

(2009) 05 J&K CK 0007

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition No. 30 Of 2009

Alam Bhat

APPELLANT

Vs

State & Ors.

RESPONDENT

Date of Decision : 25-05-2009

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Jammu and Kashmir Public Safety Act, 1978 — Section 19, 8

Citation : (2009) 3 JKJ 250

Hon'ble Judges : Muzaffar Hussain Attar, J

Bench : Single Bench

Advocate : N.H.Shah, M.A.Qayoom, Advocates appearing for the Parties

Judgement

1. This petition calls in question detention order No.DMS/PSA/41/2009 dated 21.1.2009 passed by respondent No.2, ordering detention of

detenu namely Masrat Alam Bhat S/o Abdul Majid Bhat R/o Zaindar Mohalla Srinagar.

2. Before referring to the grounds of challenge pleaded in the petition it would be appropriate to record some admitted facts which preceded the

passing of the impugned detention order. The detenu was ordered to be detained vide order No. DMS/PSA/03/2007 dated 28th April 2007 and

was lodged in Kotbalwal Jail. The grounds of detention were served on the detenu in pursuance of the said detention order. HCP No. 108/07 was

filed calling in question the said detention order. This court vide its order dated 1 st of Oct. 2007 quashed the detention order. Thereafter the

petitioner was again ordered to be detained vide order No. DMS/PSA/26/2007 dated 16.01.2008. The grounds of detention on the basis of

which the petitioner was detained vide order dated 28th April 2007 found their

place in the grounds of detention, which had become basis for issuance of detention order on 16th Jan. 2008. The said detention order was challenged before this court in HCP No. 30/08 dated 23rd May 2008. This court after considering the case of the parties vide its judgment dated 23rd May 2008 quashed the detention order and ordered for release of detenu provided he was not required in any other case. For the purpose of this disposal of this petition, it becomes necessary to refer to and reproduce the said judgment:

Detenue Masrat Alam has been detained under Section 8 of Jammu & Kashmir Public Safety Act, 1978 (for short the Act). Through the medium of the present petition the petitioner has challenged the order of detention issued by the District Magistrate, Srinagar under No.DMS/PSA/26/2007 dated 16.1.2008.

Petitioner was earlier also detained by the District Magistrate vide Order No.DMS/PSA/03/07 dated 28.4.2007. The said detention came to be challenged before this Court and by its judgment dated 1.10.2007 the court allowed the petition and quashed the detention order. The petitioner has now been detained again on almost the same grounds on which he was detained earlier.

The grounds of detention show that the detenu is a staunch supporter of secessionist ideology and since 1990 he is actively involved in terrorist activities which have a direct bearing upon the maintenance of security of the State. The District Magistrate has given various grounds for his detention. It is stated that on 28.4.2007 the break way group of Hurriyatj Conference arranged a Public meeting at Iddgah, Srinagar, despite the fact that the permission for conducting such a meeting was not given by the district administration. The detenue was one of the Chief organizers of the said meeting and while addressing the gathering he raised anti national slogans and incited the general public on spot, who got provoked and resorted to anti national slogan shouting. During his speech he challenged the accession of the State of J&K with the Union of India and asked the general public to join terrorism and rise against the so called India occupation. His conduct in the said meeting was criminal in nature and accordingly a case under FI No.70/07 U/s 13,18 ULAP) was registered in Police Station Safa Kadal, Srinagar, which is under investigation.

Learned counsel for the petitioner has submitted that the District Magistrate has passed a fresh order of detention without revoking the earlier

order and that in terms of Section 18 & 19 of the Act, the District Magistrate could not have directed a fresh detention of the detenu without

revoking the earlier one. He has relied on Ibrahim Bachu Bafan v. State of Gujarar AIR 1985 SC 697 and Chhagan Bhagwan Kahar v. N.L.

kalna AIR 1989 SC 1234 to show that the order of detention is not in accordance with law.

