

Ghulam Rasool Vs. State and ors.

Ghulam Rasool Vs. State and ors.

SooperKanoon Citation : sooperkanoon.com/899824

Court : Jammu and Kashmir

Decided On : Feb-17-2005

Reported in : 2005(2)JKJ580

Judge : Y.P. Nargotra, J.

Acts : Jammu and Kashmir Public Safety Act, 1978 - Sections 8, 9, 13, 15, 16 and 17(1)

Appeal No. : H.C. Petition No. 04/2004

Appellant : Ghulam Rasool

Respondent : State and ors.

Advocate for Def. : N.H. Shah, Dy. A.G.

Advocate for Pet/Ap. : M.A. Qayoom, Adv.

Disposition : Petition allowed

Judgement :

Y.P. Nargotra, J.

1. Through this petition the petitioner is calling in question the detention order issued by the District Magistrate, Budgam under Section 8 of the Jammu and Kashmir Public Safety Act and the consequent detention of the detenu

Mohammad Maqbool Mir code Baber S/o Ghulam Rasool Mir. The order of detention reads:

'Whereas, Superintendent of Police Budgam vide No Pros/Dos-15/03/990-93 dated 1/7/03 has produced material record viz a dossier, FIR and investigation report in respect of Mohammad Maqbool Mir code Baber S/o Ghulam Rasool Mir R/o Rayer Tehsil Beerwa District Budgam who has been reportedly arrested by police Budgam in case No. 32/02, 50/03, 51/03 and 80/03. Whereas, I, have gone through the contents of dossier produced before me carefully.

Whereas, after due consideration of the facts and circumstances involved I am satisfied that with a view to preventing Mohammad Maqbool Mir code Baber S/o Ghulam Rasool Mir R/o Rayer Tehsil Beerwa District Budgam from acting in any manner prejudicial to the maintenance of public order and security of state, it is necessary so to do;

Now, therefore, in exercise of powers conferred by Section 8 of the J&K; Public Safety Act, 1978, I Bashir Ahmed, District Magistrate, Budgam hereby direct that the said Mohammad Maqbool Mir code Baber S/o Ghulam Rasool Mir R/o Rayer Tehsil Beerwa District Budgam be detained and lodged in Sub Jail Kotebhalwal for a period of 24 months.'

2. The District Magistrate after passing the aforesaid order of detention forwarded the same in duplicate to Senior Superintendent of Police Budgam for execution under Section 9 of the Jammu and Kashmir Public Safety Act and he was asked to give notice of the order to the detenu by reading over and explaining the same to him in the language he understands fully. The detenu was already in custody of the police in FIR Nos. 32/02, 50/03, 51/03 and 80/2003. On the date of issuance of detention order under Section 8 i.e., 12.8.2003, the District Magistrate, Budgam also informed the father of the detenu who is petitioner herein that his son has been detained by order No. DMB/PSA/14 of 2002 dated 12.8.2003 made under Section 8 of the Jammu and Kashmir Public Safety Act, so if he wishes to make any representation to the Government against the said order, he may make the same. The grounds of detention were communicated to the detenu through Superintendent Sub Jail Kotebhalwal. After having received the said information

from the District Magistrate, the father of the detenu, the petitioner herein has alleged in the petition that he submitted a representation against the detention of the detenu to respondent No. 1 that is State of Jammu and Kashmir through Financial Commissioner Home Department on 9.12.2003. He has also alleged that the copy of the representation was given by the petitioner to respondent No. 2 for information and necessary action. However, despite lapse of more than a month, the representation of the petitioner has not been decided. The copy of the representation submitted by the petitioner has been annexed with the petition as annexure D which carries an endorsement of receipt dated 9.12.2003 by some person who according to the learned counsel for the petitioner is some officer in the office of the Financial Commissioner.

3. The first contention of Mr. Qayoom learned counsel for the petitioner is that failure of the respondents to consider and decide the representation of the petitioner vitiates detention order and detention of the detenu. Mr. Qayoom submits that in view of the provisions contained in Section 13 of the Jammu and Kashmir Public Safety Act, it is incumbent upon the Detaining Authority to communicate the grounds of detention to the detenu within a period specified so as to afford him an earliest opportunity of making a representation against the order of detention to the Government. As per the provision contained in Section 15, the Government was to forward the representation made by the detenu to the Advisory Board who under Section 16 was to decide the same one way or the other before making its report to the Government. According to Mr. Qayoom, since the representation of the petitioner has not been placed before the Advisory Board for being considered for judging the propriety of the detention of the detenu. The right of making representation against the detention has been denied to the detenu which renders his detention illegal. In support of his contention he has relied upon the case reported in : 1996 CriLJ1981 .

4. To controvert the allegation of the petitioner respondent No. 1 the State of Jammu and Kashmir has not filed any counter affidavit and thereby has allowed the allegation of the petitioner that he had filed the representation against the detention of the detenu to go un-rebutted. It is only in the affidavit filed by the Detaining Authority, the allegation of the petitioner made in this behalf has been

denied. The denial of the allegation by the District Magistrate is of no consequence because he is not authority before whom the representation could be made under law and alleged to have been made. In this view of the position the allegation of the petitioner being un-rebutted has to be believed that he made a representation against the detention order on behalf of the detenu to the Government on 9.12.2003.

