

Fazal Hussain And Arshad Ahmad vs The State Of Jammu And Kashmir on 29 July, 1969

Equivalent citations: 1970 AIR 1870, 1970 SCR (1) 684, AIR 1970 SUPREME COURT 1870, 1970 (1) SCR 684 1970 MADLJ(CRI) 373, 1970 MADLJ(CRI) 373, 1970 CRI. L. J. 1649, (1970) 1 S C R 817

Author: S.M. Sikri

Bench: S.M. Sikri, G.K. Mitter, K.S. Hegde

PETITIONER:

FAZAL HUSSAIN AND ARSHAD AHMAD

Vs.

RESPONDENT:

THE STATE OF JAMMU AND KASHMIR

DATE OF JUDGMENT:

29/07/1969

BENCH:

SIKRI, S.M.

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MITTER, G.K.

HEGDE, K.S.

CITATION:

1970 AIR 1870

1970 SCR (1) 684

1969 SCC (2) 356

ACT:

Jammu and Kashmir Preventive Detention Act, 1964 s. 3(1)(a)(i) and s. 8--Information to detenu that it would be against public interest to communicate grounds of detention to him--It must be given within 10 days.

HEADNOTE:

In a petition under article 32 of the Constitution the first petitioner's detention under s. 3(1)(a)(i) of the Jammu and Kashmir Preventive Detention Act, 1961 was challenged as illegal on the basis that no grounds of detention were served on him but that an order informing him that it would be against public interest to disclose the

grounds to him was served on him after the expiry of 10 days prescribed in section 8; it was contended that his detention was, therefore, illegal.

In the case of the second petitioner it was claimed that the affidavit in reply to the petition which set out the facts relating to the service of the order of detention and an order under the proviso to section 8 was sworn to by an Additional Secretary on the basis of information derived from the record of the case. and not by the Jail Superintendent who was alleged to have served the orders on the detenu.

HELD: (1) The detention of the first petitioner was illegal and he must be released.

It is the duty of the detaining authority to communicate the grounds of detention within 10 days of the date of detention if the case does not fall within the proviso to s. 8. If the detaining authority neither communicates the grounds of detention nor informs the detenu under the proviso within 10 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. Abdul Jabbar Butt v. State of Jammu and Kashmir, [1957] S.C.R. 51,59.

(2) The petition filed by the second petitioner must be dismissed.

The State had annexed to its affidavit a copy of the Government detention order on which the Jail Superintendent had endorsed the fact of its service. In view of this it was not necessary for the Superintendent to have filed an affidavit of having effected service.

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition No. 111 of 1969. Petition under Art. 32 of the Constitution of India for a writ in the nature of habeas corpus.

R.K. Garg and Anil Kumar Gupta for the petitioners. R. Gopalakrishnan and R.N. Sachthey, for the respondent.

The Judgment of the court was delivered by Sikri, J. This is a joint petition by two detenues under art. 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. The petitioner, Arshad Ahmad, was detained in pursuance of Detention Order dated September 19, 1967, passed under s. 3(1)(a)(i) of the Jammu & Kashmir Preventive Detention Act, 1964. The copy of the order on the record shows that the order was served on the detenu by Jaswant Singh, Deputy Superintendent of Police (CID), Jammu on September 27, 1967. No grounds of detention were served on the detenu, 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 detention had expired.

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 s. 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."

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 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 10 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.

A similar point arose before this Court in *Abdul Jabar Butt v. State of Jammu & Kashmir*(1). 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-s.(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 a certain specified cases the proviso authorises the Government to issue the requisite declaration so as to exclude entirely the operation of sub-s. (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-s. (1) should be exercised before that very result sets in."

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 s. 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. In the result we hold that the detention of the petitioner Arshad Ahmad 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 (1) [1957] S.C.R. 51, 59.

s. 3(1) read with s. 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 s/o Ayub Khan detenu by reading over the same to him.

Sd/-Dy.

Superintendent Central Jail, Jammu 8/1"

In view of this endorsement' 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.

R.K.P.S. Petition dismissed.