Respondents have not filed any reply despite several opportunities provided to them. However, detention record has been produced which shows

that the order of detention has been passed by the District Magistrate, Srinagar on 16.1.2008. The record Would show that the material on the

basis of which detention has been directed has not been furnished to the detenu at all. Only contents of the detention warrant and grounds of

detention have been read over to the detenu in Urdu/Kashmiri Language. Though a Photostat copy of the grounds of detention has also been

served on the detenu, other material on the basis of which the grounds have been framed has not been furnished to the detenu.

The provisions of the Act require the detenu should be communicated with the grounds of the detention order and the material in order to enable

him to file an effective representation. In Sophia Ghulam Mohammad Bhan v. State of Maharashtra & Ors. AIR 1999 SC 3051, the Apex Court

observed as under:

.The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the

grounds are based flows from the right given to the detenu to make a representation can be made and the order of detention can be assailed only

when all the grounds on which the order is based are communicated to the detenu and the material on which those grounds are based are also

disclosed and copies thereof are supplied to the person detained in his own language.

3. It was further held that the words 'grounds' used in clause (5) of Art. 22 means not only the narration or conclusions of facts, but also materials

on which those facts or conclusions which constitute 'grounds' are based.

4. The record would further show that the order of detention was issued on

16.1.2008 while as it has been executed on 23.1.2008. Thus, it took 7 days to the respondents to execute the same though the petitioner was available with the respondents during this period.

5. Order of detention No. DMS/PSA/03/07 dated 28.4.2007, by means of which the detenue was detained earlier was quashed by this Court on

1.10.2007. A second order of detention has been passed (impugned in the present petition) without revoking the earlier order of detention.

6. Section 19 of the Act gives powers to the Government to revoke an order of detention order. It provides as under:

Revocation of detention orders: (I) Without prejudice to the provisions of section 21 of the 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 Subsection

(2) of Section.

7. In Ibrahim Bachu Bafan v. State of Gujarat (supra) it was held that where an order of preventive detention is quashed by the High Court in

exercise of its ordinary jurisdiction, the power of making a fresh order is not available to be exercised. Such a fresh order can be made only when

the previous order is revoked. The Court observed:

Law of preventive detention within the ambit of which the Act is covered has been accepted by our Constitution. Challenge to legislations of

preventive detention as being ultra vires the Constitution has, therefore, been repelled by this Court on more than one occasion. The inbuilt

safeguards provided by the different statutes dealing with preventive detention have been accepted to be in keeping with the rule of law. There is

judicial consensus that under the preventive detention law, before the Act in question came into the field, repeated orders of detention could not be

made. This Court had clearly indicated that more than one order of detention on the same grounds in succession would not be valid.

8. In Chhagan Bhagwaqn Kahar (supra) the Supreme Court observed that if the order of detention comes to an end either by revocation or by

expiry of the period of detention there must be fresh facts for passing a subsequent order.

9. As noticed above the order of detention impugned in the present petition has been based on the same grounds of detention on which the earlier

detention order, quashed by this Court was passed.

10. The Supreme Court in *Chotka Hembram v. State of W.B* AIR 1974 SC 432 held that fresh facts must be present to warrant the making of a

subsequent order of detention otherwise it would run counter to the entire scheme of the whole Act. The Court observed:

The matter can also be looked at from another angle Section 13 of the Act provides that the maximum period for which any person may be

detained in pursuance of any detention order, which has been confirmed under Section 12, shall be 12 months from the date of detention. It is,

therefore, plain that the maximum period for which a person can be detained on account of specified acts should not exceed 12 months. If for the

same acts repeated orders of detention can be made, the effect would be that for the same acts a detainee would be liable to be detained for a

period of more than 12 months. The making of a subsequent order of detention in respect of the same acts, for which an earlier order of detention

was made, would run counter to the entire scheme of the Act. It would also set at naught the restriction which is imposed by Section 13 of the Act

relating to the maximum period for which a person can be detained in pursuance of a detention order.

