
(2011) 05 J&K CK 0030
In the Jammu And Kashmir High Court
Case No : HCP No. 36 of 2010

Akram Asif

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 01-05-2011

Acts Referred:

Ranbir Penal Code, 1989 — Section 120B, 147, 148, 332

Citation : (2011) 2 JKJ 247

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Judgement

Hasnain Massodi, J.—Shri Akram Asif S/o Mohammad Asif R/o Mandra Gujjar Khan, Pakistan (hereinafter referred to as ""detenue"") on

whose behalf exercise of extraordinary jurisdiction is sought, has been placed under preventive detention vide Government order No. Home/PB-

V/328/2009 dated 20.02.2009 for a period of 24 months with effect from 04.08.2008 with the purpose to regulate his continued presence in the

State. The detenue is an accused in case - FIR No. 70/2006 u/s 332/120B/147/148/149 RPC & 4/25 A. Act Police Station, Gharota Jammu and

case FIR No. 06/2006 u/s 1/CCA, 7/25 A. Act & 201/115 RPC P/SJIC, Jammu and the detenue is obviously to be available for trial within the

territorial limits of the State. The Government while confirming Detention Order has directed lodgment of detenue in Central Jail, Tihar, New Delhi.

The detenue is presently lodged in Central Jail No. 4 Tihar, New Delhi.

2. The detention order dated 29th August, 2008 is challenged on the grounds that copy of order and grounds of detention have not been served on

the detenue; that the detention order has found approval of the Government after the period stipulated u/s 17 J & K Public Safety Act, 1978; that

the detention order, by directing lodgment of the detainee in Central Jail Tihar, New Delhi, has violated Section 8 of J & K Public Safety Act. It is

pleaded that as the detention order does not indicate the purpose for which the detainee has been placed under preventive detention, the order is

liable to be set aside.

3. The Respondents, in their counter affidavit, insist that the detention order has been made with the purpose to regulate the continuous presence of

the detainee till the arrangements for his deportation from J & K State is made. It is pleaded that the State Advisory Board has gone through the

record and even heard the detainee in person in the jail premises and that the State Advisory Board has opined in favour of continued preventive

detention of the detainee. It is further stated that the Government, in exercise of powers conferred u/s 17 of J & K Public Safety Act, 1978, has

confirmed Detention order. The Respondents seek dismissal of the petition on the grounds set up in their counter affidavit.

Heard and considered.

4. Section 8 of the J & K Public Safety Act, 1978 (hereinafter ""The Act"") empowers the Government to make an order, directing a person to be

detained, if one or more conditions set out in Section 8 (i) Clauses (a) (a-1) or (b) are satisfied. Section 8 (2) confers such power on Divisional

Commissioner and District Magistrate as well. However, the only difference between the power conferred u/s 8 (1) & (2) is that the Divisional

Commissioner and District Magistrate are not clothed with the power to order detention of a person (foreigner) or a person residing in the area of

the State under occupation of the Pakistan, on the grounds set out in Section 8 (1) (b) of the Act. The law makers in their wisdom have restricted

this power to the Government. In other words, though Divisional Commissioner or District Magistrate may order detention of a foreigner or a

person residing in the area of State under the occupation of Pakistan, if conditions laid down in Section 8 (1) (a) or/and Section 8 (1) (a-1) are

satisfied but no such order can be passed to regulate continued presence of the detainee in the State or with a view to make arrangements for his

deportation from the State. In the present case, the order to detain Shri Akram Asif has been made by the Government. The order has been made

to regulate continued presence of the detainee in the State. It would be

appropriate to reproduce hereunder the detention order in question:

GOVERNMENT: ORDER NO HOME/PB-V/1690 OF 2008.

Whereas, Shri Akram Asif S/o Mohd. Asif R/o Mandra Gujjar Khan, Pakistan is not an Indian national and is a foreigner within the meaning of

Foreigners Act, presently in custody in India in connection with his militants activities, and;

Whereas, the Government is satisfied that with a view to regulate his continued presence in the State, it is necessary to detain him under the provisions of Jammu and Kashmir Public Safety Act, 1978.

