
(2004) 04 J&K CK 0039
In the Jammu And Kashmir High Court
Case No : HCP No. 30 of 2003

Firdous Ahmed Farash

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 27-04-2004

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 11(2)
Constitution of India, 1950 — Article 22(5)
Jammu and Kashmir Public Safety Act, 1978 — Section 13, 8

Citation : (2004) 04 J&K CK 0039

Hon'ble Judges : Syed Bashir-Ud-Din, J

Bench : Single Bench

Advocate : B.A. Khan and M.S. Hussain, for the Appellant; T. Khawaja, GA, for the Respondent

Judgement

Syed Bashir-Ud-Din. J.

1. By order No. DMS/PSA/Dt./98 Dated 6.2.2003 District Magistrate Srinagar (respondent No.2) has detained Firdous Ahmed Farash U/s 8 of

J&K P.S. Act, 1978 with a view to prevent him from acting in any manner prejudicial to the security of the State. This order and the consequent

detention is under challenge in this petition.

2. Ld. Counsel for the petitioner has confined his submissions to following two grounds:-

First that detenu has not been communicated the order within the meaning of Article 22(5) of the Constitution and Section 13 of the J&K P.S. Act,

in as much as, record is not supplied to detenu thereby he is prejudiced to make an effective and meaningful representation against the detention

and Second that detenu was detained earlier U/s 8 of J&K P.S. Act under Order

No. DMS/PSA/28 dated 21.11.2001 on the very grounds which are basis for subsequent detention referred above. The present detention on the self same grounds which in fact have been adjudicated by the

court in HCP NO. (35/02) whereunder the detention is held as not legally sustainable for non-application of mind, cannot be over again ordered.

3. Counter is filed by the detaining authority. Ld. Counsel for respondents submits that the detenu has been supplied grounds and the order which

has been also explained to him. Though the counsel concedes that the record referred to in the detention order by the detaining authority is not

supplied to detenu. As regards to second contention the counsel submits that the earlier detention has failed on a technical ground though ruled by

the court to suffer from non-application of mind and the competent authority is within the powers to pass instant fresh detention.

4. The impugned detention order dated: 6.2.2003 (Annexure P-6) opens as under:-

Whereas I District Magistrate Srinagar am satisfied on the basis of record received from SSP Srinagar .

First line of copy of grounds annexed to the detention order (annexure p-5) reads as under:

Perusal of record provided by Senior Superintendent of Police Srinagar reveals that you deserted the Police Department and voluntarily joined Al-

Burq outfit, having its headquarters at Pakistan occupied Kashmir

5. Para 13 of the writ petition reads as under:-

That the detenu has not been furnished with the grounds of detention, order of detention and material considered by the detained authority for the

detention of the detenu non-supply of the same prevented the detenu to make a representation against his detention on this ground the detention of

the detenu is illegal and renders to be quashed.

6. In reply to para 13 in counter it is stated that the detention order alongwith grounds of detention were properly served and explained to the

detenu enabling him to make a representation against the detention. The details of the activities of the detenu have been given in the grounds,

therefore no prejudice caused by non-supply of material.

7. A combined reading of the above would fairly show that the detenu is not supplied the record which was available to the detaining authority on

which the detaining authority based its subjective satisfaction to pass the impugned detention order. Going by the grounds of detention it is more

than clear that the activities of detenu are catalogued from 1994. His egress and ingress to the otherside of the State across the line of control,

receiving of training in arms and ammunition and after remained silent for some years being recycled into militancy coming into contact with the

other activists and being introduced to top militants of out-fit Jesh-e-Mohammad and acting as candute between the out-fit and the press/media

and his involvement in publicising the attack on Assembly of J&K Srinagar in 2001 and registration of FIR No. 122/01 U/s 302, 307,120B etc.

are the incriminating circumstances and unlawful activities attributed to the subject in the grounds. The detention file made available by the Ld.

