

(2011) 07 J&K CK 0022
In the Jammu And Kashmir High Court
Case No : HCP No. 137 of 2011

Faizan Rafiq Hakeem

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 19-07-2011

Acts Referred:

Jammu and Kashmir Public Safety Act, 1978 — Section 8

Citation : (2011) 07 J&K CK 0022

Hon'ble Judges : Muzaffar Hussain Attar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Honble Mr. Justice Muzaffar Hussain Attar, Judge

1. Order dated 07.06.2011 passed by the Court is noticed as under:

Last opportunity of three weeks is granted to the respondents to file counter to the instance petition with an advance copy to be furnished to Mr.

Hussain failing which the right for the same shall stand closed. Rejoinder, if any, within one week thereafter.

List again on July 19, 2011 for final hearing.

Learned State counsel shall keep the detention record ready with him for perusal of this Court on the next date of hearing, so that the disposal of

the instance petition is not delayed any further.

2. Reply affidavit has not been filed. In terms of aforementioned court order, right to file the same stands closed. Detention record is also not made available.

3. Heard learned counsel for the parties. Considered the matter.

4. The detent namely, Faizan Rafiq Hakeem S/o Mohd. Rafiq Hakeem R/o Reshi Bazar Anantnag Tehsil and District Anantnag has been ordered

to be detained by the District Magistrate, Anantnag vide order no. Det/PSA/DMA/11/38 dated 23.02.2011 in exercise of powers conferred upon

him u/s 8 of the J & K Public Safety Act, 1978 (for short Act of 1978).

5. It is this order which is called in question inter alia on the grounds that detent is a minor; the material upon which the detaining authority has relied

upon while passing detention order has not been supplied to the detent which has prevented him from making an effective representation against his

detention; in the grounds of detention it is provided that the activities of the detent are highly prejudicial to the security of the State and maintenance

of the Public Order which shows complete non application of mind on the part of the detaining authority; detent was on bail and detaining authority

has not shown awareness about the same.

6. Learned counsel for the petitioner argued in tune with the respective pleadings.

7. Learned counsel for detent submitted that detent was ordered to be released on parole for a period of three months vide Government order No.

Home (Det) 885 of 2011 dated 04.04.2011 and ever-since he is released on parole nothing adverse has been reported against him. Learned

counsel produced Xerox copy of the said Government order which is taken on record.

8. Mr. Vakil, learned AAG appearing for respondents submitted that in view of the activities mentioned in the grounds of detention, detaining

authority had no option but to order for detention of detent. Leaned counsel also submitted that this Court cannot adjudicate upon and determine

the issue of age of detent as raised by the learned counsel for the detent as that would require conducting of an enquiry. Learned counsel submitted

that age of detent is to be taken as twenty seven years as same has been mentioned in the grounds of detention. Learned counsel also submitted

that requisite material has been supplied to the detent but he has not filed representation against his detention, so none of his constitutional rights

stand violated. Learned counsel further submitted that detenu's activities in fact warrant for his detention.

9. Perusal of the grounds of detention reveal that detent has been involved in three FIRs and as submitted by learned counsel for detent he was

granted bail and had not been involved in any activity which would warrant his detention under the Act of 1978. Nothing is produced before the

Court to show that material which has become basis for passing the detention order has been supplied to the detent. It is also not stated that what

were the compelling reasons for ordering detention of the detent when he was alleged to have committed substantive offences.

10. A person who is detained under the preventive detention laws is not to be produced before a Magistrate nor has to be given an opportunity to

prove before the court of competent jurisdiction that the allegations made against him in the grounds of detention are not correct.

11. The right to personal liberty is a guaranteed Fundamental Right and a person can be deprived of same only in accordance with procedure

established by law. The preventive detention laws are of extreme nature, recourse to which has to be taken in extreme situation. Detaining authority

on entering satisfaction in respect of activities of a person orders for detention of detent. State authorities, however, are duty bound to follow

mandate of Article 22 of the constitution of India and more particularly Sub Clause 5 of the said Constitutional provision. The inbuilt safeguards

have been made in the Article 22 of the Constitution to provide constitutional safeguards to a person, and in pursuance thereof statutory safeguards

have also been provided to a detent under the provision of Act of 1978. Article 22(5) and provisions of Act of 1978 are to be strictly construed.

