

(2024) 03 J&K CK 0043

In the Jammu And Kashmir High Court

Case No : ?Habeas Corpus Petition No. 1 Of 2023, Civil Miscellaneous No. 3303 Of 2023

Bashir Ahmed Naik

APPELLANT

Vs

Union Territory Of Jammu And Kashmir And Others

RESPONDENT

Date of Decision : 28-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 8(2), 8(4), 13
General Clauses Act, 1897 — Section 21

Citation : (2024) 03 J&K CK 0043

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : N. D. Qazi, Eishaan Dadhichi

Final Decision : Allowed

Judgement

Sanjay Dhar, J

1. Through the medium of instant petition, the petitioner has challenged order No.44/PSA of 2023 dated 19.05.2023 passed by respondent No. 2, District Magistrate, Ramban (hereinafter to be referred as "the detaining authority"), whereby the petitioner, Bashir Ahmed Naik S/o Ghulam Rasool Naik, R/o Aripinchila Tehsil Khari, District Ramban (for short "the detenue") has been taken into preventive custody in order to prevent him from acting in any manner prejudicial to the maintenance of public order.

2. The impugned detention order has been challenged by the detenue on the grounds that same suffers from non-application of mind as the grounds of detention are verbatim copy of the police dossier. It has been contended that grounds of detention were never explained to the petitioner in the language he understands. It has been submitted that the petitioner studied only upto 8th standard and was not able to understand the English language, in which the grounds of detention have been formulated. It has been further contended that

the petitioner was not informed about his right to file a representation against the impugned order of detention before the detaining authority, which has prevented him from making a representation against the order of detention. It has also been contended that the impugned order of detention suffers non-application of mind as the detaining authority has used the expressions "public order" and "security of the State" interchangeably. Lastly, it has been contended that whole of the material relied upon by the detaining authority for formulating the grounds of detention has not been provided to the petitioner.

3. The respondents have filed the counter affidavit in order to contest the petition. In their counter affidavit, the respondents have submitted that the petitioner has remained involved in anti-national activities and was arrested in the year 1993. It has been further contended that the petitioner's name figures in the list of OGWs. It is being alleged that brother-in-law of the petitioner had crossed over to POK/Pakistan in the year 1999 with whom the petitioner is in constant contact. It has been submitted that the petitioner was passing on information regarding the activities of the security forces to the Pakistan based terrorists. According to the respondents, reports in this regard have been entered in the daily diary of Police Post, Khari of District Ramban on 11.05.2023, 12.05.2023, 13.05.2023, 14.05.2023 and 15.05.2023. It has been further contended that all the statutory and constitutional safeguards have been adhered to by the respondents while passing the impugned order of detention. It has been contended that the grounds of detention have been explained to the petitioner in the language he understands and that whole of the material on the basis of which the grounds of detention have been formulated, has been furnished to the petitioner. In order to lend support to their contentions, the respondents have produced the detention record.

4. I have heard learned counsel for the parties and perused the pleadings and the record produced by the respondents.

5. The first ground that has been urged by the learned counsel for the petitioner is that the petitioner has not been informed about his right to make a representation against the order of detention before the detaining authority. A perusal of the record shows that District Magistrate, Ramban, the detaining authority has given notice of detention to the petitioner vide his communication dated 19.05.2023, whereunder the petitioner has been informed that he may make a representation before the Government against the said order. In terms of said communication, the petitioner has not been informed about his right to make a representation before the District Magistrate, who has passed the impugned order of detention.

6. Sub-section (2) of Section 8 of the Jammu and Kashmir Public Safety Act provides that a detention order can be passed by a District Magistrate and Sub-section (4) of Section 8 of the Act provides that when any such order is made by the District Magistrate, he shall forthwith report the fact to the Government together with the grounds on which the order has been made. It also provides

that such an order shall not remain in force for more than twelve days after the making thereof unless in the meantime, the order is approved by the Government. Thus, an order of detention made by a District Magistrate is required to be approved by the Government not later than 12 days from the date of order.

7. In terms of Section 21 of the General Clauses Act, 1897, power to make an order includes power to add to, amend, vary or rescind, notifications, orders, rules or bye laws. Thus, an authority which is vested with jurisdiction to make an order is empowered to add to, amend, vary or rescind such an order. Therefore, the District Magistrate, who is empowered to make the order of detention, is also empowered to revoke it till such time it is not approved by the Government.

8. Adverting to the facts of the present case, the impugned detention order was made by the respondent-District Magistrate, Ramban on 19.05.2023 and the same was approved by the Government on 25.05.2023. During this period i.e. 19.05.2023 to 25.05.2023, District Magistrate, Ramban was vested with jurisdiction to revoke the said order but there is nothing on record to show that the District Magistrate did inform the petitioner about his right to make a representation before the said authority, though he did address a communication to the detainee that he has right to make a representation to the Government. In view of this, the petitioner has been deprived of his right to make a representation before the detaining authority.

9. A Division Bench of this Court in the case of Tariq Ahmad vs. State of J&K and Ors. 2017 (3) JKJ 684 has, while dealing with a similar issue, held that non-communication of the fact that the detainee can make a representation to the detaining authority, till the detention order is not approved by the Government, would constitute an infraction of a valuable constitutional right guaranteed under Article 22(5) of the Constitution of India as also of the right under Section 13 of the Jammu and Kashmir Public Safety Act, 1978. It has been further held that such non-communication would invalidate the order of detention.

10. On this ground alone, the impugned order of detention deserves to be quashed.

11. Viewed thus, the petition is allowed and impugned order No. 44/PSA of 2023 dated 19.05.2023 passed by the District Magistrate, Ramban is quashed. The detainee is directed to be released from the preventive custody, provided he is not required in connection with any other case.

12. The record, as produced, be returned to the learned counsel for the respondents.