

(2017) 12 J&K CK 0032
In the Jammu And Kashmir High Court
Case No : 187 of 2017

Farooq Ahmad Bhat

APPELLANT

Vs

State of J&K and anr.

RESPONDENT

Date of Decision : 01-12-2017

Acts Referred:

Constitution of India, Article 22(5) -
Protection against arrest and detention in certain cases
Jammu and Kashmir Public Safety Act, 1978, Section 8

Citation : (2017) 12 J&K CK 0032

Hon'ble Judges : Mohammad Yaqoob Mir, Ali Mohammad Magrey

Bench : DIVISION BENCH

Advocate : G. N. Shaheen, M. A. Wani

Final Decision : Disposed Of

Judgement

1. Judgment dated 19.09.2017 passed by learned Single Judge, whereunder HCP No.161/2017 titled ""Farooq Ahmad Bhat Vs. State of J&K

and Ors"" has been dismissed, is under challenge in this Letters Patent Appeal.

2. Noticing the activities of the appellant (hereinafter referred to as the detenu) prejudicial to the security of the State, the District Magistrate,

Pulwama, in exercise of powers vested in him under Clause (a) of Section 8 of the J&K Public Safety Act, 1978, has ordered his detention vide

order No.08/DMP/PSA/17 dated 09.05.2017. The maximum period of detention in such like cases is two years but initially it has to be for a

period of six months extendable thereafter upto two years. The first spell of six months has expired on 9th November, 2017. Perusal of the

records suggests that the period has not been extended beyond 9th November, 2017.

3. Be that as it may. According to learned counsel for the appellant, number of grounds were projected while seeking quashment of the order of

detention. All the grounds have not been looked into by the learned Single Judge, the grounds which have been looked into have not been

appreciated and the law referred to has not been applied the way it should have been applied.

4. Learned Single Judge has observed that the grounds of detention have been explained to the detainee in the language which he understood. The

detainee being illiterate, therefore, non-supply of grounds of detention in the language which he understands is not mandatory. In support whereof,

he has placed reliance on the decision of the Division Bench of this Court rendered in the case of ""Rustum Wani Vs. State of J&K"", 2002 (2) SLJ

479.

5. True it is that when detainee is illiterate, it may not be of any use to supply him the grounds of detention but when the grounds of detention have

been read over to him in the language he understands, then the person who has explained the grounds of detention to such illiterate person was

required to file an affidavit so as to indicate that the grounds of detention were explained to the detainee. No such affidavit has been placed on

record. Same circumstance has not been taken note of. In this behalf reliance is rightly placed on the judgment captioned ""Smt. Raziya Umar

Bakshi Vs. Union of India and others"" reported in AIR 1980 SC 1751. It shall be advantageous to quote following portion from Para 3 of the

judgment:

.....If it was a fact that Mr. Sharma had personally explained the grounds to the detenu then the respondents should have filed an affidavit of

Mr. Sharma himself to show that he had actually explained the contents of the grounds to the detenu by translating the same in the language which

he understood. No such affidavit is forthcoming. No Contemporaneous record has been produced to show that Mr. Sharma had actually

explained or translated the grounds to the detenu. The service of the ground of detention on the detenu is a very precious constitutional right and

where the grounds are couched in a language which is not known to the detenu, unless the contents of the grounds are fully explained and

translated to the detenu, it will tantamount to not serving the grounds of

detention to the detenu and would thus vitiate the detention ex-facie.

6. Para 4 of the judgment shall be apposite to be quoted hereunder: ""In case of Hadibandhu Das v. District Magistrate, Cuttak & Anr. [1969 (1)

SCR 227] (AIR 1969 SC 43), it was clearly held that merely oral explanation of an order without supplying him a translation in a script or

language which the detenu understood amounted to a denial of right of being communicated the grounds. In the instant case, it is not even alleged in

the affidavit of Mr. Shah that any translation or translated script of the grounds was furnished to the detenu.

7. Further, following portion from Para 5 of the judgment shall also be quite relevant to be quoted:

.....when it is not supported by any document or by any affidavit of the person who had done the job of explaining or translation. We have

pointed out in several cases that courts frown on detention without trial and insist on the strict compliance of the constitutional safeguards enshrined

in Article 22(5) to the letter of the law, because a non-compliance of these safeguards would itself be sufficient to vitiate the order of detention.

Despite our repeated observations, unfortunately, however the detaining authority continues to pass orders of detention in a casual or cavalier

fashion with the result that the courts are compelled to release the detenue. We hope and trust that in future the detaining authorities should fully

apply their mind so as to result in a strict compliance of the constitutional safeguards contained in the Constitution, more particularly because the

liberty of the subject is in peril.

8. Learned Single Judge has also observed that non-supply of documents vitiates the order of detention only when the non-supply of documents

has prevented the detenue from filing an effective representation, there is no material on record to show that the detenue has been deprived to file

an effective representation.

9. It is the positive case of the petitioner as projected in the petition that the documents were not supplied to him. It is settled position of law that

when documents forming base for the order of detention are not supplied to the detenue, deprivation of making effective representation is quite

apparent which negates the valuable right as guaranteed under Article 22(5) of the Constitution of India. In this connection, it shall be quite relevant

to quote following portion from Para 14 of the judgment rendered by the Hon''ble Supreme Court in the case captioned ""Sophia Ghulam Mohd.

