or conclusions which constitute 'grounds' are based. In *Prakash Chandra Mehta v. Commissioner and Secy. Govt. of Kerala*, 1985 Supp SCC 144, in which an order of detention was passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act this Court, while examining the concept of 'grounds' used in Article 22(5), had observed that the word 'grounds' has to receive an interpretation which would keep it meaningfully in tune with the contemporary notions. It was explained that the expression 'grounds' includes not only conclusion of facts but also all the 'basic facts' on which those conclusions were founded. The 'basic facts' are different from subsidiary facts or further particulars.'

6. Learned Government advocate submitted that the report of the sponsoring authority is not such a material which, if not supplied to the detenu, will be sufficient to vitiate the order of detention and in that regard, he cited *State of U. P. v. Shakeel Ahmad*. 1996 SCC (Cri) 108, wherein It was observed :

'The respondent was detained on 31.7.1989 under Section 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. When he challenged the order of the detention, the High Court in the impugned order dated 25.7.1990 made in W.P. No. 2029 of 1990 set aside the order of detention on the ground that the delay in non-consideration of the representation for one month, i.e., from 20.2.1990 to 15.3.1990, was not explained and also on the ground that copy of the report of the sponsoring authority had not been supplied to the detenu which violates Article 22(5) of the Constitution. We are of the opinion that the High Court was not right in setting aside the order of detention on these grounds. It is not mandatory that the report of the sponsoring authority should be supplied to the detenu under Article 22(5) of the Constitution. It is only a material furnished to the detaining authority. All the material on which reliance was placed for order of detention was admittedly supplied to the detenu. In the facts

and circumstances of the case, the delay in disposal of the representation of about 23 days also is not fatal.

Under these circumstances, the order of the High Court setting aside the detention order is clearly illegal. However, since the period has already expired, we do not think that it is a case warranting further detention of the respondent.

The appeal is accordingly disposed of.'

7. When the District Magistrate passed an order of detention, he is to be subjectively satisfied from the material on record that the person sought to be detained had been indulging into prejudicial activities, which amounted to disturbance of public order which has affected the tempo of life of persons or community. Besides other documents, one of the material documents is the report of the sponsoring authority. Hence, it cannot be said that the report of the sponsoring authority is not a material document. If there existed more than one material documents, it cannot be said that on the basis of which document, the District Magistrate was satisfied subjectively to detain a person under the provisions of National Security Act. In arriving at his subjective satisfaction to pass an order of detention, he might have passed the order of detention or not have passed on the basis of the report of the sponsoring authority. As the document was a relevant and material one, the copy of which has not been furnished to the petitioner to make an effective representation to the State Government as well as to the Central Government.

8. The only right which a detenu possesses in detention without a regular trial in any criminal court, is the right to make a representation. Hence, if the copies of the material and relevant documents are not furnished to the detenu, certainly then it cannot be said that the detenu denied the right to make an effective representation in accordance with Article 22(5) of the [Constitution of India](#).

9. The word 'grounds' occurring in Article 22 of the [Constitution of India](#) is of paramount importance. The word 'grounds' used in clause (5) of Article 22 means not only the narration or conclusion of facts, but also all materials on which those facts or conclusions which constitute 'grounds' are based. Hence, non-supply of

the report of the sponsoring authority to the detenu amounted to denial of opportunity as contemplated under Article 22(5) of the [Constitution of India](#).

10. The observations of Hon'ble the Supreme Court in State of U. P. v. Shakeel Ahmad (supra) pertained to a case of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, which is a social offence affecting the society at large. Under Article 141 of the [Constitution of India](#), only those precedents of Hon'ble Supreme Court are binding upon this Court where the entire facts of the case, pleas taken by the opposite parties, and the law on the subject have been discussed and elaborated. Every judgment of Hon'ble the Supreme Court, which does not deal with all those questions, cannot be said to be a binding precedent under Article 141 of the Constitution. In State of V. P. v. Shakeel Ahmad (supra) neither the facts involved were mentioned nor the law on the subject was elaborated and explained, hence the view taken by Hon'ble the Supreme Court in the case noted above which the learned counsel for the petitioner has cited, cannot be said to be a precedent.

11. There is another aspect of the matter, which requires consideration. The grounds of detention disclose that under Section 11(1) of the National Security Act, the petitioner shall have a right to be heard in person before the Advisory Board and If the petitioner intended to be heard in person before the Advisory Board, then in that regard he can make an effective representation. Under the provisions of National Security Act, even when an order of detention is passed by the District Magistrate, the State Government within twelve days of passing of the order of detention, has to pass an order approving or disapproving the order of detention passed by the District Magistrate ; hence it is necessary that the detenu should be informed that he shall have a right to make a representation before the State Government.

12. In the present case, the petitioner was not informed that he shall have a right to prefer a representation before the State Government either within twelve days or before the matter is placed before the State Government for approval of the detention order. A person, detained under the provisions of National Security Act, has only one right, i.e., to make a representation and if he is not made aware that

he has a right to make a representation before the State Government for considering the matter for approval or disapproval of the detention order, then that right to make a representation under Article 22(5) of the Constitution would be a futile exercise. As the petitioner was not made aware of making representation before the State Government, the petitioner could prefer the representation only on 16th December, 2000, when the period of twelve days had already expired.

13. In *State of Maharashtra and Ors. v. Santosh Shanker Acharya*, 2001 (1) ACrR 453 (SC) : 2000 SCC (Cri) 1400, the Hon'ble Supreme Court observed :

'The District Magistrate or Commissioner of Police on being authorised by the State Government could issue an order of detention under Sub-section

(2) of Section

3. When an officer exercises power and issues order of detention under Sub-section

(2) then he is duty-bound to report forthwith the facts 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 officer concerned the State Government is required to approve the order of detention within 12 days, and if it is not approved within 12 days, then it automatically lapses. Section 8(1) casts mandatory obligation both on the authority which passes an order of detention either under Sub-section

(1) or under Sub-section (2), i.e., if the State Government issues an order of detention under Sub-section (1), or if the officer empowered issues an order of detention under Sub-section

(2) then the same must be communicated to the detenu not later than 5 days from the date of detention. Although in the latter part of Sub-section

(1) of Section 8 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 under Sub-section

(2) as provided under Sub-section

(3) thereof nor does it take away the power of entertaining a representation from a detenu so long as the order of detention has not been approved by the State Government. 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 Bombay General Clauses Act, 1904, cannot be said to be taken away merely because Section 8(1) specifically provides for making a representation to the State Government. Such failure would make the order of detention invalid. As such the ratio of the Constitution Bench decision of this Court in Kamlesh Kumar case would apply notwithstanding the fact that in Kamlesh Kumar's case the Court was dealing with an order of detention issued under the provisions of the C.O.F.E.P.O.S.A. Act.'

14. Similar observations were made in other cases also, which we have not cited to avoid the bulk of judgment. Suffice to say, non-supply of the report of the sponsoring authority to the petitioner and non-informing him that he had a right to make representation before the State Government, amounted to denial of his right under Article 22(5) of the [Constitution of India](#) and thus, the order of detention is vitiated.

15. The writ petition accordingly succeeds. The petitioner is directed to be released forthwith unless wanted in any other case.