
(2003) 10 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : O.W.P. No. 263 of 2001

Abdul Rashid Beigh

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 09-10-2003

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Section 103

Jammu and Kashmir Protection of Human Rights Act, 1997 — Section 13, 18

Citation : (2004) CriLJ 1706

Hon'ble Judges : Syed Bashir-Ud-Din, J

Bench : Single Bench

Advocate : G.A. Lone, for the Appellant; M.A. Rathore, AAG, for the Respondent

Judgement

Syed Bashir-Ud-Din, J.—One Fayaz Ahmed Beigh was working as Camera-man with University of Kashmir in its Department of Central

Asian Studies, He was taken in custody and whisked away by the personnel of STF/SOG camp Lelthapora Awantipora of District Pulwama, from

the University campus. The parents and other family members of the boy, on search and enquiries came to know about his arrest by the STF team.

They approached STF and SOG officials through S.P., Operations, Awantipora, who after initial hesitancy admitted and acknowledged that said

Fayaz Ahmed Beigh was with the STF Lethpora Awantipora. As these efforts brought no result, petitioner, father of the said Fayaz Ahmed Beigh

filed a complaint before Human Rights Commission in December, 1997 at a time when his wife Mst. Maryam (mother of Fayaz Ahmed) filed HCP

No. 1411/97 in the High Court wherein besides requiring the respondents to show authority and law under which Fayaz Ahmad Beigh was

arrested and cause for continued detention of the detenu, prayer for registration

of case against culprits regarding disappearance of said Fayaz

Ahmed Beigh and quashment of false case registered at P/S Soura by the SOG, is also made. However, this writ petition was withdrawn on 29-4-

1998, on the presentation of the petitioner that her husband has approached Human Rights Commission in the matter which has taken cognizance

of the case and fairness and propriety require writ petition to be withdrawn.

2. The Human Rights Commission after taking cognizance of the complaint, during the course of the enquiry summoned officers of STF and SOG

personnel and S.P., Operations, Awantipora to associate them with the proceedings and for filing their written version of the events and matter

under inquiry. The Commission catalogued points requiring determination and allowed parties full opportunity to produce evidence and to examine

and cross examine the witnesses. After a detailed fair transparent enquiry in which parties examined and cross-examined number of witnesses and

produced other evidence, Commission came to the conclusion that version put forth by the writ petitioner as above, is true and did not believe the

counter version put-forth by the Police and State Government of said Fayaz Ahmed Beigh having escaped enroute for recovery of arms and

ammunition by the search party at Nowhatta. The Commission held so as under :--

We therefore, hold in firm words that Fayaz Ahmad Beigh S/o Ab. Rashid Beigh R/o Nowshera, was arrested by Sh. H.R. Parihar, SP,

Operations, Awantipora and his subordinates namely Mohd. Amin SOG Lethopra, Rattan Chand Constable No. 602 JKAP and Abdul Rashid

Trail, (killed in mine blast Tral), during the pendency of this enquiry. The said team after having taken into custody Fayaz Ahmed Beigh from

Kashmir University Campus on 6-9-1997, caused him to disappear by foul play against the norms of law on the subject of arrest. The

disappearance of Fayaz Ahmed Beigh by giving it a shape of escaping while in their custody, allegedly during recovery proceedings at Nowshera,

due to heavy firing by unknown Militants is a made up, concocted and baseless story put forth by the defence, is far from iota of truth and in our

opinion, the said team appear to have been hand in glove to liquidate the person of Fayaz Ahmed Beigh, while in their custody under the drama of

arrest on 9-9-1997 and subsequent alleged recovery in the intervening night of

9/10-9-1997. Equally, Abdul Rashid Khan, the then SHO, Soura, at present SDPO, Pattan has fallen in line to commit the crime by giving legal cover to the disappearance of Fayaz Ahmed Beigh and creating false evidence by registering a false case and supporting the same before the Commission.