Bham v. State of Maharashtra and others"" (AIR 1999 SC 3051):

.....The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the

grounds are based flows from the right given to the detainee to make a representation against the order of detention. A representation can be made

and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detainee and the material

on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language.

10. In Para 28 of the judgment captioned Thahira Haris etc. etc. Vs. Government of Karnataka & Ors, reported in AIR 2009 SC 2184, Hon''ble

Apex Court has held as under:

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detainee who has been detained in pursuance of

the order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other

materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable

the detainee at the earliest opportunity to make effective and meaningful representation against his detention"".

11. Perusal of the detention order reveals that it is on the basis of dossier placed before the detaining authority by Superintendent of Police,

satisfaction has been derived but it is nowhere mentioned that the grounds of detention were formulated. Even if it would have been mentioned still

perusal of the record shows that the grounds of detention is the copy of dossier except for the interplay of words here and there. For deriving

subjective satisfaction, the detaining authority is required to apply its mind to the entire material as shall be collected by the police, thereafter to

formulate the grounds of the detention and only then to pass the order of detention. In this view, support can be had from the judgment rendered

by the Hon''ble Apex Court in the case of ""Jai Singh and Ors. Vs. State of Jammu and Kashmir"" (AIR 1985 SC 764), wherein it has been held as

under:

First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim

reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur to the District Magistrate requesting that a detention

order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father's name is mentioned as Sardar Ram Singh

and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited ""The subject is an important member of.....

Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the ground of detention, all that the District Magistrate has done

is to change the first three words ""the subject is"" into ""you Jai Singh, S/o Ram Singh, resident of village Bharakh, Tehsil Reasi"". Thereafter word for

word the police dossier is repeated and the word ""he"" wherever it occurs referring to Jai Singh in the dossier is changed into ?you" in the grounds

of detention. We are afraid it is difficult to find greater proof of non-application of mind. The liberty of a subject is a serious matter and is not to be

trifled with in this casual, indifferent and routine manner.

12. The communication sent to the detainee after passing of order of detention suggests that he has been asked to make representation to the

Government against the detention order but he has not been asked to file representation before the detaining authority. Similar issue cropped up for

determination before the coordinate Division Bench of this Court in the case titled ""Tariq Ahmad Dar Vs. State of J&K & ors"" (LPAHC

No.43/2017) decided on 09.06.2017, wherein it has been held that the omission to inform the detainee that he has right to represent against the

detention before the detaining authority negates the right guaranteed under the Constitution. It shall be relevant to extract in extenso paras 14 to 17

of the said judgment:

14. The Supreme Court, after considering the Constitutional Bench decision in Kamleshkumar Ishwardas Patel v. Union of India (1995) 4 SCC

51, came to the conclusion that until the detention order is approved by the State Government, the Detaining Authority can entertain the

representation from the detenu in exercise of powers of the Bombay General Clauses Act and annul revoke or modify the order, as is provided

under Section 14 of the Maharashtra Act. The Supreme Court held that, this

being the position, non-communication of the fact to the detenu that he could make a representation to the Detaining Authority so long as the order of detention has not been approved by the State Government in a case where the order of detention is issued by an officer other than the State Government under Section 3(2) of the Maharashtra Act would constitute an infraction of a valuable right of the detenu under Article 22(5) of the Constitution and that the ratio of the Constitution Bench decision in case of Kamleshkumar's case (supra) would apply notwithstanding the fact that in Kamleshkumar's case (supra) the Court was dealing with an order of detention issued under the provisions of COFEPOSA Act. Ultimately the Supreme Court held as under:-

This being the position, it goes without saying that even under the Maharashtra Act a detenu will have a right to make a 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 detenu that he has a right to make representation to the detaining authority would constitute an infraction of the valuable constitutional right guaranteed to the detenu under Article 22(5) of the Constitution and such failure would make the order of detention invalid. We, therefore, see no infirmity with the impugned judgment of the Full Bench of the Bombay High Court to be interfered with by this Court. These appeals accordingly fail and stand dismissed.

15. From a reading of the said decision, it is abundantly clear that non-communication of the fact that the detenu 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. Failure of such non-communication would invalidate the order of detention.

16. The plea of the learned counsel for the respondents, that the detenu could make a representation to the State Government and that such an opportunity had been provided, would be of no consequence for the simple reason that the Government's approval of the detention order came later i.e., on 28.12.2016 whereas, the detention order was executed upon the detenu on 24.12.2016 and between that date and 28.12.2016 he

had a right to make a representation to the Detaining Authority i.e., the District Magistrate, Baramulla, to revoke the detention order. That

opportunity not having been given, vitiated the detention order. In other words, the detention order stood vitiated and invalidated on 22.12.2016

itself.

17. In view of the foregoing, we need not to consider any of the other pleas sought to be raised by the learned counsel for the appellant, inasmuch

as the detention order has been invalidated because of non-communication of the fact that the detenu could make a representation to the Detaining

Authority. The detention order having become invalid, the detenu is liable to be released forthwith insofar as this detention order is concerned.

13. For the stated reasons, circumstances and the law which squarely covers the case, appeal succeeds. Impugned judgment is set aside. The

order of detention bearing No.08/DMP/PSA/ 2017 dated 09.05.2017 is quashed. Further custody of the detenue shall be governed in

accordance with the orders as shall be passed by the Court of competent jurisdiction relatable to the case registered as FIR No.31 of 2017 P/S

Awantipora.

14. Detention records as produced be returned to the learned counsel for the respondents.

15. Disposed of as above.