Now, therefore, in exercise of powers conferred by Section 8 (i) b (i) of J & K Public Safety Act, 1978, the Government hereby order that the

said Shri Akram Asif S/o Mohd. Asif R/o Mandra Gujjar Khan, Pakistan be detained for a period of 24 months with effect from 04.08.2008 and

lodged in Central Jail Tihar.

5. From a bare perusal of the detention order, it appears that though the Government had power to order detention of the detinue in terms of

Section 8 (1) (b) to regulate his continued presence in the State are to make arrangements for his deportation from the State, yet the Government

has made the detention order only with a view to regulate continued presence of the detinue in the 'State'.

7. The expression ""State"" means State of J & K. In other words, the detention order in question has been made to regulate continued presence of

the detinue in the State of J & K. It is argued by learned Counsel for the Petitioner that having regard to the reason spelt out in the Detention order

that has prompted the Government to order detention of the detinue, the detinue ought to have been directed to be detained in a Jail within the

State of J & K. It is contended that the ground detailed in the detention order, thus runs contrary to the operative part of the detention order, in as

much as, detention order is made to regulate continued presence of the detinue in the J & K State but the detinue is directed to be lodged in

Central Jail, Tihar Delhi. The detention order, it is insisted is liable to be set aside on this ground alone.

8. It is argued next that the Respondents by avoiding to furnish/hand over, the copy of the Detention order and the material relied upon by the

Detaining Authority have violated the constitutional and statutory rights of the

Petitioner. It is stated that the Detention order has not been confirmed by the Government within the period prescribed u/s 17 of the Act.

9. The grounds of detention claimed to have been relied upon by the Detaining Authority to order detention in question, the detainee is informed

that as the detainee is facing trial at present in case FIR No. 70/2006 u/s 332/120B/147/148/149 RPC & 4/25 A. Act. P/S Gharota, Jammu, FIR

No. 06/2006 u/s 1/CCA, 7/25 A. Act & 201/115 RPC P/S JIC, Jammu, therefore, with a view to regulate continued presence of the detainee in

the State of J & K, it is rendered necessary to detain him under the provisions of the Act. It would be apt to reproduce hereunder the grounds of

detention available on the record:

Grounds of Detention

Name: Akram Asif

Code:

S/o Mohd. Asif

R/o Mandra Gujjar Khan, Pakistan.

You are facing trial at present in case FIR No. 70/06 P/S Gharota Jammu, 2/06 P/S JIC Jammu. Therefore, with a view to regulate your continued

presence in the State it becomes necessary to detain you under the provisions of the Jammu and Kashmir Public Safety Act, 1978.

10. The Detaining Authority by directing lodgment of the detainee in Central Jail Tihar New Delhi, during the period of detention has gone against

the grounds of detention. In other words, the detention order is not based on the grounds of detention that are claimed to have been gone through

and relied upon by the Detaining Authority, while making the detention order. The detainee is evident from communication No. F.4/SCJ-

4/ASCT/2010/794 dated 12-03-2010 received from Superintendent Central Jail No. 4 Tihar, New Delhi was lodged in Central Jail, Tihar New

Delhi on 17th August, 2007 i.e. almost a year prior to the Detention order in question on transfer of his lodgment from Central Jail Kot Bhalwal,

Jammu to Central Jail Tihar, New Delhi. The detention order in the circumstances, is not only conflict with the grounds of detention but also depicts

non application of mind by the Detaining Authority.

11. The Detention order in question was made on 29th August, 2008, the copies

were provided to the detainee on 20th September, 2008. The Detaining Authority/Government in terms of Section 15 of the J & K Public Safety Act, 1978 is under statutory obligation to place the Detention order before the State Advisory Board within four weeks from the date of Detention order. The Advisory Board in terms of Section 16 (1) of the J & K Public Safety Act, is required to submit its report to the Government within 8 weeks from the date of Detention. It is after the report of the Advisory Board is available to the Government that the Government may confirm the Detention order and in terms of Section 18 of the J & K Public Safety Act, 1978 fix the period of Detention.