Any infraction of these provisions of law would invalidate the detention order.

12. Perusal of the grounds of detention reveal that detaining authority has not recorded any satisfaction as to how in the face of registration of

criminal cases for having allegedly committed substantive offence, there was requirement of ordering for detention of detent. The order of detention

suffers from non-application of mind. As averments made in the petition are not controverted either by filing reply affidavit or production of record.

In the facts and circumstances of this case thus it is assumed that material upon which detaining authority has relied upon while ordering for the

detention of detent has not been supplied to him. Detent has been prevented from making representation which in turn has infringed his

Constitutional right guaranteed under Article 22(5) of the Constitution of India. The detention order is rendered invalid.

13. Admittedly, detent has been released on parole three months back. Nothing adverse is reported against him during the period of these three

months. This is one more circumstance which would invalidate order of detention.

14. Detaining authority has ordered for detention of detent by holding that his activities are highly prejudicial to the security of the State and

maintenance of Public order. Detaining authority was not thus sure as to for what reason and for which activity the detent is ordered to be

detained.

15. The Hon'ble Supreme Court in case titled Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others, has ruled as under :-

13. This court has forged certain procedural safeguards in the case of preventive detention of citizens. The constitutional imperative indicated in

Art. 22(5) are twofold: (1) the detaining authority must, as soon as may be, that is, as soon as practicable, after the detention, communicate to the

detent the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detent the earliest opportunity of

making a representation against the order of detention. The right to make a representation implies what is means the right of making an effective

representation. Where certain documents are relied upon in the grounds of detention the grounds would be incomplete without such documents.

The detent, therefore, has right to be furnished with the grounds of detention along with the documents relied upon. Khudiram Das Vs. The State

of West Bengal and Others, , Narendra Purshotam Umrao Vs. B.B. Gujral and Others,

16. Hon'ble Supreme Court in case titled G. M. Shah v. State of J & K reported in (1980) 1 Supreme Court Cases 132 has ruled that detaining

authority cannot while ordering for detention of a person simultaneously state that his activities are highly prejudicial to the security of the state and

maintenance of public order. Relevant paragraph is reproduced as under;

9. As observed by Hidayatullah, J. (as he then was) in Dr. Ram Manohar Lohia v. State of Bihar one has to imagine three concentric circles, in

order to understand the meaning and import of the above expressions. ""Law and order"" represents the largest circle within which is the next circle

representing ""public order"" and the smallest circle represents ""security of State"". It is then easy to see that an act may affect law and order but not

public order just as an act may affect law and order but not public order just as an act may affect public order but not security of State. It is in view

of the above distinction, the Act defines the expressions ""acting in any manner prejudicial to the security of the state"" and ""acting in any manner

prejudicial to the maintenance of public order"" separately. An order of detention made either on the basis that the detaining authority is satisfied that

the person against whom the order is being made is acting in any manner prejudicial to the security of the State or on the basis that he is satisfied

that such person is acting in any manner prejudicial to the maintenance of public order but which is attempted to be supported by placing reliance

on both the bases in the grounds furnished to the detent has to be held to be an illegal one vide decisions of this Court in Bhupal Chandra Ghosh v.

Arif Ali and Satya Brata Ghose v. Arif Ali.

17. For the above stated reasons, this petition is allowed. By issuance of writ of Certiorari, detention order no. Det/PSA/DMA/11/38 dated

23.02.2011 passed by the District Magistrate, Anantnag is quashed. It is directed that detent, namely, Faizan Rafiq Hakeem S/o Mohd. Rafiq

Hakeem R/o Reshi Bazar Anantnag Tehsil and District Anantnag, who has been ordered to be released on parole, be not arrested in pursuance to

aforementioned detention order.