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Court : Jammu and Kashmir

Decided On : Nov-12-1991

Reported in : 1993CriLJ842

Judge : B.A. Khan, J.

Acts : Jammu and Kashmir Public Safety Act, 1978- Sections 15 to 17; ;
[Constitution of India](#) - Article 22(4); ;Detention Law

Appeal No. : H.C. No. 723 of 1991

Appellant : Sona Begum

Respondent : State and ors.

Advocate for Def. : S.K. Gupta, AAG and; R. Pant, G.A.

Advocate for Pet/Ap. : M.S.A. Farooqi, Adv.

Disposition : Petition allowed

Judgement :

ORDER

B.A. Khan, J.

1. Petitioner seeks quashment of detention of her son Mohd Ayub Shabnam. He is said to have been arrested by Army authorities on May 14, 1990 and later taken

into custody by police on 22-5-1990 in case FIR No. 45/1990. Subsequently detention order No. 35/PS A/90 dated Aug. 8,1990 was passed by respondent No. 2 ordering his detention for two years. This order was executed on 11-8-1990. Grounds of detention were served on him on 13-8-1990. His case was referred to Advisory Board on 4-9-1990. His case vide No. ISD/217-A/90. The board submitted its report on 7-11-1990. But itrigingly (intriguingly) his detention stood confirmed by Govt. vide order No. Home. ISD-845-A/90 dated 19-8-1990. In other words Govt. had confirmed his detention at a time when his case had not been referred to the Advisory Board. I shall advert to this aspect later.

In her petition, petitioner challenged detenu's detention on all conceivable grounds. Put briefly, these are as follows :-

- i)that grounds of detention are vague, perverse and irrelevant;
- ii) that no order of detention was served on detenu, nor was he informed to make representation against his detention.
- iii) that detenu being already in Jail when his detention was ordered, Detaining authority had not shown any compelling necessity to detain him under the J & K public safety Act.
- iv) that detenu was not given any option to appear before Advisory Board and to make representation.
- v)that copies of FIR No. 45/90, seizer memos and other material relied upon by Detaining authority was not furnished to detenu.
- vi) that detaining authority had not recorded his satisfaction regarding detenu's detention in accordance with law.
- vii) that J & K Public Safety Act was ultra-vires the Constitution.

2. On 5-3-1991, this court granted two weeks last opportunity to respondents to file counter-affidavit and directed the case to be listed for hearing. No counter was filed within stipulated time. However, Mr. Jalali, AAG, appears to have presented a counter-affidavit in Registry on 9-7-91 which is placed along with the petition. In

the interests of justice, I am taking this counter affidavit into consideration along with the record submitted by Mr. Gupta, AAG.

3. Learned counsel for petitioner has not pressed his challenge to the vires of the Act. Instead he has confined his attack on other grounds, which I do not propose to examine in entirety for the reason that petitioner is liable to succeed on two counts, to be dealt with hereinafter.

4. As pointed out elsewhere, scrutiny of record has revealed that detenu's detention was confirmed by the Govt. much before his case was placed before the Advisory Board. At the burden of repetition, it may be restated that his detention was confirmed under Section 17 of P.S. Act vide Govt. Order No. Home-ISD 845-A/90 dated Aug. 19, 1990, whereas his case was referred to Advisory Board 15 days after on Sept. 4, 1990. Confirmation of his I detention has preceded reference of his case to Advisory Board. In other words, his detention has not been confirmed on the report of Advisory Board in consonance with mandate of Section 17 of P.S. Act. The moot question that arises for determination is whether this vitiates the detention.

5. I have no doubt in my mind that it does so and this is so for a variety of reasons. Article 22(4) of the Constitution provides that no prevention detention Law shall authorise detention of a person for longer period than three months unless an Advisory Board has reported before expiry of three months that there is sufficient cause for such detention. Section 15 of P.S. Act casts an obligation on Govt. to place grounds of detention etc. before Advisory Board within four weeks from the date of detention. Under Section 16, Advisory Board is to submit its report to the Government within eight weeks from the date of detention. Section 17 then empowers the Govt. to confirm or revoke the detention depending upon the report of the Advisory Board.

6. Going by the letter and spirit of these provision the scheme envisages that a person cannot be detained for more than three months unless his case is placed before the Advisory Board and that Board finds grounds of detention sufficient to warrant his further detention up to the maximum period of detention prescribed by any preventive Detention Law. That is why time limitation and periodical safe-

guards have been provided in various provisions of P.S. Act, 1978, referred to hereinabove. That being the position, reference to Advisory Board of a detenu's case within the time frame prescribed becomes mandatory and it is only when the Board finds grounds of detention sufficient that the Government can confirm the detention even for a maximum period prescribed in terms of Section 17 of the Act. Without all this Govt. has no competence to confirm the detention of a detenu for a longer than three months.

7. In the present case, I find that Govt. has put the cart before horse by confirming the detention on 19-8-1990, 15 days before detenue's case was referred to Advisory Board. In other words, confirmation of detention is not based on the report of Board, therefore detention of detenu beyond three months becomes totally unauthorised. It is immaterial that board has found grounds of detention sufficient to warrant detenue's further detention subsequently. It appears to be a case of gross non-application of mind by all concerned.

For the reasons stated, I have no reluctance in holding the detenu's detention as invalid on ground of being violative of Article 22(4) and Sections 15 to 17 of P.S. Act.

8. Even though this relieves me of the necessity of examining other grounds, yet I find that copies of FIR No. 45/1990, seizure memos and other material relied upon by detaining authority have not been made available to the detenu. The averments made in this regard by petitioner have not been refuted in the counter-affidavit sworn in by detaining authority. Nor is there any trace in record that material in question was provided to detenu. Therefore, there should be no difficulty in holding that non-furnishing of material relied upon by detaining authority has prevented the detenu from making representation against his detention. On this count also, impugned detention order cannot be allowed to sustain.

9. Given regard to foregoing discussion, I quash order of detention dated 8th Aug. 1990 and command respondents to release the detenu forthwith. Record be returned to Mr. Gupta, AAG.

