Madhya Pradesh High Court
Rafiq Kha vs The State Of Madhya Pradesh on 5 July, 2021
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THE HIGH COURT OF MADHYA PRADESH
Writ Petition No. 9885/2021
(Rafiq Khan Vs. State of MP)
Indore, Dated: 5/7/2021

Heard through video conferencing
Shri M.K. Vijaywargiya learned counsel for petitioner.
Shri Pushyamitra Bhargav, learned Additional Advocate General for respondent/State.

With the consent finally heard.

Order dictated separately.

This petition filed under Article 226 of the Constitution assails the detention order dated 16.5.2021, whereby petitioner is detained under the National Security Act, 1980 by learned District Magistrate Shajapur.

Learned counsel for petitioner raised singular contention before this Court against the impugned order dated 16.5.2021. It is submitted that learned District Magistrate mentioned that petitioner has a right to prefer representation against the detention order before (i) State Government and (ii) the Central Government. But there is no mention in the impugned order that petitioner has a valuable right to prefer representation against the detention order before the same authority namely District Magistrate. In absence of this, the order became vulnerable and liable to be interfered with. The reliance is placed on a recent judgement passed by this Court in W.P. No.9630/2021 (Gurubachan Singh Saluja Vs. State of MP & Others), which is followed in several matters.

Shri Bhargav, learned Additional Advocate General did not dispute the aforesaid legal contention and fairly submitted that the impugned order became vulnerable because of non mentioning of right of representation before the same authority.

No other point is pressed by learned counsel for the parties. We have heard the parties at length.

The curtains on the present issue are finally drawn by a Full Bench of this court in WP No.22290/2019 (Kamal Khare Vs. State of MP). The Full Bench after considering the Constitution Bench judgement of Supreme Court in Kamleshkumar Ishwardas Patel v. Union of India, (1995) 4 SCC 51 and recent Division Bench judgement of this Court in W.P. No.9630/2021 opined as under:-

6) In one of the aforesaid matters (WP No.9792/2021), this Court held as under:-

31) Indisputably, the detention order does not contain any stipulation that the detenu has right to prefer representation before the same authority namely, District Magistrate. The reliance is placed on the recent Full Bench judgment of this Court passed in the case of Kamal Khare (supra). To counter this argument, the bone of contention of learned AAG was that the said Full Bench decision is distinguishable. Full Bench judgment is based on a constitution bench judgment in the case of Kamleshkumar Ishwardas Patel v. Union of India, (1995) 4 SCC 51. In Kamleshkumar (supra), the Apex Court was dealing with the provisions of COFEPOSA Act and the PIT NDPS Act and not with NSA Act. Hence, the said constitution Bench judgment could not have been relied upon.

32) We do not see much merit in this argument because similar argument was advanced by the Govt. before Full Bench in the case of Kamal Khare (supra) which is reproduced in extenso in para-14 of the said judgment. The similar argument could not find favour by the Full Bench.

33) In Kamleshkumar (supra), Apex Court opined as under:-

"6. This provision has the same force and sanctity as any other provision relating to fundamental rights. (See: State of Bombay v.

Atma Ram Shridhar Vaidya [1951 SCR 167, 186 : AIR 1951 SC 157] .) Article 22(5) imposes a dual obligation on the authority making the order of preventive detention: (i) to communicate to the person detained as soon as may be the grounds on which the order of detention has been made; and (ii) to afford the person detained the earliest opportunity of making a representation against the order of detention. Article 22(5) thus proceeds on the basis that the person detained has a right to make a representation against the order of detention and the aforementioned two obligations are imposed on the authority making the order of detention with a view to ensure that right of the person detained to make a representation is a real right and he is able to take steps for redress of a wrong which he thinks has been committed. Article 22(5) does not, however, indicate the authority to whom the representation is to be made. Since the object and purpose of the representation that is to be made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such relief, i.e., the authority which can revoke the order of detention and set him at liberty. The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order. It is recognised by Section 21 of the General Clauses Act, 1897 though it does not flow from it. It can, therefore, be said that Article 22(5) postulates that the person detained has a right to make a representation against the order of detention to the authority making the order. In addition, such a representation can be made to any other authority which is empowered by law to revoke the order of detention.

14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.

38. Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered: Where the detention order has been made under Section 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation."

Emphasis supplied

34) The Full Bench after considering the constitution Bench judgment opined as under:-

> "20. The Supreme Court in Life Insurance Corporation of India v. D.J. Bahadur and Others, (1981) 1 SCC 315 dealing with the aspect whether the Life Insurance Corporation Act, 1956 is a special statute qua the Industrial Disputes Act, 1947 when it came to a dispute regarding conditions of service of the employees of the Life Insurance Corporation of India held that the Industrial Disputes Act would prevail over the Life Insurance Corporation of India Act as the former relates specially and specifically to industrial disputes between the workmen and employers. Relevant discussion in paragraph No.52 of the report would be useful to reproduce hereunder:-
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> "52. In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot

> blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes - so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission - the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, or management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers.

The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to."