3. Having reached the conclusion and returned findings as above, the State Human Rights Commission recommended the Government to grant immediate interim relief of Rs. 5 Lacs to the members of his family and to register a case against the Police officials for investigation besides taking disciplinary proceedings against erring police officials. The Commission forwarded copy of its enquiry report with recommendation to the State Government. It is alleged in the petition that the State Government took no steps whatsoever though legally obligated to take action on such report and recommendation and report the action taken or proposed to be taken to the Commission within a period of one month or till such period as the Commission may extend for the purpose.

4. Petitioner frustrated and disappointed by zero response of the Government has filed this writ petition seeking following reliefs :--

I A writ of mandamus directing the respondent/State to register a case of murder and conspiracy against the then, officers/ officials of the SOG of

Lethpora Awantipora as indicating in the recommendations/judgment of the State Human Rights Commission;

II. To take stern departmental disciplinary action against the erring officials/ officers mentioned in the judgment of the State Human Rights

Commission dated 3-4-2000;

III. To pay to the petitioner the compensation as awarded by the State Human Rights Commission in its judgment dated 3-4-2000 with interest

upto date and

IV. Any other writ, order or direction in the facts and circumstances of the case may also be passed in favour of the petitioner and against the

respondents.

5. Respondent State Government through its Chief Secretary and Additional Chief Secretary Incharge of Home Department has filed reply through

one Gopal Dass, an under Secretary to Government, Home Department. It is not denied that said Fayaz Ahmed Beigh was picked up by STF/

SOG and SP, Operations, Awantipora and detained. However, their version is that said Fayaz Ahmed Beigh was picked up and detained on 9-9-

1997 at Kadalbal Chowk Pampore. After his arrest pursuant to his subsequent interrogation he was taken by one Mohd. Amin Sub Inspector for

recovery of arms and ammunition. The arms and ammunition was recovered from the vicinity of Kashmir University. While on their way to effect

further recovery in Soura area when the police party headed by said Mohd. Amin assisted by a contingent of CRPF personnel, reached Nowhata

area, they came under fire from militants. After taking positions in self defence the encounter ensued and Fayaz Ahmed Beigh in the meantime

managed to escape from Police custody and has not been heard thereafter. Mohd. Amin, Sub Inspector (4461 NGO) lodged report in P/S Soura

as FIR No. 239/97, The investigation of the case has been concluded and final report produced in Court of 2nd Additional Munsiff, Srinagar in

absence of the accused Fayaz Ahmed Beigh after resorting to proceedings u/s 512, Cr.P.C.

6. This version and stance in deto has been taken up by respondents before the Human Rights Commission and Commission has examined this

version and counter case of State Govt. in depth and detail. It has been subjected to scrutiny on parole (oral) and documentary evidence led in the

case by both parties and the commission has on thorough, comprehensive and detailed evaluation and appreciation of the evidence and the material

placed before it, firmly and positively held and concluded that the disappearance version put forth by the authorities/Police officer(s) is concocted

and fabricated. A legal cover is attempted to be thrown around the special personnel of the police party lest, they may be roped into face the

consequences of custodial disappearance of said Fayaz Ahmad Beigh . The version put forth by the writ petitioner about custodial disappearance

of the Fayaz Ahmed has been accepted and found true. The disappearance of said Fayaz Ahmed from custody is opined to be virtually a fact and

the misconduct and incriminating involvement of erring police officials is of the nature and order which need to be investigated and the victims family

need to be paid interim compensation besides, the officials to be booked in disciplinary proceedings.

7. In counter, the petition allegations as also the findings, conclusion and recommendations of the Human Rights Commission are not displaced.

Respondents have done nothing except to reiterate the very version and adopt same stance, as it did and put before the Commission. The Human

Rights Commission constituted under J. and K. Human Rights Act of 1997 has in discharge of its statutory functions on observance 'of prescribed

procedure in a fair, reasonable and Just enquiry come to the conclusion that Fayaz Ahmed's case is one of custodial disappearance' from the

custody of police located at Awantipora (STF/SOG). On taking follow up steps pursuant to the enquiry, Commission made recommendations as

stated earlier to the Government. The Government is under duty and legal obligation to report back to the Commission about the action taken or

proposed to be taken in the matter within the stipulated period of one month or extended period as may be permitted by the Commission, once it

receives the enquiry report with recommendations of the Commission.