In view of the above discussion I find the order of detention impugned in the present petition cannot stand. Petition is, therefore, allowed and the

detention order No. DMS/PS A/26/2007 dated 16.1.2008 is set aside. Respondents are directed to release the detainee Masrat Alam Bhat S/O

Abdul Majeed Bhat R/O Zaindar Mohalla, Srinagar forthwith provided he is not required in any other case.

The record produced by Ld. Dy. AG is returned to him in the open Court.

11. After quashing of the said detention order yet another detention order No. DMS/PSA/20/2008 dated 9.9.2008 was passed by respondent

No.2 against petitioner(detenu). The grounds of detention were served on the petitioner(detenu) which in essence were replica of the earlier

grounds of detention. This detention order was again challenged before this Court in HCP No. 223/2008 and this court vide its judgment dated

27.12.2008 was pleased to quash the said detention order and detainee was directed to be released from preventive custody, if not, required in any

other case. This court in the said two judgments has considered, the case set up

in respective petitions on the basis of law occupying the field.

12. It is after quashment of these detention orders that the detention order impugned in this petition was passed which is being called in question on number of grounds summarized in the petition. After notice was issued, respondent filed counter affidavit and controverted the allegations contained in the petition.

13. Right to liberty besides being constitutional right guaranteed under Article 21 of the Constitution of India is also one of the basic human rights of an individual. The said right cannot be taken away unless there are sufficient grounds available for depriving a person of his liberty. It is true that the State has to struck balance between individual rights and rights of Society. It is further true that the state is duty bound to protect the interests of the society which are of paramount importance when pitted against individual interests. When the state and/or statutory authority takes an action to deprive an individual of his liberty then the law which permits taking of such action has to be strictly construed by the authority. In the case of preventive detention the allegations as contained in grounds of detention are not required to be proved as such allegations do not go through the mill of trial. The subjective satisfaction arrived at on the basis of material available with the detaining authority has to be thus subjected to close scrutiny to find out as to whether the satisfaction arrived at is bonafide or not.

14. Heard Id. counsel for parties at great length.

15. In order to show to the court that the detention order is illegal and deserves to be quashed, Id. Counsel Mr. M.A. Qayoom, referred to the grounds pleaded in this petition, and has referred to host of the judgments including the judgment of the Hon'ble Supreme Court reported in AIR 1970 SC 1164, to show that the detention order is bad in law. The Id. counsel interalia stated that the fresh order of detention cannot be passed in law on the grounds on which the earlier detention order was passed. He further stated that the grounds of detention of earlier detention order cannot become basis for passing of fresh detention order and it is only on fresh grounds detention order can be passed. The Id. Counsel has further submitted that the detention order is render further bad in law as the documents referred to in the grounds of detention have not been made available to the detenu which has disabled him to make an effective

representation. Though, Id. counsel has stated that in this case a representation was filed but it has not been considered and nonconsideration also has rendered the detention order bad in law.

16. Mr. N. H. Shah, Id. Counsel for respondents, however, submitted that the detention order does not suffer from any infirmity and is incapable of being quashed as no legal ground is available to the detenu. The Id. Counsel in support of his contention has referred to SLJ 2008 (2) 683 and has also produced a Xerox copy of Division Bench judgment of this court passed in OWP No. 162/06 dated 6th August 2006.

17. This Court has considered the case earlier on in respect of the grounds of detention which have been reiterated in the grounds of detention provided to the detenu in pursuance of detention order impugned in this petition. The fresh ground incorporated in the grounds of detention which necessitated passing of the impugned detention order, reveal that the detenu during his lodgment in District Jail Udhampur in view of the disclosure made by one Irshad Ahmad Sheikh; has motivated other jail inmates to continue so called Jihad so as to liberate State of J&K from India in the name of religion. It is also stated that detenu is making provocative speeches in the Jail to provoke the jail inmates to continue and accelerate the terrorism after release from jail.

