

(2011) 02 J&K CK 0015
In the Jammu And Kashmir High Court
Case No : HCP No. 285 of 2010

Farooq Ahmad Bhat

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 04-02-2011

Acts Referred:

Constitution of India, 1950 — Article 21, 22(5)

Citation : (2011) 2 JKJ 227

Hon'ble Judges : Mohammad Yaqoob Mir, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mohammad Yaqoob Mir, J.—The Right to Life and Liberty is guaranteed by Article 21 of the Constitution. Deprivation thereof while having

recourse to preventive measures is also controlled by the safeguards which are to be respected. Infraction to such safeguards vitiates the action of

the Detaining Authority. The procedural defects strengthen the right of the detainee to challenge the executive invasion of his personal liberty. The

Detaining Authority keeping in view the sacrosanct protection as guaranteed under Article 21 of the Constitution is under an obligation to show in a

transparent manner that the detention meticulously conforms to the procedure established by law.

2. Evilish activities aimed at causing threat to the State's security and maintenance of public order may at times warrant preventive measures which

may be totally justifiable but at the same time for advancing such object, the authority concerned has a constitutional obligation to adhere to the

safeguards lest a justified action, so as to deter a person from such evilish activities, may in effect be an itious act.

3. Noticing the activities of the detainee prejudicial to the maintenance of public order, has been detained in pursuance to order of detention bearing

No. DMB/PSA/187/2010 dated 21.7.2010. The said order of detention has been approved by the Government on 27.7.2010 and send to the

State Advisory Board on 30.7.2010. Based on the report of Advisory Board, the order of detention has been confirmed vide order No.

Home/PB-V/2033/2010 dated 6.9.2010 and period of detention has been fixed as 12 months.

4. Aggrieved and dissatisfied with the order of detention, by instant petition quashment of the same is sought.

5. The learned Counsel for the Petitioner contended that the impugned order is liable to be quashed on the following grounds:

(1) The Detaining Authority (District Magistrate) has not communicated to the detainee about filing of representation before him which invalidates

the order of detention.

(2) The detainee has not been supplied the material forming base for the grounds of detention.

(3) The detainee was in custody in connection with case FIR No. 260/2010, no compelling reasons have been recorded for passing the order of

detention.

(4) The grounds of detention are vague, contrary to facts and self contradictory, still order of detention has been passed which shows lack of

application of mind.

(5) The detainee has not been supplied with translated script of grounds of detention.

6. The first contention raised about right of the detainee to move representation before the Detaining Authority (District Magistrate) was seriously

highlighted by the learned Counsel for the Petitioner. While supporting the submission has referred to the judgment rendered by the Hon'ble Apex

Court in case State of Maharashtra and Ors. v. Santosh Shankar Acharya reported in 2000 STPL(LE) 28305 SC.

7. Opposing the said contention, learned Counsel for the Respondents would contend that right to make representation as against the order of

detention is available to the detainee which has to be made to the Government as provided by Section 13 of the Jammu & Kashmir Public Safety

Act. The said provision does not provide for making any representation to the officer (District Magistrate), further added that the judgment as

referred to by the learned Counsel for the Petitioner is not applicable because in the reported judgment provisions of Maharashtra Prevention of

Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangers Persons Act, 1981 and Section 21 of Bombay General Clauses

Act, 1904 were analyzed. The said provisions are not para-materia with the provisions of the Jammu & Kashmir Public Safety Act and the Jammu

& Kashmir General Clauses Act.

8. On thoughtful consideration of the rival submissions of the learned Counsel for the parties and a look on the relevant provisions of the Jammu &

Kashmir Public Safety Act (hereinafter referred to as "the Safety Act") and Section 21 of the Jammu & Kashmir General Clauses Act, it is clear

that the detinue is vested with the right to make representation to the officer (District Magistrate) itself in addition of making representation to the

Government.

9. In terms of Section 8 of the Safety Act, the Government is empowered to pass the orders of detention in the situations enumerated in Section

8(1)(a)(a-1) and (b) whereas Sub-Section 2 of Section 8 also empowers the officers, namely, Divisional Commissioner and the District Magistrate

to exercise the powers as conferred by Sub-section (1) to the Government only in cases which are covered under Sub-clauses (i) and (ii) of

Clause (a) of (a-1) of Sub-section (1) but the said power as exercisable by the said officers is controlled by Sub-Section 4 of Section 8 of the

Safety Act, which provides that such officers, when passing such order of detention, shall forthwith report the fact to the Government together with

the grounds on which the order has been made and also the particulars as in their opinion have a bearing on the matter and such order has to

remain in force only for 12 days unless in the meantime it has been approved by the Government.

10. Section 13 of the Safety Act provides that the authority making the order of detention i.e. both Government or the officers as mentioned above

whosoever passes such order, has to communicate grounds of detention to the detinue within five days, however, in exceptional circumstances for

which reasons are to be recorded, within a period of 10 days so as to afford the

detenue an earliest opportunity of making representation against such order to the Government.

11. Now the question which emerge for consideration is as to whether the officer (District Magistrate) or for that purpose Divisional Commissioner shall be competent to look into the representation if made to them. Here the provisions of Section 21 of the J & K General Clauses Act comes into play. Same is reproduced here-under:

21. Power to make; to include power to add to, amend, vary or rescind, orders, rules or bye-laws:

Where, by any Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

12. Plain wording of Section 21, among other things, provides that when an officer is conferred, by any Act or regulation, power to issue notifications/orders, in the like manner he has power to add, amend, vary or rescind any such order.

