

(2010) 02 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : HC(W) No. 22 Of 2009 & CMP No. 10 Of 2009

Fiaz Ahmed

APPELLANT

Vs

State of J&K & Anr.

RESPONDENT

Date of Decision : 09-02-2010

Acts Referred:

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

Citation : (2010) 2 JKJ 909

Hon'ble Judges : Virender Singh, J

Bench : Single Bench

Advocate : S.C.Gupta, O.P.Thakur, Advocates appearing for the Parties

Judgement

1. Sh. Fiaz Ahmed aged 19 years S/o Late Sh. Abdul Salam R/o Village Chachal, Tehsil Banihal District Ramban (hereinafter to be referred to as

detenu) through his mother Atiqa Begum, seeks the quashment of the detention order bearing No.09/PSA dated 23.10.2008 passed by District

Magistrate, Samba (respondent No.1).

2. Pursuant to the notice, counter has been filed by respondent No.1. The period of detention has been fixed as twenty four months as is clear

from the document (AnnexureF) annexed by the District Magistrate alongwith his counter/reply.

3. I have heard Mr. O. P. Thakur, learned counsel for the petitioner and Mr. S.C. Gupta, learned Sr. Addl. Advocate General representing the

State. Detention record also perused.

4. Mr. Thakur has assailed the impugned order primarily on two main grounds viz: one the impugned order sans application of mind by the

detaining authority; second the complete material was not supplied to the detenu

in the jail and, therefore, he has been deprived of making an effective representation.

5. Developing the first limb of argument, Mr. Thakur submits that the grounds of detention is a verbatim copy of the dossier right from the start till

its end. He submits that a minute perusal of the grounds of detention as well as the dossier prepared by the police would show that the word

'subject' used in the dossier is substituted by word 'you' in the grounds of detention and rest of the contents are exactly the same. From this,

learned counsel wants to develop that the District Magistrate (respondent No.1) has not at all applied his mind and passed the detention order just

in a mechanical manner. On this short ground only the detention order deserves to be quashed.

6. In support of his aforesaid submissions, Mr. Thakur has relied upon the following two judgments:

1) Javid Ahmed Dar v. State of J&K and ors. 2007 (II) S.L.J. 769

2) Azad Ali Khan v. State and ors. 2007 (II) S.L.J. 822

7. Launching his attack on the second flaw of non supply of complete material to the detenu, Mr. Thakur has drawn the attention of this Court to

para 'C' of the writ petition in which it has been specifically averred that alongwith letter dated 23.10.2008 in which there is a reference to passing

of the detention order bearing No.09/PSA dated 23.10.2008 under Section 8(1) (a)(i) of the J&K Public Safety Act, 1978, the copies of the

grounds of detention and dossier were supplied to the detenu and no other material was supplied. In response to this para, the District Magistrate

in his counter has stated that all the relevant documents required to be given under law were supplied to the detenu. From this, Mr. Thakur wants

to develop that beside aforesaid three documents, no other material was supplied to the detenu inasmuch as even the basic detention order, which

is now annexed as AnnexureA with the counter was also not furnished enabling him to make an effective representation to project his bona fides.

Learned counsel submits that it appears that a very casual approach has been adopted in this case without caring the basic requirement. Dwelling

upon his argument, the learned counsel submits that if one peruses the grounds of detention, the detenu has been shown to be connected with

certain militant outfits right from the time he was a student of 6th class in a

Government School in village Chichal. Subsequently, he is shown to have been arrested in case F.I.R. No. 41/2008 alongwith his other two coaccused on 14.06.2008. This is without any basis. He then submits that even the copy of the said F.I.R. and any other relevant document with regard to the alleged recovery of arm from him was also not furnished to him in the jail and, therefore, he has been deprived of making an effective representation. This is a very serious flaw which makes the detention order liable for quashing. In support of his submissions Mr. Thakur relies upon a latest judgment handed down by the Apex Court rendered in *Thahira Haris Etc. Etc. v. Government of Karnataka & Ors.*, AIR 2009 Supreme Court 2184.

