

Ghulam Nabi Zaki

Vs

State of Jammu and Kashmir

Writ petition No. 168 of 1969

(M. Hidayatullah, V. Ramaswami-I JJ)

27.10.1969

JUDGMENT

HIDAYATULLAH, C.J. -

1. The petitioner Ghulam Nabi Zaki has been detained under Section 3(1)(a) of the Jammu and Kashmir Preventive Detention Act, 1964, by an order passed on August 20, 1969. He was originally arrested on November 9, 1968, under an order passed under the same section on August 23, 1968. After the first order was passed, a second order was passed by the Government on November 12, 1968, under Section 8(2), read with Section 13(1)(a)(1) of the Act, stating that in the interest of security of the State, the grounds of detention could not be disclosed. Against the first order, the writ petition No. 168 of 1969 was filed in this Court. On September 6, 1969, the two orders of detention which had been passed against the detenu were served on him with the counter-affidavit filed in the writ petition. Previously, both the orders, that is to say, the order under Section 3 and the order under Section 8(2), were not served on the petitioner. On August 20, 1969, the first two orders were revoked, and under Section 14(1) of the Act, the same day, a fresh order of detention was passed which is now being challenged in these proceedings. The same day, yet another order under Section 8(2), read with Section 13(1)(a)(1) was also passed but it is an admitted fact that the orders this time too were not served upon the detenu although it is alleged in one of the later affidavits that the gist of those orders was orally communicated to the detenu. The present petition has been filed to question the second detention order and is based mainly on two points, namely, that the second detention order could not be validly made except on some fresh material, as contemplated by Section 14(2) of the Detention Act, and secondly, that the non-service of the order of detention as well as the order under Section 8(2) upon the detenu is fatal to his continued detention.

2. In view of our decision on the first of the contentions, we do not consider it necessary to examine the second. In our opinion, the detenu is entitled to his release, because the second order of detention could not be passed without there being additional or fresh material in the hands of the detaining authority, as contemplated by Section 14(2) of the Act. We give our reasons below.

3. The power to detain persons and to make orders regarding them is contained in Section 3 of the Jammu & Kashmir Preventive Detention Act, 1964 (Act No. 13 of 1964). It enables the Government, if satisfied with respect to any person with a view to preventing him from acting in certain manners described in the section that it is necessary to detain him, to make an order directing that such a person be detained. A similar power is exercisable under sub-section (2) by certain officers of the State. It is next provided that the grounds of the order of detention must be disclosed to persons affected by the order. This direction is contained in Section 8(1) which says 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 of the date of detention, communicate to him the grounds on which the orders has been made, further giving him an opportunity of making a representation. Sub-section (2) of Section 8 says : "Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose". Sections 9 and 10 deal with the constitution of and reference to the Advisory Boards, Section 11, with the procedure of the Advisory Boards, and Section 12, action upon the report of the Advisory Board. We need not refer to those sections. Section 13 then lays down that the maximum period for which has been confirmed under Section 12, shall be two years from the date of detention. Sub-section (2) of that section is in the nature of a proviso to the first sub-section we have quoted. It says that nothing contained in Section 13 shall affect the power the Government to revoke or modify the detention order at any earlier time. This power, however, is subject to one other provision and that is Section 14 which may be quoted in extenso here. It reads :

"14. Revocation of detention orders. - (1) Without prejudice to the provisions of Section 31 of General Clauses Act, Samvat 1977, a detention order may at any time be revoked or modified by the Government, notwithstanding that the order has been made by any officer mentioned in sub-section (2) of Section 3.

(2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Government or an officer, as the case may be, is satisfied that such an order should be made."

4. The first sub-section is not germane to the matter here, but the second is. Relying upon the second sub-section, the detenu claims that the order revoking the detention on August 20, 1969, was followed the same day by another order detaining him, and as he was in detention all the time, there could not be any fresh material before the Government for a second detention, as required by the second sub-section referred to here. The State Government contends, on the other hand, that the existence of fresh material is not condition precedent to the passing of a second order and that in any event, the second order can be made when the first order is withdrawn or revoked for a technical defect. According to the learned counsel for the State Government, the grounds of detention may be so serious that even if the detenu is to be released because of a defective order, a second order may be necessary to put him in detention immediately after his release.

5. The matter is not *res integra*. In a number of decisions of this Court to which reference will be made presently, this point has been considered and it has been held that once an order of revocation is made, another order detaining the same person can only be passed if some additional or fresh material is in the possession of the State Government on which action can be based. The first of these case in *Harbandhu Das v. District Magistrate, Cuttack and Another*. In that case, under almost identical circumstances under Section 13(2) of the Preventive Detention Act, 1950, which is similar to Section 14(2) of the Jammu & Kashmir Act, it was held by this Court :

"The clearest implication of Section 13(2) is that after revocation or expiry of the previous order, no fresh order may issue on the grounds on which the order revoked or expired had been made."

In other words, the revocation or expiry of the previous order cannot lead *ipso facto* to a revival of the detention by the passing of fresh order, because a person who is entitled to his liberty can only be put in a second jeopardy when there are additional or fresh facts against him. If the section had

not spoken of the fresh facts, the matter might have been different, because, then, the courts would have been required to see whether there was any curb upon the power of the Government to detain a person second time after his release on the self-same material. Indeed, an earlier case of this Court does exist in which such a view was taken and we shall presently refer to it. The case from the All India Reporter to which we have referred was a decision of the Constitution Bench. It was followed in *Kshetra Gogoi v. State of Assam*, and *Mohd. Shafi and Mohd. Yaqub v. State of Jammu & Kashmir*. In these two cases also, the view has been affirmed that the enactment of Section 14(2) of the Act or the corresponding Section 13(2) of the Preventive Detention Act, 1950, makes it incumbent upon the Government to base the detention on some fresh facts and not old facts on which the detention was once ordered but the revocation of the order took place. This view is binding upon us and applies in the present case.

6. As against this, reference was made to a decision of this Court in *Jagdev Singh v. State of Jammu & Kashmir*, in which it is laid down that even after the revocation or expiry of the period of first detention, a fresh order can be made on the same grounds on which the first order proceeded, unless the action can be said to be mala fide. There was, however, no section equivalent to Section 13(2) of the Preventive Detention Act or Section 14(2) of the Jammu and Kashmir Act in the Defence of India Rules under which that detention had proceeded. This is sufficient to distinguish the earlier case. As pointed out in the All India Reporter case, the interference is very compulsive that fresh facts must be found for new orders otherwise once the old detention comes to an end either by the expiry of the period of detention or by the cancellation of the order of detention, a fresh detention cannot be ordered. Following, therefore, the string of cases to which we have referred and which are indistinguishable from the facts of the present case, we think the detention of the detenu cannot be sustained. He is, therefore, ordered to be released forthwith unless required in some other connection.

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