

Fazal Hussain and Arshad Ahmad

Vs

The State of Jammu and Kashmir

Writ Petition No. 111 of 1969

(S. M. Sikri, G. K. Mitter, K. S. Hegde JJ)

29.07.1969

JUDGMENT

SIKRI, J. -

1. This is a joint petition by two detainees under Article 32 of the Constitution praying for the issue of a writ of habeas corpus or other appropriate writ, direction or order directing that the petitioners be released.

2. The petitioner, Arshad Ahmad, was detained in pursuance of Detention Order, dated September 19, 1967, passed under Section 3(1)(a)(i) of the Jammu and Kashmir Preventive Detention Act, 1964. The copy of the order on the record shows that the order was served on the detainee by Jaswant Singh, Deputy Superintendent of Police (CID), Jammu, on September 27, 1967.

3. No grounds of detention were served on the detainee, but an order, dated October 25, 1967, issued by the Secretary to the Government, Home Department, was served on him informing him that it would be against the public interest to disclose the facts or the grounds of detention to him.

The learned counsel for the petitioner, Mr. Garg, contends that the order, dated October 25, 1967, was served too late and the detention of the petitioner became illegal when the time for serving the grounds of the detention had expired.

4. Section 8 of the Jammu and Kashmir Preventive Detention Act, 1964, provides that "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 ten 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". But the proviso to Section 8 states :

"Provided that nothing in this sub-section shall apply to the case of any person detained with a view to preventing him from acting in any manner prejudicial to the security of the State, if the authority making the order, by the same or a subsequent order, directs that the person detained may be informed that it would be against public interest to communicate to him the grounds on which the detention order has been made."

5. The learned counsel for the State contends that if an order has been made under the proviso it does not matter whether the order is made and served beyond the ten days' time specified in Section 8.

6. We are unable to accept this contention. There is no doubt that it is the duty of the detaining authority to communicate the grounds within ten days of the date of detention if the case does not fall within the proviso. If the detaining authority neither communicates the grounds of detention nor informs the detenu under the proviso within ten days of the detention, the detention would become illegal and a subsequent order under the proviso would not have the effect of rendering the detention legal.

7. A similar point arose before this Court in *Abdul Jabar Butt v. State of Jammu and Kashmir*. ((1957) SCR 51 at p. 59). This Court was then considering the Jammu and Kashmir Preventive Detention Act (IV of Sambat 2011) and similar provisions contained therein. Das, C.J., observed :

"If the grounds are not communicated to the detenu within the period of time prescribed by the expression 'as soon as may be' the detenu becomes deprived of his statutory right under sub-section (1) and his detention in such circumstances becomes illegal as being otherwise than in accordance with procedure prescribed by law. In order to prevent this result in certain specified cases the proviso authorises the Government to issue the requisite declaration so as to exclude entirely the operation of sub-section (1). It, therefore, stands to reason and is consistent with the principle of harmonious construction of statutes that the power of issuing a declaration so as to prevent the unwanted result of the operation of sub-section (1) should be exercised before that very result sets in."

8. Although there is some change in the language in the present act in substance the provisions are similar as far as the present point is concerned. We are here concerned with the liberty of a subject and we must adopt a construction which would not have the effect of enabling the executive to make an order under the proviso at any time after the lapse of ten days specified in Section 8. Even from the practical point of view we are unable to see that the Government would experience any difficulty in deciding within ten days whether the grounds should be served or not in the public interest. All the material is with the Government when it passes the order of detention and a period of ten days is ample for the Government to make up its mind whether the case falls within the proviso or not.

9. In the result we hold that the detention of the petitioner Arshad Ahmed is illegal and he should be released.

Coming to the case of the second petitioner Fazal Hussain, he was detained by order, dated January 3, 1968, passed under Section 3(1), read with Section 5 of the Jammu and Kashmir Preventive Detention Act, 1964. The order of detention was served on the petitioner in the Central Jail on January 8, 1968 and the same was read out to him. By order, dated January 11, 1968, the petitioner was informed that it was against public interest to disclose facts or to communicate to him the grounds on which the detention order was passed. The affidavit stating these facts is sworn to by the Additional Secretary to the Government, Jammu and Kashmir, Home Department, and it is stated in the verification that these facts were stated on the basis of information derived from the record of the case which he believed to be true.

The learned counsel for the petitioner contends that the Deputy Superintendent, Central Jail, who is alleged to have served the order of detention on the petitioner, should have filed the affidavit. The State has annexed to the affidavit a copy of the Government Detention Order and below the detention order the following endorsement exists :

"The notice of this order has been served upon Shri Fazal Hussain, son of Ayub Khan, detenu by reading over the same to him.

#(Sd.) Deputy Superintendent, Central Jail, Jammu 8/1. "##

In view of this endorsement existing on the order of detention we do not consider that it was necessary that the Deputy Superintendent, Central Jail, should have filed an affidavit to the effect that he had served the order of detention on the detenu Fazal Hussain.

No other point is raised. The petition of Fazal Hussain accordingly fails and is dismissed.

</html