

(2022) 12 J&K CK 0014

In the Jammu And Kashmir High Court

Case No : Writ Petition (Criminal) No. 162 Of 2022

Faisal Hassan Naikoo

APPELLANT

Vs

Union Territory Of J&K And Anr

RESPONDENT

Date of Decision : 07-12-2022

Acts Referred:

Constitution Of India, 1950 — Article 22, 22(5)
Jammu And Kashmir Public Safety Act, 1978 — Section 8

Citation : (2022) 12 J&K CK 0014

Hon'ble Judges : Moksha Khajuria Kazmi, J

Bench : Single Bench

Advocate : S. T. Hassan, Nida Nazir, Insha Rashid

Final Decision : Disposed Of

Judgement

Moksha Khajuria Kazmi, J

1. Through the medium of instant writ petition, quashment of Order No. 46 DMB/PSA/2022 dated 09.04.2022, passed by the respondent No. 2- District Magistrate, Baramulla (hereinafter called 'Detaining Authority') in exercise of powers under Section 8 of the Jammu & Kashmir Public Safety Act, 1978, in terms whereof the brother of the petitioner namely, Faisal Hassan Naikoo S/O Ghulam Hassan Naikoo R/O Qazi Hamam, Tehsil and District, Baramulla (for short 'detenue') was ordered to be detained and lodged in Central Jail Kotebalwal, Jammu, has been sought on the grounds taken in the memo of the petition.

2. Though the detention order has been challenged on several grounds, but the main ground taken by the petitioner is that the representation filed against the detention order has not been considered by the respondents till date. It is submitted that because of non-consideration of the representation, the detention order is liable to be quashed. Copy of the representation is annexed with the writ petition.

3. The respondents in their counter have defended the order of detention, stating therein that the detaining authority after being satisfied on the basis of the material available including the dossier submitted by Senior Superintendent of Police, Baramulla, it had become necessary to prevent the detainee from acting in any manner prejudicial to the 'maintenance of security of the State' to place him under preventive detention. It is stated that the detention of the detainee has been ordered strictly in accordance with the provisions of J&K Public Safety Act, 1978 (for short 'the Act') and the procedural safeguards prescribed under the provisions of the Act have strictly been followed and the rights guaranteed to the detainee under the Constitution are protected. It is further submitted that activities of the detainee are highly prejudicial to the security of the Union Territory of J&K and, therefore, there was no option left to the detaining authority, but to order detention of the detainee under the Act. It is also urged that the grounds of detention sufficiently connect the detainee with the activities which are highly prejudicial to the security of the UT of J&K, as such, the detention of the detainee is legal.

4. With regard to the allegation of non-consideration of the detainee's representation, it is stated by the respondents that the detainee was informed about his right to make a representation to the detaining authority or the Government. However, no whisper has been made in the counter affidavit whether the representation has been made or not by the detainee.

5. Heard learned counsel for the parties and perused the available material including the detention record.

6. It has been contended that representation has been filed by the brother of the detainee before the detaining authority, copy whereof is annexed as Annexure-VI to the writ petition but despite lapse of more than seven months, the representation has not been considered by the detaining authority.

7. From the perusal of the detention record, produced by Ms. Insha Rashid, Government Advocate, nothing reveals in respect of the receipt or disposal of the representation. It is thus, evident that representation filed by the detainee through his brother, i.e, petitioner herein in the month of April. 2022, has not been considered by the respondents so far. The execution report of the detention record reveals that dossier has not been provided to the detainee when the detention warrant was executed at Central Jail Kot Bhalwal, Jammu.

8. The respondents were under bounden duty to furnish all the documents to the detainee, so that an effective representation can be filed by the detainee to put forth his stand against the detention order. However, the respondents have failed to provide the requisite material to the detainee but despite that as is evident from the material available before the Court, detainee has made a representation but same has not been disposed of when the respondents were duty bound to consider and dispose of the same within a reasonable dispatch and convey the outcome of the same to the petitioner at an earliest. In the instant case, the

respondents have slept over the matter and have not decided the representation of the petitioner as on date.

10. Article 22(5) of the Constitution of India, casts legal obligation on the Government to consider the detenu's representation as early as possible. It is the bounden duty of the Detaining Authority or the Government, as the case may be, to consider the representation of the detenu and pass appropriate orders thereon. There should be no slackness and callous attitude in considering the representation of the persons who are detained. Any unexplained delay would be breach of constitutional safeguards and would render the detention of the detenu as illegal. Every day delay in dealing with the representation has to be explained and the explanation offered must be reasonably indicating that there was no slackness or callousness.

11. In *Tara Chand vs State of Rajasthan & Ors.*, 1980 (2) SCC 321, Hon'ble Supreme Court has held that any inordinate and unexplained delay on the part of the Government in considering the representation renders the very detention illegal. The Supreme Court in another case *Rahmatullah vs State of Bihar*, AIR 1981 SC 2069 has held that clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. The obligation of the Government to afford to the detenu an opportunity to make representation is distinct from the Government's obligation to refer the case of the detenu along with representation to the Advisory Board to enable it to form its opinion and send a report to the Government. Therefore, it is implicit in clauses (4) and (5) of Article 22 of the Constitution of India that the Government, while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The Supreme Court in the case of *Kundanbhai Dulabhai Sheikh vs. District Magistrate Ahmedabad & Ors.* 1996 CrL.J 1981 quashed the detention order only on the ground of delay in disposing of the representation.

12. Having gone through the observations of the Supreme Court in the aforesaid cases, this Court is of the considered view that the said decisions with all its forces is applicable to the instant case. Therefore, the detention order is liable to be quashed.

13. In view of the settled proposition of law (*Supra*), the non-consideration of the detenu's representation constitutes violation of the constitutional right, guaranteed under Article 22 of the Constitution. This also depicts the failure of the Government to discharge its function. Therefore, for this reason alone, writ petition can succeed.

14. Accordingly, the writ petition is allowed and the impugned detention Order No. 46 DMB/PSA/2022 dated 09.04.2022 is quashed. The Jail Superintendent concerned is directed to release the detenu namely, Faisal Hassan Naikoo S/O Ghulam Hassan Naikoo R/O Qazi Hamam, Tehsil and District, Baramulla

forthwith, if his detention is not required in connection with any other criminal case(s).

15. Disposed of.

16. Registry to return the record to learned counsel for the respondents forthwith.