12. In the present case, the Detention order was made on 29th of August, 2008. The Government/Detaining Authority in terms of Section 15 of

the J & K Public Safety Act, 1978 was required to place the Detention order before the State Advisory Board by or before 29th September,

2008 and the State Advisory Board on receipt of the Detention order and other documents was to transmit its opinion to the Government within a

further period of four weeks i.e. by 29th October, 2008. From perusal of the Detention order, it transpires that the Government placed the

Detention order with connected record before the State Advisory Board vide its No. Home/PB-V/22/2008 on 23rd January, 2009 i.e. almost five

months after the Detention order was made. The State Advisory Board thereafter gave its opinion/confirmation on 5th February, 2009 and the

Government on receipt of the opinion of the State Advisory Board, confirmed the Detention order vide Government Order No. Home/PB-

V/328/2009 dated 20.02.2009. The Detention order thus was not placed before the State Advisory Board within the period prescribed under law

nor was the Detention order confirmed within the prescribed time frame. The lapse by itself makes cast a cloud on legality of the Detention order.

It also needs to be noticed that the Detention order in question was passed by Principal Secretary, Home Department and the Detaining Authority

in the Detention order itself decided about the period of Detention. This matter was required to be left open for the Government (Financial

Commissioner, Home Department) to decide while confirming or revoking the Detention order on receipt of the opinion from the State Advisory

Board. The Detaining Authority has thus jumped the conclusions and decided

about duration of the period of Detention before receiving the opinion from the State Advisory Board.

13. The constitutional safeguards guaranteed under Article 22(5) Constitution of India and the statutory safeguards envisaged u/s 13 of the J & K

Public Safety Act, 1978 apply with equal force, in case of preventive Detention ordered u/s 8 (1) (b). It follows that the detinue at the time of

execution of the Detention order are immediately thereafter is to be informed that the detinue can make a representation against his detention. The

detinue is to be furnished copy of the grounds of Detention order and copies of all other material that was gone through and relied upon by the

Detaining Authority while passing the Detention order. This apart the grounds of Detention, on which the Detention order is edified are required to

clear unambiguous and as far as possible specific. It is only after these safeguards are taken care of that the detinue can make a meaningful and

effective representation against his detention. In the present case the detinue, if the Detention record is taken on this face value, was handover

copy of the Detention order and the grounds of Detention order on 20th September, 2008. The record does not indicate that the copy of the

grounds of Detention was also provided to the detinue

14. Again, though mention is made of FIR Nos. 70/2006 u/s 332/120B/147/148/149 RPC & 4/25 A. Act. P/S Gharota, Jammu and FIR No.

06/2006 u/s 1/CCA, 7/25 A. Act & 201/115 RPC P/S JIC, Jammu, in the ground of Detention, yet neither copies of FIRs nor any material

collected during investigation appears to have been handed over to the detinue, so as to enable the detinue to make a representation against his

detention.

15. The Detention order does not indicate that the detinue was informed that the detinue may file a representation against the Detention order to

the Government.

16. It needs no emphasis that right to file representation against the Detention order can be meaningful and effective only when the detinue in the

first instance is informed that the detinue may make a representation against his detention. In case the detinue is not informed at all that the

detinue has a right to file the representation, the detinue may not be alive to his right and file representation against his detention.

17. In the present case as already point out that no such information has been given to the detainee at the time of execution of the Detention order

or immediately thereafter.

18. The Supreme Court in Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others, held:

...Preventive detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against the improper

exercise of the power must be jealously watched and enforced by the Court....

19. The law on the subject was reiterated in Union of India (UOI) and Another Vs. Shrimati Chaya Ghoshal and Another, , the Supreme Court

observed that:

...the laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguard, however, technical, is

mandatory....

20. The constitutional safeguards available to a person, detained under preventive detention law, were summed up by the Supreme Court in

Dhananjay Das Vs. District Magistrate, Darrang and Another, in the following words:

...The law is by now well settled that the detainee has two rights under Article 22(5) of the Constitution: (a) to be informed, as soon as may be of

the grounds on which order of detention is made, that is, the grounds which led to the subjective satisfaction of the detaining authority, and (2) to

be afforded the earlier opportunity of making representation against the order of detention, that is to be furnished with sufficient particulars to

enable him to make representation which on being considered may obtain relief to him....

21. For the reasons discussed, the Detention order does not stand legal scrutiny and is liable to be set aside.

22. So viewed, the Detention order No. HOME/PB-V/1690 of 2008 29th August, 2008 is set aside. Resultantly, the Respondents are striped of

authority to detain the detainee under detention order in question in Central Jail No. 4, Tihar Delhi.