
(2019) 03 J&K CK 0127

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 433 Of 2018

Bashir Ahmad Bhat

APPELLANT

Vs

State Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 20-03-2019

Acts Referred:

Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 — Section 3(1)
Jammu And Kashmir Public Safety Act, 1978 — Section 8, 8(a), 8(4), 9, 13, 17
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 148, 188, 307, 332, 336, 395
Unlawful Activities (Prevention) Act, 1967 — Section 13

Citation : (2019) 03 J&K CK 0127

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : MianTufail, M.A. Qayoom, Mir Suhail

Judgement

1. By dint of order bearing No.48/DMP/PSA/2018 dated 06.10.2018 passed by the Respondent No.2/District Magistrate Pulwama, in exercise of powers vested in him under Clause (a) of Section (8) of the Jammu and Kashmir Public Safety Act, 1978 (for short the Act of 1978), one Bashir Ahmad Bhat S/o Habibullah Bhat R/o Parigam Tehsil Pulwama, District Pulwama (petitioner herein), has been detained and lodged in Central Jail Kotebalwal, Jammu.

2. In the petition, it has been stated that the petitioner is the son of Bashir Ahmad Bhat, Son of Habibullah Bhat, Resident of Parigam, Tehsil and District Pulwama, (hereinafter to be referred to as detainee) has been detained by respondent no.2 under the provisions of Public Safety Act (for short PSA), in terms of order referred supra and lodged at Central Jail Kotebalwal, Jammu.

3. The detainee has challenged the said order of detention on following grounds:-

That the respondent no.2 has detained the detainee under the provisions of PSA on the basis of the dossier placed before him by respondent no.3 vide his letter

dated 01.10.2018. However, neither a copy of the dossier nor a copy of letter dated 01.10.2018 or any other material record produced by respondent no.3 before respondent no.2 has been provided to the detainee to enable him to make a representation against his detention to the appropriate authority. It is stated that detainee is alleged to be involved in case FIR No.367/2010 and FIR No.354/2016 of Police Station Pulwama. The respondent no.2 after referring to the aforesaid two FIRs in the grounds of detention has stated that remaining at large of detainee would pose threat to the security of the State particularly in the present scenario prevailing in the District as such, he is required to be detained under the provisions of PSA. It is further submitted that respondent no.2 has nowhere stated in the grounds of detention as to whether the detainee has applied for bail in FIR No.367/2010 and FIR No.254/2016. The order of detention having been passed by respondent no.2 in a most mechanical and arbitrary manner. It is further stated that respondent no.2 has also stated in the grounds of detention that normal law is not sufficient to deter the detainee from indulging in anti-national activities. Since such a ground is neither recognized by law nor can be made use of by the detaining authority for detaining a person under the provisions of PSA. Also the respondent no.2 has not provided copies of the FIR No.367/2010 and FIR No.354/2016 of Police Station, Pulwama to the detainee. He has also not provided any other material relied upon by him to the detainee for detaining him under the provisions of PSA. Since by not providing the material to the detainee, he has been disabled from making a representation against his detention before the appropriate authority. It is stated that the order and grounds of detention have neither been read over nor explained to the detainee by the respondent no.2 or anybody on his behalf in the language which he understands i.e. Urdu/Kashmiri. The detainee has also not been provided translated copies of the grounds of detention to enable him to make an effective representation against his order of detention to the appropriate authority. The grounds of detention upon which the detainee has been detained, are vague, uncertain, untrue, baseless, unfounded and ambiguous and lack in material particulars and essential details. It is further stated that the order of detention has admittedly been passed by respondent no.2, but as per the information of the petitioner, he has not referred the matter to the Government "forthwith" as warranted by Section 8(4) read with Section 13 of the J&K Public Safety Act. That while passing the order of detention against the detainee, the respondent no.2 has violated all the procedural safeguards enshrined in Article 21 and 22(5) of the Constitution of India as applicable to the State of J&K and also the provisions of Public Safety Act.