Counsel shows that the Dossier of SSP Srinagar is on the file. that else records is made available to the detaining authority on which he has drawn

subjective satisfaction for the detention, is not forth-coming from record. But the fact remains that the SSP Srinagar has made available records to

the detaining authority on which subjective satisfaction is drawn and the detention is passed.

8. In such circumstances it cannot be said that the detenu has not been communicated the grounds of detention as mandated by Article 22(5) of the

Constitution and statutorily laid down by Section 13 of the J&K P.S. Act.

9. In Naseer Ahmad Sheikh Vs. Addl; Chief Secretary Home and Anor., Division Bench of this court to which I was a party 1999 SLJ 241

observed:-

The grounds of detention give out that the alleged prejudicial activities came to be attributed on the basis of the reports made available to the

detaining authority by the concerned SSP. Nowhere is it pleaded, much less shown, that the copy/copies of these reports of the police on which

the detaining authority based its satisfaction to pass the detention order were supplied/provided to the detenu so as to enable him to make an

effective representation against the order.

10. Obviously the detention order cannot be sustained on this count.

11. The detention also appears bad for the reasons herein after to follow. Detenu was earlier detauned U/s 8 of J&K P.S. Act by order dated

29.11.2001(Annexure P-2) on grounds stated in Annexure P-1. However, the

detention was quashed in HCP NO. 35/02 by order dated

7.12.2002 for the reason of non-application of mind. Collating earlier grounds of detention (annexure P-1) to detention order dated

29.11.2001(Annexure P-2) with the grounds of detention (annexure P-5) to the instant detention order (Annexure P-6) would show that the

subsequent grounds bear remarkable similarity with earlier grounds and subject is detained earlier as also subsequently on almost self same

grounds astonishingly likeness in paras and sentences is noticeable. Apart from the introductory sentences the sum and substance of both detention

orders is like and same.

12. In such circumstances subsequent detention on self same grounds cannot with stand scrutiny in this judicial review. It is not a case of technical

defect in which case detaining authority is within its rights to pass fresh orders as laid by Section 19 of the J&K P.S. Act. By a subsequent order

like one impugned in this petition, an illegal detention cannot be ordered and allowed to continue.

13. In like situation the Supreme court in the context of COFEAPOSA Act in Ibrahim Bachu Bafan Vs. State of Gujarat and Ors, observed:-

We are of the view that this seems to be the legislative scheme. The pronounced judicial view of this Court was that repeated orders of detention

are not to be made .Parliament while making provision in S.11(2)of the Act, must be taken to have been aware of such view and in conferring the

power of making repeated orders, safeguards have been provided under Subs (1)by confining the exercise of power to limited situations.

14. Clothing the prescribed authority to exercise power under S.3 even in a situation where the Court has intervened to bring about nullification of

the order of detention would give rise to complicated situations and keeping the scheme of the section in view we are of the clear opinion that

where an order is quashed by Court in exercise of extraordinary jurisdiction the power of making a fresh order under Sub-Section (2) of S.11 is

not available to be exercised.

15. This court also in like situation in Mohd. Amin Sheikh Vs. State of J&K observed:-

Viewed thus non-compliance with the mandate of the above constitutional provision and Section 13 of the P.S. Act is not at all a technical defect.

Once the detention order is quashed on this count clamping another order on self same grounds under the shield of technical defect, is abuse of

process of court and share attempt to circumvent, the operation of the judgement. In other words it is to perpetuate the illegality and continue

violation of the constitutional mandate and provisions of the P.S. Act.

16. In the above view of the matter, the detention order is not sustainable under law and is quashed. Detenu Firdous Ahmad Farash S/o Gh.

Mohi-ud-din Farash R/o Lassipora Budgam (age 35) shall be released and set at liberty forthwith provided not required in any other case, offence

or matter.

17. Copy of the order be given to petitioner free of cost. Registry to take follow up action. Disposed of.