
(1992) 04 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : H. Corpus No. 2 of 1991

Farhat Ahmad Kanjwal

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 23-04-1992

Acts Referred:

Constitution of India, 1950 — Article 22(5)

Citation : (1995) SriLJ 101

Hon'ble Judges : S.M.Rizvi, J

Bench : Single Bench

Advocate : U.K.Jalali , N.A.Ronga, Advocates appearing for the Parties

Judgement

1. By medium of this petition for a writ of habeus corpus the detention of Farhat Ahmad Kanjwal S/o Abdul Gaffar Kanjwal R/o Mohalla Syed

Sultan, Sopore, Baramulla as ordered by the respondent u/s 8 of the JandK Public Safety Act, hereinafter referred to the Act, has been challenged

on numerous grounds as enumerated therein.

2. Despite ample opportunities the respondent has failed to file any counter. The petition was admitted as far back as on 25.1.1991. It took five

months to serve the respondent where on 27.6.1991, the Government Advocate appeared for the respondent. He took six opportunities to file the

counter but failed to do so. Last of all on 17.12.1991 the right to file counter was closed. Thereafter, for one reason or the other the case would not

be taken up for hearing till 17.4.1992. On that day when the case was heard, the learned Sr. AAG, had no record with him. He was given time to

produce the same. He again failed to produce the record of detention. The result of all this would be that the allegations made in the petition on an

affidavit have remained unrebutted and are to be taken as correct.

3. I have heard the learned counsel for the petitioner. First of all the detention has been challenged on the ground that the same has been made under the orders of an incompetent authority.

4. As this allegation has been made on an affidavit and there is no rebuttal to it on the file in the form of counter or record, it is to be taken as correct.

5. Moreover, the perusal of the grounds of detention shows that it is signed by Addl. Secretary to Government, Home department. It has not been shown to be under the orders of the Governor/Government. It has not been authenticated either. Needless to mention that under section 8 of the Act, the Addl. Secretary is no entity and he has no power to detain any person under the provisions of the Act.

6. The order of detention has not been served upon the detainee and nor has it been produced by the respondent to show it to the court as to who has passed the said order and under what circumstances.

7. In these circumstances of the case, the court has to presume that the order of detention has been passed by an incompetent authority which is therefore liable to be quashed.

8. The second challenge to the order of detention is that it has since expired. Allegedly the detainee was taken into custody on 22/1/1990 and was ordered to be detained for a period of two years. The said period of two years has expired on 22/1/1992 and therefore, the detainee was to be released on the said date. Allegedly he is still in detention.

9. This allegation too is on an affidavit and it has not been rebutted in any manner whatsoever. There is no counter filed by the respondent. The record too has not been produced. The court therefore has no alternative but to presume that the detainee was arrested on 22/1/1990 and since then more than two years have passed but he has not been released.

10. Even from the perusal of grounds of detention it appears that the detainee has been taken into preventive custody somewhere in February or March 1990. In the ground of detention there is no mention of the fact that the detainee was arrested in any other case. No awareness of his arrest in any other case has been shown in the grounds of detention. It is therefore

established that he was taken into preventive custody on 221990.

11. The maximum period for which a detainee can be detained under section 8 of the Act is two years. The said period of two years has expired

on 221992. His detention therefore, is nothing but wrongful confinement.

12. On this ground also the detainee merits to be released forthwith and without any delay.

13. Thirdly, it is alleged that the grounds of detention were supplied to the detainee in English language which he does not understand. No

translation copy of the same was given to him in Kashmiri. Allegedly, he knows [SIC] no language except Kashmiri. For this reason he has been

deprived of his constitutional right to make a representation against his detention.

14. This allegation too has remained un rebutted and the court therefore has no alternative but to presume that the detainee knows no other language

than Kashmiri and the grounds of detention were given to him in English language. It is beaten law that the grounds of detention are to be supplied

to a detainee in a language which he understands. This is so because the grounds of detention are required to be given to the detainee to enable him

to make a representation against his detention. If he does not know the language in which the grounds of detention are couched, how can he make

a representation. For this reason also the order of detention is liable to be quashed.

15. Fourthly, it is argued that the specific grounds of detention were not furnished to the detainee and therefore he could not make an effective

representation against his detention.

16. From the perusal of the grounds of detention it transpires that some specific grounds of detention have not been furnished to the detainee. It has

been mentioned in the grounds of detention specially that specific grounds of detention were not disclosed to the detainee.

17. For want of counter and the detention record, the court has no alternative but to presume that some specific grounds of detention were not

disclosed to the detainee. Had the respondent produced the record, the court could ascertain as to what sort of grounds were not disclosed to him.

Having failed to produce the record and there being a specific mention of this fact in the grounds of detention itself, how can the court hold

otherwise.

18. Now the question is whether the detaining authority has any power to withhold the grounds of detention from the detainee. It may be made clear at the very outset that under law the detaining authority has no such power. In Art. 22(5) of the constitution of India the detaining authority is obliged to furnish grounds of detention to the detainee as soon as possible so as to afford him an earliest opportunity to make a representation against the order of detention. It has power to withhold grounds of detention from the detainee. However, under SubClause (6) of Art. 22, the detaining authority has the power to withhold some facts if it is in the public interest to do so.

19. In the present case, the detaining authority in the very grounds of detention has stated that specific grounds of detention were not disclosed to the detainee. It had no power to withhold any ground of detention as it has deprived the detainee of his valuable right as guaranteed in Art. 22 (5) of the Constitution of India, to make a representation against his detention. For this reason also the detention of the detainee is illegal and unconstitutional.

20. The result is that I allow this petition. The detention of the detainee is held as unconstitutional illegal and bad in law. I therefore, direct that the detainee be set at liberty forthwith. The respondent as also the Superintendent Jail concerned are directed to implement this order at once.

21. As the respondent has miserably failed to justify the detention of the detainee and he has been deprived of his liberty for over two years without any legal justification, the court is of the opinion that it would be just and proper to award some compensation to him at least for his wrongful confinement. The liberty of a citizen of India is guaranteed in Art. 21, of the constitution of India, and he cannot be deprived of the same unless in due course of law. The detainee in the present case appears to have been deprived of a fundamental right of his liberty for over two years without following the procedure as established by law, he was therefore, every right to get damages from the respondents, at whose behest he has suffered the wrongful confinement. He is hereby held entitled to damages assessed [SIC] of Rs.25,000/ The respondent is directed to pay the said amount to him, after he is released from custody in pursuance of this order. The detainee should have the liberty to file an application for execution of this

order for recovery of the said amount, if it is not paid to him within four weeks time from the date of this order.

22. Let this file be consigned to record after due completion.