4. Respondents have filed the counter affidavit wherein they have vehemently resisted the averments made in the petition. The District Magistrate Pulwama, respondent no. 2 herein, has stated that the detainee has been detained in pursuance of detention Order No.48/DMP/PSA/18 dated 06.10.2018. It is submitted that the detainee is a member of religious organization namely Muslim Deeni Mahaaz. The detainee has been brought up in an environment hostile to

police and other law enforcement agencies and therefore pursuing the policy of seceding the J&K State from the Union of India and annexing it with Pakistan. In order to implement this far distant dream, the detainee has been indulging in rendering services to the militants in following their agenda inimical to the State besides, provoking the youth of the area to take part in the stone pelting, sloganeering and causing damages to the public infrastructure. The detainee has been involved in Case FIR No.367/2010, under Sections 148, 188, 336, 395, 427, 332, 307 RPC 13 ULA(P) Act Police Station Pulwama. Accordingly, the police Station prepared a dossier and while finding that the activities of the detainee are prejudicial to the security of the State and normal law of land is not sufficient to deter the detainee from his nefarious activities and forwarded dossier along-with record to the detaining authority with the recommendations to order preventive detention of the detainee.

5. That while examining the dossier carefully and after perusing the material, the detaining authority was satisfied that the activities of detainee are prejudicial to the security of the State, as such, the in the facts and circumstances of the case, the preventive detention of the detainee has been found necessitated. Accordingly vide Order No.48/DMP/PSA/18 dated 06.10.2018, detention of the detainee was ordered with a view to prevent him from acting in any manner, which is prejudicial to the security of the State and accordingly ordered his lodgement in KotBhalwal Jail Jammu. The said warrant was forwarded to SSP Pulwama in duplicate for execution under Section 9 of J&KPSA, 1978.

6. That pursuant to the above detention order, the warrant was executed through SI Ghulam Rasool No.115539/ARP of P/S Pulwama on 09.10.2018, who on 10.10.2018 handed over the detainee and the Deputy Superintendent Central Jail Jammu Kotbhalwal took over the detainee against proper receipt and lodged him in the said Jail. Contents of the warrant were read over and explained to the detainee in his own language which he understands.

7. That the grounds of detention were read over, explained and served to the detainee along-with a communication No.209-12/DMP/PSA/18 dated 06.10.2018 where under he was made aware about his preventive detention and that he has a right to file representation to the Government against his detention, which as per record shows not have been filed by the detainee.

8. That the detention of the detainee has been ordered strictly in accordance with the provisions of J&KPSA, 1978 and the procedural safeguards prescribed under the provisions of the PSA and the rights guaranteed to the detainee under the constitution have strictly been followed in the case.

9. I have heard learned counsel for the parties and gone through the record produced by the learned AAG. The impugned detention order reads as under:-

Government of Jammu & Kashmir

Office of the District Magistrate Pulwama

Order No.48/DMP/PSA

Dated:-06-10-2018

Whereas on the basis of dossier placed before me by the Sr. Superintendent of Police Pulwama vide his No.Pros/Lgl/PSA/18139 dated 01.10.2018. I am satisfied that there are grounds to detain Bashir Ahmad Bhat S/o Habibullah Bhat R/o Parigam Tehsil Pulwama District Pulwama so as to prevent him from acting in any manner prejudicial to the Security of the State. Therefore, it is necessary to detain him under the provisions of J&K Public Safety Act, 1978;

Now, therefore, in exercise of powers vested in me in terms of Clause (a) of Section 8 of J&K Public Safety Act, 1978. I, District Magistrate Pulwama hereby direct the Bashir Ahmad Bhat S/o Habibullah Bhat R/o Parigam Tehsil Pulwama District Pulwama be detained and lodged in KotBhalwal Jail Jammu.

District Magistrate

Pulwama.

Copy to the:-

1) Principal Secretary to Government Home Department J&K Government Civil Secretariat Srinagar.

2) ADGP, CID J&K Srinagar.

3) Sr. Superintendent of Police Pulwama in duplicate for execution of the order as provided for under Section 9 of J&K Public Safety Act, 1978. Notice of the order be given to the detainee Bashir Ahmad Bhat S/o Habibullah Bhat R/o Parigam Tehsil Pulwama District Pulwama by reading over and explaining the same to him in the language he understands fully. However, he should be got examined by the government Medical Practitioner of the respective jurisdiction at the time of executing the warrant simultaneously the legal advisors of the detentee informed about his detention which factum should have supportive records. As copy of this order duly executed in accordance with stipulations in the endorsement be returned to his office for onward submissions to the concerned quarters.

4) Superintendent KotBhalwal Jail Jammu for information and necessary action.

5) Office Order file.

10. The notice of information under section 13 of PSA Act reads as under:-

Government of Jammu & Kashmir

Office of the District Magistrate Pulwama

Name

:-

Bashir Ahmad Bhat

Parentage

:-

Habibullah Bhat

R/o

:-

Parigam

Tehsil

:-

Pulwama

District

:-

Pulwama

Whereas you have been detained vide Order No.48/DMP/PSA/18 dated 06.10.2018 made by me under Section 8 of J&K Public Safety Act, 1978.