8. On the basis of the aforesaid submissions, Mr. Thakur seeks quashment of the detention order, which is opposed by Mr. Gupta submitting that the detenu is a hardcore worker of a militant outfit. He, in fact, is an over ground worker of a militant organization and his activities are highly prejudicial to the security of the State. He then submits that no constitutional right of the detenu has been infringed in the present case as the detention order was executed on him on 25.10.2008 in the jail itself and on that date the grounds of detention, and the dossier were supplied to him. This fact, according to Mr. Gupta, is clear from the documents (Annexures RB & RC) attached with the counter. He then submits that the detention order was subsequently approved by the Government and it was referred to the Advisory Board under the Act, which had also approved the same and, therefore, it cannot be said that there is any lapse by the authority concerned on any count, which would make the detention order liable to be quashed. He, otherwise, submits that the detaining authority is not supposed to supply all the documents covering information reflected in the grounds of detention as many documents are to be kept secret in such type of cases and that the detenu in this case was otherwise aware of registration of the criminal case as he was initially detained in that case before passing of the detention order and, therefore, it cannot be said that there is nonsupply of material facts to him. On the strength of aforesaid submissions, Mr. Gupta prays for dismissal of the petition.

9. One fact, which is admitted by Mr. Gupta after perusing the detention record,

is that but for the aforesaid documents referred to by him, no other document was supplied to the detenu. He also admits that even the copy of F.I.R. No.41/2008 in which the detenu was arrested on 14.06.2008 or any other document relating to the said case is also not available in the detention record. I have also verified this fact from the detention record for my satisfaction.

10. In my view, there is a failure on the part of detaining authority to follow the safeguards as provided under the Act. After all detention order involves the fundamental right of a person and, therefore, before it is slapped upon any one, there has to be a proper application of mind by the detaining authority. This right has not to be infringed just in a mechanical manner. I am conscious of the legal position that Court should not ordinarily sit in appeal over the detention order so as to reappreciate the entire material afresh, which has already become basis of subjective satisfaction of the detaining authority, but this does not mean that even if the detaining authority is absolved of applying its mind at all and the Court would still approve the approach adopted by it as it is. If on the face of it, the detention order speaks volume of the nonapplication of mind, in my view, it would certainly fall within the scope of judicial review. The present case is being tested on the touchstone of that rationale alone keeping in view the flaws pointed out by Mr. Thakur, learned counsel for the petitioner.

11. Perusal of the grounds of detention and the dossier minutely by this Court would show that it is verbatim of each other. I find force in the submissions advanced by Mr. Thakur that the word 'subject' in the dossier is substituted by word 'you' in the grounds of detention and the aforesaid two judgments rendered by this Court on this point in Javid Ahmed Dar & Azad Ali Khan's cases (supra) apply to the present case on all fours. In Javid Ahmed Dar's case, this Court had followed the view already taken by Hon'ble Supreme Court in Jai Singh and Ors. V. State of Jammu & Kashmir AIR 1985 SC 764 wherein the Apex Court in a similar set of circumstances quashed the detention order observing that the liberty of the subject being a serious matter was trifled in a casual and routine manner. It was observed thus:

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\mportant member of.

Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds 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 Jail Singh in the dossier is changed into 'you' in the

grounds of detention. We are afraid it is difficult of find greater proof of nonapplication of mind. The liberty of a subject is a serious matter and it is

not to be trifled with in this casual, indifferent and routine manner.

12. Applying the aforesaid settled legal position to the facts and circumstances of the present case, I find no hesitation in observing that there is no

due application of mind by the detaining authority in passing the impugned order.

13. I find yet another infirmity in the detention order on this aspect. On a specific query put to Mr. Gupta, as to whether any formal application was

moved by the detenu for bail in a case of substantive offence, he has admitted that there is no documentary evidence available with regard to that

case in the detention record and as such he cannot furnish any information to the Court. Mr. Thakur, however, states that the information supplied

to him is that till the date of passing of the detention order, he has not applied for regular bail and thereafter its filing was of no consequence.