5. It is not the case of the respondents that such representation was ever placed before the Advisory Board for consideration, therefore, no question of its disposal arises and as such said representation continues to remain un decided. What is the effect of non-consideration of the representation made by the detenu? Their lordships of the Supreme Court in case *Kindanbhai Dulabhai Shaikh v. Distt. Magistrate, Ahmedabad and Ors.*, : 1996 CriLJ1981 . After taking note of various decisions of the Supreme Court, observed as follows:

'In *Mohinuddin* : [1987]3SCR668 And *Rama Dhondus* : 1990(25)ECC50 cases (supra), it was provided that inordinate and unexplained delay in the disposal of representation would make the continued detention of a person, illegal and unconstitutional. In *Devi Lal Mahto v. State of Bihar*, AIR 1982 SC 1544, the continued detention was held to have become bad on account of the indifferent attitude of the government in not attending to the representation for about 10 days.'

6. In view of the aforesaid observations of their lordships, the law on the point stands well settled that continued detention of the detenu becomes bad if there is inordinate and unexplained delay in the disposal of the representation.

7. In the present case, the detenu was detained on 12.8.2003 and the Advisory Board has submitted its report that there is sufficient cause for the detention of the detenu. The opinion of the Board stands already accepted by the Government under Section 17(1) of the Jammu and Kashmir Public Safety Act and in consequence whereof detention of the detenu for twenty four months has been directed, but the representation of the petitioner made on behalf of he detenu has remained un decided and therefore, the detention of the detenu has been rendered bad in law.

8. The contention of Mr. N. H. Shah, learned Deputy Advocate General appearing on behalf of the respondents, however, is that as per the record the Board had afforded an opportunity of hearing to the detenu and, therefore, whatever detenu had to say, he has said before the Board and in such a situation according to Mr. Shah, the petitioner cannot be allowed to say that any prejudice has been caused to the detenu so as to render his detention illegal. I am not in agreement with the learned Dy. Advocate General. The right of hearing alone is not the substitute of a representation. Section 13 of the Jammu and Kashmir Public Safety Act make it clear that an opportunity for making the representation against the detention order shall be provided to the detenu. The requirement of Section 13 will not be satisfied simply by providing an opportunity of being heard to the detenu. On this ground alone the detention of the detenu can be held illegal and deserves to be quashed. However, there is yet another ground available to the detenu on which the detention order of the Detaining Authority cannot be sustained in law. The detention order quoted above makes it clear that Detaining Authority for drawing satisfaction that activities of the detenu were prejudicial to the maintenance of public order and security of the State relied upon the material record vis the dossier, FIR and investigation report in respect of the detenu. The case of the petitioner is that with the grounds of the detention and copies of the material relied upon by the Detaining Authority has not been furnished to the detenu and therefore, his right of making an effective representation has been jeopardized, the detention order, therefore, is illegal. The Detaining Authority in reply to the allegations of the petitioner made in para No. 5 in his counter affidavit has stated as follows :-

'In reply to para 5, it is submitted that it were the activities of the detenu, as reflected in the dossier, that persuaded the answering respondent to order the detention of the detenu. It is submitted that FIR and investigation report has not been relied upon for passing the order. It is submitted that material details of the activities carried on by the detenu, which persuaded the detaining authority to issue the impugned order, have been fully narrated in the grounds of detention....'

9. From the aforesaid reply, it is admitted by the detaining Authority that copies of the FIR and investigation report were not made available to the detenu along with

the grounds of detention. The stand of the Detaining Authority is that FIR and investigation report were not relied upon for drawing the satisfaction that the activities of the detenu were prejudicial to the maintenance of public order and security of the State but, only dossier submitted by the Senior Superintendent of Police was relied upon. The plea put forth by the Detaining Authority in the counter affidavit cannot be accepted because it runs contrary to what has been stated in the order of detention. The material record which was placed before the Detention Authority besides the dossier included the FIR and investigation report whereafter the Detaining Authority has passed the order. It does not stand to reason that Detaining Authority would only examine the dossier and not the record of FIR and investigation report for drawing the necessary satisfaction. It is the mandatory rule envisaged by Section 13 of the Jammu and Kashmir Public Safety Act that detenu shall be afforded an earliest opportunity for making a representation. The detenu can make an effective representation against the order of detention if he knows about the record which persuaded the Detaining Authority for ordering his detention, therefore, if the material relied upon by the Detaining Authority is not furnished along with the grounds of detention to the detenu, his right to make an effective representation comes to be jeopardized which invalidates the order of detention itself.

10. In view of the above, this Petition is allowed and detention order No. DMB/PSA/14 of 2002 dated 12.08.2003 in respect to the detenu Mohammad Maqbool Mir S/o Ghulam Rasool Mir R/o Rayer Tehsil Beerwa District Budgam is quashed. The respondents are directed to release the detenu forthwith if not required in any other case or offence. The record of the Detaining Authority is returned to the learned Deputy Advocate General.