Now, therefore, in pursuance of Section 13 of the said Act, you are hereby informed that your detention has been ordered on the grounds specified in the Annexure "A" hereto. You may inform the Home Department early, if you would like to be heard in person by the Advisory Board.

You may make a representation to the undersigned as also to the Government against the said detention order, if you so desire.

District Magistrate

Pulwama

Dated:- 06-10-2018

No.209-12/DMP/PSA/18

Copy to the:-

1) Principal Secretary to Government Home Department J&K Government Civil Secretariat Srinagar.

2) Sr. Supdt. Of Police Pulwama for information and n.a.

3) Superintendent KotBhalwal Jail Jammu alongwith a copy of the grounds of detention and that of letter addressed to the detainee which, may be communicated and delivered to him (detenue) within a stipulated period of 5 days from the date of his detention except in case covered under Section 13 of PSA for which reasons are to be recorded.

11. The grounds of detention reads as under:-

Subject

: -

Grounds of detention

Name

: -

Bashir Ahmad Bhat

Parentage

: -

Habibullah Bhat

Address

: -

ParigamPulwama

Tehsil

: -

Pulwama

District

: -

Pulwama

Age

: -

50 years

Qualification

: -

Graduate

You Bashir Ahmad Bhat aged about 50 years are an ordinary resident of Village New ParigamPulwama. You pursued your education upto 5th Standard from Government Primary School Parigam and subsequently joined the Government Middle School Newa and pass 8th Class Examination therefore. You qualified 12th from the Higher Secondary School Pulwama and completed graduation in Amar Singh College Srinagar. You started to work as farmer besides, are a member of religious organization Muslim Deeni Mahaaz.

You have been brought up in an environment hostile to Police and other law enforcement agencies and, therefore, pursuing the policy of seeding the J&K State from the Union of India and annexing it with Pakistan. To implement your far distant dream you have been indulging in rendering services to the militants in following their agenda inimical to the State besides, provoking the youth of the area to take part in the stone pelting, sloganeering and causing damages to the public infrastructure. You, by way of creating obstructions for suspending the transport and other day-to-day businesses, never allowed the security forces/ Police or other like law enforcing agencies to restore the peace and tranquility in the area.

You along-with other accomplices were witnessed more often than never roaming in the streets of the District during night horse and using public address system installed at Mosques in the town thereby urging the people of the area to follow the agenda being devised by the Separatist Leaders and raise anti-national slogans etc. You even went to the extent of threaten those who do not give heed to your dictations. Your activities have not only made the lives of the people of the area miserable but are also preventing the students from pursuing studies thereby jeopardizing their future as well. The Police although put in ceaseless/ breathless efforts to prevent you from acting in a manner which is prejudicial to the security of the State but you and your accomplices succeeded to escape from their clutches. You and your accomplices facilitated the movement of the militants freely in the streets which otherwise would have been extremely difficult.

You had managed to draw out an unmanageable mob and provoked them to put in efforts to sabotage the election campaign in the town and the villages of area by issuing threats and intimidation to local populace with the to prevent them from participating in electoral process of ensuing Panchayat Elections. There is every apprehension that you and your accomplices will indulge in stone pelting and organizing unruly mobs and other like activities just to keep the electors away from the election process on the day of voting.

You being a habitual stone pelter, trouble monger hell-bent to carry out subversive activities in the area were booked in the following cases: -

1. 367/2010 U/S 148,188,336,395,427,332,307 RPC 13 ULA (P) Act of P/S Pulwama.
2. Case FIR No.354/2016 U/S 13 ULA (P) Act of P/S Pulwama. Your remaining at large would pose severe threat to the security of the State particularly in the present security scenario prevailing in the District.

The activities as projected in the forgoing Paras of the instant dossier run heavily against you and are highly prejudicial to the security of the State. Being highly motivated to carry on the illegal designs you are not likely to desist from anti-national and anti-social activities. You are directly involved in the above mentioned cases and the normal laws are not sufficient to deter you from anti-

national activities. Therefore, in order to prevent you from indulging in these activities, which are prejudicial to the security of the State, it is necessary to detain you by invoking the provisions of J&K Public Safety Act, 1978.