18. The record shows that the grounds of detention are replica of dossier made available by SSP Srinagar to the detaining authority. This ground alone is sufficient to order the quashment of the detention order as this shows complete lack of application of mind on the part of the detaining authority to issue the detention order. But as the fresh ground has been referred to in the grounds of detention on which the impugned order is passed, it becomes imperative to deal with the said fresh ground. The complete answer is provided to the said fresh ground in the judgment reported in AIR 1970 SC page 1664 titled ""Kshetra Gogoi v. State of Assam"". Para 4 of the judgment is reproduced as under:

4. In the present case, we have compared the grounds of detention served in pursuance of the order dated 28th August, 1969, with the grounds of detention which were served on the petitioner in pursuance of the second detention order dated 29th August, 1968, and we find that the two are identical, except that two small paragraphs have been added when serving the

grounds of detention in respect of the detention order dated 28th

August, 1969. These paragraphs are as follows:

That though in preventive custody, he has been maintaining links with Shah Syed Hussain and other associates, who went underground in

Nagaland, through his friends and relatives. Shah Syed Hussain and his gang since received some arms and explosives from Naga rebels for

committing acts of sabotage and creating largescale disturbances, particularly in the plains areas along AssamNagaland border. That, in the

circumstances, Shri Kshetra Gogai's being at large will jeopardize the security of the State and the maintenance of public order in this region"".

The first one of these two paragraphs is the only one that purports to mention some ground in addition to the grounds which were included

amongst the grounds which were the basis of the order dated 29th August, 1968. We have found it very difficult to appreciate how a person in

preventive custody could continue to maintain links with his associates outside jail who had gone underground even through his friends and

relatives. If the present petitioner was able to maintain such links, it casts a sad reflection on the persons in charge of him while he was in custody

and, in any case, it would appear that his detention could serve no useful purpose. It appears to us to be, in fact, very doubtful whether any such

contacts could possibly have been maintained. However, even if we accept that such links were maintained, this additional ground mentioned does

not satisfy the requirements of Section 13 (2) of the Act, because the only allegation is that the links were maintained during the period of

preventive detention. Under Section 13 (2) what is required is that fresh facts should have arisen after the expiry of the previous detention. Facts

arising during the period of detention are, therefore, not relevant when applying the provisions of Section 13 (2). In the present case, the fresh

order was passed on 28th August 1969, a day before the expiry, and it is obvious that no fresh facts could by that date arise and yet be held to

have arisen after the date of expiry. The order dated 28th August, 1969 was therefore, not at all justified under Section 13 (2) of the Act and that

order being in violation of the provisions of the Act has to be held to be invalid, so that the deten/tion under that order is illegal. The petition is

allowed. The petitioner shaH be set at liberty forthwith. Petition allowed.

19. It is almost in identical circumstances that the Hon'ble Supreme Court held detention order illegal and directed that the detenu be set at liberty.

On the reasoning and analogy given by the Hon'ble Supreme Court in the above referred judgment the fresh ground of detention cannot be

countenanced in law to have the potential of ordering detention of the detenu. It does not stand to reason as to how the detenu while being in

detention can indulge in such activities as alleged in fresh grounds of detention and if so, it casts a serious reflection on the functionaries of the Jail.

20. In view of the law laid down by the Hon'ble Supreme Court in AIR 1970 (supra), the fresh ground cannot become basis for issuance of the

detention order, which is accordingly held to be illegal.

21. The detention order No.DMS/PSA/41/2009 dated 21.1.2009 passed by respondent No.2, is quashed and the detenu namely Masrat Alam

Bhat S/o Abdul Majid Bhat R/o Zaindar Mohalla, Srinagar is directed to be released forthwith, if not, required in any other case.

22. Record of the case be returned to Id. Dy. Advocate General.