30. Now coming to the question as to what would be the effect of not informing the detenu that he has a right of making representation, apart from the State Government and the Central Government, also to the detaining authority itself, the Constitution Bench of the Supreme Court in Kamlesh Kumar Ishwardas Patel (supra) even examined this aspect in paragraph No.14 of the report and categorically held as under:- "14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, who is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation."

33. In view of the above, the Constitution Bench of the Supreme Court in Kamlesh Kumar Ishwardas Patel (supra) analyzed the effect of not informing the detenu of his right to make a representation to the detaining authority itself in paragraph No.47 of the report and held that this results in denial of his right under Article 22(5) of the Constitution of India, which renders the detention illegal. The relevant paragraph No.47 is reproduced hereunder:-

> "47. In both the appeals the orders of detention were made under Section 3 of the PIT NDPS Act by the officer specially empowered by the Central Government to make such an order. In the grounds of detention the detenu was only informed that he can

make a representation to the Central Government or the Advisory Board. The detenu was not informed that he can make a representation to the officer who had made the order of detention. As a result the detenu could not make a representation to the officer who made the order of detention. The Madras High Court, by the judgments under appeal dated 18-11-1994 and 17.1.1994, allowed the writ petitions filed by the detenus and has set aside the order of detention on the view that the failure on the part of the detaining authority to inform the detenu that he has a right to make a representation to the detaining authority himself has resulted in denial of the constitutional right guaranteed under Article 22(5) of the Constitution. In view of our answer to the common question posed the said decisions of the Madras High Court setting aside the order of detention of the detenus must be upheld and these appeals are liable to be dismissed."

Emphasis supplied

35) Another Division Bench in WP No.5866/2015 (Salma vs. State of MP) opined as under:-

"On the last date of hearing opportunity was granted to the learned counsel for the State to examine the law laid down b the Apext Court, which has been made applicable in the various cases by the Division Bench of this Court, in the matter of compliance of provisions of Article 22 (5) of the Constitution of India in the matter of detention itself, intimating the detenu that he/she is entitled to make a representation before the Detaining Authority himself against the order of detainsion. Such law was considered and made applicable in view of the law laid down by the Apex Court in the matter of State of Maharashtra and others Vs. Santosh Shankar Acharya (2000) 7 SCC 463, vary same law was made application by this Court in W.P. No.1830/2015, W. P. No.3491/2015, W .P. No.3677/2015 & W. P. No.3683/2015 in the following manner :

Notably, both these points have been considered by the Supreme Court in the case of State of Maharashtra and others vs. Santosh Shankar Acharya (2000) 7 SCC 463 in para 5 and 6 in particular. The Supreme Court following the dictum in the case of Kamleshkumar restated that non-communication of the fact to the detenu that he could make a representation to the detaining Authority so long as order of detention has not been approved by the State Government in case the order of detention has been issued by the Officer other than the State Government, would constitute infringement of right guaranteed under Article 22(5) of the Constitution and this ratio of the Constitution Bench of the Supreme Court in Kamlesh kumar would apply notwithstanding the fact that same has been made in the context of provisions of COFEPOSA Act. In para 6 of the reported decision, the Supreme Court rejected the similar objection canvassed by the learned counsel for the State relying on Veeramanâ s case and noted that the said decision does not help the respondents in any manner. Inasmuch as, in that case the Court was called upon to consider the

matter in the context of situation that emerged subsequent to the date of approval of the order of detention by the State Government and not prior thereto. In none of the cases on hand the observation in the case of Veeramani will have any application. Suffice it to observe that the detention order and the disclosure of the fact that detenu could make representation to the detaining Authority before the State Government considered the proposal for approval has abridged the right of detenu under Article 22(5) of the Constitution. As a result, the continued detention of the detenu on the basis of such infirm order cannot be countenanced. These petitions, therefore, must succeed. The impugned detention orders in the respective petitions are quashed and set aside and respondents are directed to set the petitioners/detenu at liberty forthwith unless required in connection with any other criminal case."

Emphasis supplied

36) In view of these authoritative pronouncements, there is no manner of doubt that the detenu had a valuable right to make a representation to the detaining authority and denial of this opportunity vitiates the impugned order. Resultantly, impugned order of detention dated 10/05/2021 is set aside.

37) In view of foregoing analysis, the impugned order of detention cannot sustain judicial scrutiny.

38) Before parting with the matter, we deem it proper to observe that the main grievance of detenue/complainant was that the District Magistrate while passing the order of detention did not inform him about his valuable right to prefer a representation against the detention order before the same authority namely District Magistrate. Full Bench recognized the said right of the detenue in light of the constitutional bench judgment in the case of Kamleshkumar Ishwardas Patel (supra). Thus, in the fitness of things, it will be proper for the State to ensure that henceforth in the order of detention, it must be mentioned that the detenue has a right to prefer a representation before the same authority."

Emphasis Supplied

7) In view of the Full Bench decision in Kamal Khare (supra) which was followed by Indore Bench in aforesaid matter, we deem it proper to set aside the impugned orders of detention.

In view whereof, the impugned order of detention cannot sustain judicial scrutiny. Resultantly the order dated 16.5.2021, Annexure P-3, is set aside.

The writ petition is allowed.

(Sujoy Paul)
Judge

(Anil Verma)
Judge

BDJ