District Magistrate

Pulwama

12. From bare perusal of grounds of detention it is evident that petitioner has been detained as his activities were prejudicial to security of state. The order of detention has been passed on 6.10.2018; notice under section 13 has been issued on same date; it has been executed by SI Gh.Rasool on 10/10/2018 after reading the grounds of detention and translating the same in kashmiri language to petitioner herein. The order has been executed in Central jail in kote Bhalwal, Jammu; this means detinue was already in jail. On 12.11.2018, advisory board has opined that there were sufficient grounds for detention. On 15.11.2018, the Govt. has confirmed detention order for a period of six months in terms of section 17(1) of Act.

Preventive detention is resorted to, to thwart future action. If the detinue is already in jail charged with some offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. There is nothing to indicate the awareness of the detaining authority that detinue was already in jail and yet the impugned order is required to be made.

13. In In SLJ (11) 2017 page 650 , it has been held as under:-

Relevant para- 11.

11/ We shall take up the first point with regard to the ground of satisfaction that has to be recorded by the detaining authority in case the detinue is already in custody in connection with some other case. In this context the need to refer to the decision of the Supreme Court in Surya Prakash Sharma (supra). Paragraphs 5,6 & 7 are relevant and they are extracted herein below :

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in Ramereshwar Shaw versus District Magistrate, Burdwan. To eschew prolixity we refrain from detailing all those cases except that of Dharmendra Suganchand Chelawat versus Union of India, wherein a three Judge Bench, after considering all the earlier relevant decisions including Ramereshwar\war Shaw answered the question in the following words :

" The decisions referred to above led to the conclusion that an order for

detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detainee is already in detention ; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which, it may be satisfied that (a) the detainee is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detainee, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained though the grounds of detention indicate the detaining authority's awareness of the fact that the detainee was in judicial custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment made in the grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail "he may again indulge in serious offences causing threat to public order" (emphasis supplied). To put it differently the satisfaction of the detaining authority that the detainee might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

7. On the conclusions as above, we quash the order of detention"

12/ From the above decision, it is evident that for an order of detention to be valid in respect of a person in custody, it is necessary that the grounds of detention must show that: (i) the detaining authority was aware of the fact that the detainee is already in custody; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee is already in detention. The expression "compelling reasons" has also been explained by the Supreme Court as signifying that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detainee is likely to be released from the custody in the near future and (b) taking into account the nature of the antecedent activities it is likely that after his release from custody he would indulge in prejudicial activities and that it was necessary to detain him in order to prevent him from engaging in such activities.

13/ In the present case we find that although there is mention of the fact that the detainee had been arrested in connection with F.I.R No. 100/2016 but, it is not clear as to whether the detaining authority was aware of fact that the detainee continued to be in custody. Furthermore, if we assume that the detaining authority was aware that the detainee was in custody in respect of FIR No. 100/2016, the compelling reasons, referred to above, have not been

indicated in the grounds of detention. In other words, the grounds of detention nowhere make a mention or indicate satisfaction that the detenu was being likely to be released from custody in near future. Therefore, in view of the decision of Supreme Court in Surya Prakash Sharma, this alone vitiate the detention order."

14. Next from the perusal grounds of detention, it is evident that petitioner has found involved in two FIRs. One FIR 367/2010 U/S 148,188,336,395,427,332,307 RPC 13 ULA (P) Act of P/s Pulwama and another FIR No.354/2016 U/S 13 ULA (P) Act of P/S Pulwama. But in record I find that there is only one FIR no. 354/2016; even receipt annexed in record would reveal that only three leaves have been given to petitioner, which means that whole of materials have not been provided to petitioner; this makes incapability for petitioner to make effective representation.

15. In AIR 1999 SC 3051 in case titled Sophia Gulam Mohd. Bham v state of Maharashtra, wherein it is held that;-

Now, an effective representation can be made against the order of detention only when copies of the material documents which were considered and relied upon by the Detaining Authority in forming his opinion that the detention of Bham Faisal Gulam Mohammed was necessary, were supplied to him. It is only when he has looked into those documents, read and understood their contents that it can be said that the detenu can make an effective representation to the Detaining Authority, State or Central Government, as laid down in Article 22 (5) of the Constitution which provides as under :

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

The above will show that when a person is detained in pursuance of an order made for preventive detention, he has to be provided the grounds on which the order was made. He has also to be afforded the earliest opportunity of making a representation against that order. Both the requirements have to be complied with by the authorities making the order of detention. These are the rights guaranteed to the person detained by this clause of Article 22 and if any of the rights is violated, in the sense that either the grounds are not communicated or opportunity of making a representation is not afforded at the earliest, the detention order would become bad. The use of the words "as soon as may be" indicate a positive action on the part of the Detaining Authority in supplying the grounds of detention. There should not be any delay in supplying the grounds on which the order of detention was based to the detenu. The use of the words "earliest opportunity" also carry the same philosophy that there should not be any delay in affording an adequate opportunity to the detenu of making a

representation against the order of detention. 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 against the order of detention. 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 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.