8. It is painful to note that the Government has slept over the matter and shown no response to Commission report dated 3-4-2000. Over three

years have gone by now and yet the Government is dragging its feet and utterly failed to discharge its duty under the State Human Rights Act. The

contention in counter that FIR No.239/97 was registered at P/S Soura about disappearance of Fayaz Ahmed on the police version (about which

final report is filed in Court) is found, by Commission as one sided cooked up ploy put forth by police, with no basis on examination of record,

scrutiny of case, appreciation of evidence and material. The Human Rights Commission has meticulously and in detail found basis on facts and law

for the petitioner's version/case that Fayaz Ahmed's case is one of ""custodial disappearance"", from police custody. The police and the State

Government was under duty and a legal obligation to register the case and investigate the version of the writ petitioner about custodial

disappearance of his son Fayaz Ahmed Beigh, which version was upheld by the State Human Rights Commission in exercise of statutory powers

under the Human Rights Act. The State Govt. is silent on this aspect of this case in counter and obviously has least to offer on this count. From the

whole record an impression is fairly gathered that registration of FIR No. 239/97 is with the object of throwing a protective cover around the

STF/SOG police personnel involved in custodial disappearance of Fayaz Ahmed Beigh to facilitate their escape from legal consequences which

they may have to bear consequent upon 'disappearance' and 'not being heard of after arrest' of said Fayaz Ahmed, once he was taken in custody

by the STF/SOG Awantipora. It appears to be a conscious attempt to hoodwink the lenses of law and tailor out a case to escape the penal

consequences of custodial disappearance of the boy. The police version is wholly unacceptable and one tailored to serve interests of the police

personnel involved in the offence of custodial disappearance of the subject.

9. In D.K. Basu Vs. State of West Bengal, it is observed :--

Custodial death is perhaps one of worst crimes in a civilized society governed by the Rule of law. The rights inherent in Articles 21 and 22(1) of

the Constitution require to be jealously and scrupulously protected. We cannot whisk away the problem. Any form of torture of cruel, inhuman or

degrading treatment would fall within-the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or

otherwise, If the functionaries of the Government become law breakers, it is found to breed contempt for law and would encourage lawlessness

and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilized nation can permit that to happen.

Does a citizen shed off his fundamental right to life, the moment a policeman arrests him 9 Can the right to life of a citizen be put in abeyance on his

arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic No. The precious right

guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under-trials, detenus and other prisoners in custody, except

according to the procedure established by law by placing such reasonable restrictions as are permitted by laws.

10. The Apex Court in the context of protection of fundamental rights qua duties of police while combating terrorism further observed in D.K.

Basu Vs. State of West Bengal, :--

There can be no gainsaying that freedom of an individual must yield to be security of the State. The right of preventive detention of individuals in

the interest of security of the State in various situations prescribed under different statutes has been upheld by the Courts. The right to interrogate

the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individuals right to personal liberty. The Latin maxim

salus populi suprema lex (the safety of the people is the Supreme law) and salus publica est suprema lex (safety of the State is the Supreme law)

co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the

community. The action of the State, however, must be "right, just and fair." Using any form of torture for extracting any kind of information would

neither be right nor just nor fair and therefore, would be impermissible, being offensive to Article 21. Such a crime suspect must be interrogated

indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot, however, be tortured or

subjected to third degree methods or eliminated with a view to elicit information, extract confession or drive knowledge about his accomplices,

weapons etc. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be

qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with

innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That

would be bad for the State, the community and above all for the Rule of Law. The State must, therefore, ensure that various agencies deployed by

it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of

innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in the manner permitted by law.

Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

11. The writ Court on establishment of violation of fundamental rights, apart from calling upon the State Government to take punitive action and

disciplinary proceedings against the officers/officials guilty of flagrant violation of fundamental rights, is also under an obligation to give

compensation and relief under public law jurisdiction for the wrong done occasioned by breach of public duty by the State Government in failing to

protect the fundamental rights of citizen. To repair the wrong done and provide Judicial redress for the legal injury in question is a compulsion of

Judicial conscience apart from one created by the statute. The fundamental rights of the citizen guaranteed under Article 21 of the Constitution have

to be jealously guarded by the State and any infringement thereof by a public servant is vicarious liability of the State. Apart from the question of

assessment of compensation, the whole object of awarding the relief/compensation in public law jurisdiction is to repair wrong done or off set in a

measure the damages caused by infringement of fundamental rights of a citizen. This should be the reason for the State Legislature to come up with

the J&K Protection of Human Rights and to provide a mechanism for protection of human, rights and other connected incidental matter(s) thereto.

The need and requirement of respecting human dignity and strict observance of Human rights is the job of State Human Rights Commission.

Protection of rights to life and. property, is the prime responsibility of the State Government and its officers/officials, which cannot be frttered away

and brushed aside on one or the other pretext.

12. Contextually the contention of the State Government that this writ petition is not maintainable as the mother of the victim had filed earlier writ

petition for Habeas Corpus and for registration of the case is quite unpalusible. The explanation for withdrawal of the writ petition given by the

mother is palusible. The pendency of complaint regarding custodial disappearance of the subject by his father and husband of the petitioner, before

Human Rights Commission under J&K Human Rights Act and to avoid multiplicity of proceedings are the reasons' given for the action. No

objection muchless a hypertechnical objection can be taken to withdrawal of the writ petition. After all two parallel proceedings on same subject

are to be avoided when the same relief can be prayed and possibly given in both proceedings. The contention and objections hardly behove the

officials of the rank of Chief Secretary or Additional Chief Secretary, on whose behalf counter is filed.

13. In the aforesaid view of the matter, the State Government/respondent is directed to register a criminal case against the erring officials as

recommended to it by the Human Rights Commission. The investigation shall be entrusted to an officer of the rank of SSP or an officer of the

higher rank. The registration of FIR No. 239/97 at P/S Soura and the final report, if any, filed in the Court shall not stand in the way of registration

and re-investigation of the above cases shall be by one and the same investigating officer. The investigation shall be taken to its logical conclusion

and completed as far as possible within a period of four months.

14. The disciplinary proceedings against erring officers/police personnel involved in the custodial disappearance of the subject Fayaz Ahmed and

responsible for the wrong done shall be simultaneously launched, processed and concluded promptly.

15. The interim relief recommended by the Commission shall be paid to the family of the victim Fayaz Ahmed Beigh. The assessment of the relief

by the Commission appears reasonable and fair in the totality of facts and circumstances of the case. It is of some interest to note that

notwithstanding the stand of the State Govt. disowning its liability, in para'8(d) of the counter, it is stated ""indeference to the Commission's

recommendations, the State Government has decided to pay Rs. 1.00 lac as ex gratia relief for the time being."" It would suffice to convey that

Govt. accepts the liability for compensation but is not prepared to pay the whole sum of relief as recommended by the Commission.

16. Having regard to the facts and circumstances of this case, just and proper quantum of compensation in Public Law jurisdiction is assessed at

Rs. 2, lacs for the wrong of custodial disappearance in breach of public duty by the State Government and its police agencies, in as much as, it has

failed to protect the fundamental rights of the subject Fayaz Ahmed Beigh a State subject citizen of India, unless the State Government decides to

pay full amount of Rs. 5 lacs as recommended by the Human Rights Commission. The compensation shall be payable within a period of two

months, unless time is extended for cause shown. It is left to the State Government whether to recover this amount of compensation or part thereof

from the officers/Police personnel actually responsible for wrong done in this case. It is made clear that the above award of compensation in public

law jurisdiction would be taken into account for adjustment in the eventuality of award of compensation in any other proceedings being taken for

recovery of compensation/damages on the very grounds as urged in this writ petition, with a view that the award of compensation as above is not

recovered by the petitioner or the family or claimants/beneficiaries over again. Disposed of as above.