Therefore, in my view, there was no compelling reason for passing the detention order. The satisfaction arrived at by District Magistrate to say that

there is every likelihood that he would manage to obtain bail from the Court under ordinary law is neither here nor there. The basis formed for

passing of the detention order is the involvement of the detenu in the substantive offence in June, 2008 and if there was any imminent threat of this

kind, as now projected in the grounds of detention, there was no reason to delay the passing of the detention order for more than four months.

Therefore, it appears that the detaining authority has just passed it taking all

what was stated by the police in the dossier as gospel truth without verifying the true factual position. This reflects nonapplication of mind.

14. Another glaring flaw, which has come to my notice and speaks nonapplication of mind on the face of it, is that in the ground No. 1 of the

grounds of detention, it is stated that the detenu had started his nexus with the various terrorist outfits in the year 1990⁹¹ by providing food and

shelter to them. At the time of detaining him under Public Safety Act, he is shown to be 19 years as is clear from grounds of detention itself. That

means when he was just 1/2 years old, he had developed his relations with the terrorists. How can it be possible? This simplicitor reflects

nonapplication of mind and it appears that the District Magistrate has just dittoed whatever was placed before him adopting a very casual

approach to it. It is not expected of the Detaining Authority.

15. Although the impugned detention order deserves to be quashed on the aforesaid basic flaw alone, yet I feel the necessity of delving into

another point, as the same, in my view, is also vital in nature. Without expressing any opinion with regard to nonsupply of other material to the

detenu, which is referred to, as they can at the most ,be said to be not based on documentary evidence, and related to supply of oral information

with regard to the activities of an individual, conceded position on one aspect atleast is there that even the copy of the F.I.R. fsfo.41/2008 and

other relevant documents relating to this case have also not been supplied to the detenu in the jail as is otherwise clear from the detention record

itself and fairly admitted by Mr. Gupta.

16. No doubt, activities attributed to the detenu as described in the grounds of detention, on the face of it, appear to be serious in nature, but the

entire aspect is to be tested on the touchstone of the legal scrutiny in the light of the settled legal position till date. Once the detenu is in jail, he has

no access to even his own documents. Therefore, it is incumbent upon the detaining authority to supply all the relevant material to him on which it is

relying, failure thereof is fatal. The Apex Court in case Union of India v. Ranu Bhandari 2008 Criminal Law Journal page 4567 observed thus:

18. Mr. Choudhary derived support for his aforesaid contention from the decision of this Court in M. Ahmedkutty v. Union of India [(1990) 2

SCC 1], wherein it was reiterated that the right under Article 22(5) is a right to

make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. The detenu, therefore, had the right to be supplied with the grounds of detention alongwith the documents which were referred to or relied upon and if there was failure or even delay in furnishing those documents, it would amount to denial of making an effective representation. It was also observed that it was immaterial whether the detenu already knew about their contents or not, but the nonsupply of the copies thereof was fatal as was held in *Mehrunissa v. State of Maharashtra* [(1981) 2 SCC 709]. It was emphasized that in order to appreciate this point it would have to be kept in mind that the detenu is in jail and has no access even to his own documents.

In *Thahira Haris'* case (*supra*) relied upon by Mr. Thakur, the Apex Court in para 25 of the judgment observed thus:

25. This Court in *Sophia Gulam Mohd. Bham v. State of Maharashtra & others* (1996) 6 SCC 593 para 11 observed that effective

representation by the detenu can be made only when copies of the material documents which were considered and relied upon by the Detaining

Authority in forming his opinion were supplied to him.

17. Following the ratio of the aforesaid two judgments rendered by Hon'ble Supreme Court to the facts of the case on hand, in my considered

view, the detenu has been deprived of his valuable right as enshrined under clause (5) of Article 22 of the Constitution.

In the light of the aforementioned discussion, the net result now surfaces is that the detention order bearing No.09/PSA dated 23.10.2008 passed

by District Magistrate, Samba (respondent No.1) deserves to be quashed. Ordered accordingly.

18. The writ petition on hand is, thus, allowed. Respondents are directed to release the person of Sh. Fiaz Ahmed S/o Late Sh. Abdul Salam R/o

Village Chachal, Tehsil Banihal District Ramban forthwith, if not required in any other case.

19. Detention record be returned to Mr. S.C. Gupta, learned Sr. Addl. AG against proper receipt.