The words "grounds" used in clause (5) of Article 22 means not only the narration or conclusions of facts, but also all materials on which those facts or conclusions which constitute "grounds" are based. In *Prakash Chandra Mehta vs. Commissioner & Secretary, Govt. of Kerala & Ors.* AIR 1986 SC 687 = (1985) Supp.

SCC 144 = (1985) 3 SCR 697, in which an order of detention was passed under Section 3 (1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, this Court, while examining the concept of "grounds" used in Article 22(5), observed that the word "grounds" has to receive an interpretation which would keep it meaningfully in tune with the contemporary notions. It was explained that the expression "grounds" includes not only conclusions of facts but also all the "basic facts" on which those conclusions were founded. The "basic facts" are different from subsidiary facts or further particulars.

The order of detention, in the instant case, is based only on one ground which is to the effect that Bham Faisal Gulam Mohammed was, on 10.8.1997, held at the Mumbai Airport and on his search being taken, he was found in possession of Diamonds which he was trying to smuggle out of India.

As pointed out earlier, copies of the documents which were seized on a search made at premises No. B/13, Sikkanagar, V.P. Road, Mumbai-400 004, admittedly considered by the Detaining Authority, were not given to Bham Faisal Gulam Mohammed. On a perusal of the documents referred to in the grounds of detention, the Detaining Authority had come to the conclusion that Bham Faisal Gulam Mohammed was acting as a "carrier" for persons who were the king-pins, financiers and organisers of the whole smuggling activities. This inference was drawn by the Detaining Authority on the basis of the documents referred to in grounds 13 and of the detention order. The Bombay High Court, before which the question of non-supply of documents was raised and the order of detention was challenged on grounds, inter alia, that requirements of Article 22 (5) were not complied with, relied upon the affidavit of the Detaining Authority and found that the documents referred to in Paras 13 and 14 of the grounds were not to be supplied to the detenu and there was no infraction of sub-clause (5) of Article 22 of the Constitution.

Thahira Haris V. Government of Karnataka, reported in AIR 2009 SC, 2184, held as follows:

27. There were several grounds on which the detention of the detainee was challenged in these appeals but it is not necessary to refer to all the grounds since on the ground of not supplying the relied upon documents, continued detention of the detainee becomes illegal and detention order has to be quashed on that ground alone.

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detainee who has been detained in pursuance of the order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other material relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detainee at the earliest opportunity to make effective and meaningful representation against his detention.

7. On this ground alone, the impugned order of detention is liable to be set aside. Accordingly, the instant Habeas Corpus petition is allowed, order of detention bearing No.139-DMG/PSA/2016 dated 29th September, 2016 as extended vide Government Order No. Home/PB-V/2937/2016 dated 30th December, 2016 is, hereby, quashed. The respondents are directed to release the detainee, namely, Waseem Ahmad Sofi S/o Late Manzoor Ahmad Sofi R/o Kondbal Manasbal Safapora, Tehsil Lar, District Ganderbal, from preventive custody forthwith, if not required in any other case.

16. Procedural requirements are the only safeguards available to a detainee; procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard. Procedural laws especially in criminal administration of justice has to be complied strictly.

17. Next FIRs i.e FIR 367/2010 U/S 148,188,336,395,427,332,307 RPC 13 ULA (P) Act of P/s Pulwama and another FIR No.354/2016 U/S 13 ULA (P) Act on the basis of which petitioner has been detained are pertaining to years 2010 and 2016 much prior to order of passing of detention order. Delay made by the sponsoring authority has not been explained in detention order as well in counter affidavit. Detaining authority should have given reasonable explanation, setting out the details, as to how the delay has occurred and what were reasons to pass detention order after more than two years from the lodging of FIR in 2016.

18. Respondents have thus not complied with cardinal principle of law while passing the detention order against petitioner in this regard. In view of what has been discussed above detention order bearing no. 48/DMP/PSA/2018 dated 06/10/2018 passed by respondent no. 2-District Magistrate, Pulwama, is quashed. Detainee to be set free if not required in any other case.