13. A look on the provisions of Section 8(2) of the Safety Act would provide that power is given to the District Magistrate to pass the order of

detention. Therefore, in terms of Section 21 of the J & K General Clauses Act he has power to revoke the order. Same position is amply made

clear by Section 19 of the Safety Act which provides that without prejudice to the provisions of Section 21 of the General Clauses Act, Samvat

1977, the detention order at any time can be revoked or modified by the government notwithstanding that the order has been made by an officer

mentioned in Sub-Section 2 of Section 8. The operation of provisions of Section 21 of the General Clauses Act is saved by Sub-section (1) of

Section 19 of the Safety Act. Therefore, it is concluded that the officer (District Magistrate) who has passed the order of detention has power to

revoke the same. When it is so, the detenue has a vested right to represent before the same officer, in turn said officer (District Magistrate) is under

a constitutional obligation to communicate to the detenue that he can make representation before him in addition to the representation as can be

made to the Government. Thus non-communication to the detenue about right to

represent to the Detaining Authority (District Magistrate) is violative of the right as guaranteed under Article 22(5) of the Constitution, which in turn vitiates the order of detention. It may be suffice to say that the District Magistrate or the Divisional Commissioner continues to be the Detaining Authority until the order of detention issued by him is approved by the government within a period of 12 days from the date of issuance of said order.

14. The pleadings of the Respondents as well as the record produced clearly indicate that the detinue has been informed to make representation to the Government, however, the record does not anywhere indicate that the detinue has been informed of his right to make representation to the authority/officer (District Magistrate). When it is so, infraction of the right followed by vitiating of order of detention can be the only conclusion.

15. In my aforesaid view I am fortified by the judgment as referred by the learned Counsel for the Petitioner. In the reported judgment correctness of the decision of the Full Bench of the Bombay High Court, Bench at Nagpur, the question which was answered in affirmative was "whether in case of an order of detention by an officer under Sub-section (2) of Section 3 of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 (hereinafter referred to as "Maharashtra Act"), non-communication to the detinue that he has a right of making representation to the Detaining Authority constitutes an infraction of a valuable right of the detinue under Article 22(5) of the Constitution and as such, vitiates the order of detention.

16. In the reported judgment order of detention was passed u/s 3(1) of the Maharashtra Act by the officer empowered by the Government under Sub-section (2) of Section 3 of the Act. The grounds of detention were communicated to the detinue but it had not been indicated therein that he has a right to make representation to the Detaining Authority though in the said communication it was mentioned that the detinue could make a representation to the State Government as provided u/s 8(1) of the Maharashtra Act.

17. Section 3(1) of the Maharashtra Act empowers the Government to pass the order of detention so as to prevent a person from acting in any manner prejudicial to the maintenance of public order. Sub-section (2) provides

that the Government may, by order in writing, in the situations given therein empower District Magistrate or Commissioner of Police to exercise the power under Sub-section (1) of Section 3 of the Maharashtra Act.

18. Section 8 of the Safety Act empowers both State Government as well as the officers i.e. Divisional Commissioner and District Magistrate, as noticed hereinabove, to pass the orders of detention but the exercise of power by Divisional Commissioner or the District Magistrate is controlled by Sub-Section 4 of Section 8 of the Safety Act and said Sub-section (4) is para-materia with Sub-section (2) of Section 3 of the Maharashtra Act.

19. Section 8 of the Maharashtra Act provides that the detainee has to be communicated the grounds of detention within a period of five days so as to afford him the earliest opportunity of making representation against the order of detention to the State Government.

20. The said position of Section 8 of the Maharashtra Act has been considered and it has been held that the Detaining Authority empowered under Sub-section (2) of Section 3 is the authority to deal with the representation under the provisions of Section 21 of the Bombay General Clauses Act, 1904.

21. Section 14(1) of the Maharashtra Act and Section 19(1) of the J & K Public Safety Act are para-materia so is the position of Section 21 of the Bombay General Clauses Act and Section 21 of the J & K General Clauses Act.

22. While analyzing the provisions of the Maharashtra Act as well as Section 21 of the Bombay General Clauses Act, in the reported judgment, it has been concluded as under:

that even under the Maharashtra Act a detainee will have a right to make representation to the detaining authority so long as the order of detention has not been approved by the State Government and consequently non-communication of the fact to the detainee that he has a right to make representation to the detaining authority would constitute an infraction of the valuable constitutional right guaranteed to the detainee under Article 22(5) of the Constitution and such failure would make the order of detention invalid.

23. Affirmative answer to the question as recorded by the Full Bench of the Bombay High court as was under challenge has not been interfered

with and appeals have been dismissed.

24. Applying the ratio of the judgment to the case in hand, as earlier concluded that the non-communication to the detinue about his right to make

representation to the Detaining Authority (District Magistrate), vitiates the order of detention.

25. The another contention of the learned Counsel for the Petitioner is that the non-supply of the material forming base for the grounds of detention

has also deprived the detinue from making effective representation even to the Government.

26. The said submission is supported by the detention records as in the detention records it is nowhere shown that the material forming base for the

grounds of detention has been furnished to the detinue, again violence to the safeguards guaranteed under Article 22(5) of the Constitution.

27. Viewed thus, the detention order of detention bearing No. DMB/PSA/187 of 2010 dated 21.7.2010 being unsustainable is quashed. Detinue,

namely, Farooq Ahmad Bhat S/O Ghulam Ahmad Bhat R/O Kremshora Tehsil Khan-sahib Budgam, shall be released forthwith provided he is not

required in connection with any other case. Detention record be returned to the learned Counsel for the Respondents.

Petition accordingly succeeds as above.