

(1999) 12 J&K CK 0012
In the Jammu And Kashmir High Court
Case No : H.C. Petition No. 93 of 1999

Ghulam Mohammad Mir

APPELLANT

Vs

State of J. and K. and Another

RESPONDENT

Date of Decision : 30-12-1999

Acts Referred:

Arms Act, 1959 — Section 25, 5, 7
Constitution of India, 1950 — Article 22, 22(5)
Jammu and Kashmir Public Safety Act, 1978 — Section 8

Citation : (2000) CriLJ 3233

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

Bench : Single Bench

Advocate : M.A. Qayoom, for the Appellant; R. Bazaz, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Syed Bashir-ud-Din, J.—Ghulam Mohd Mir, was arrested on 20-5-1998, at Lassipora Sogam (Kupwara). From his possession four

Handgrenades, one Mag, and AKAmn-20. Rds were recovered. Case (FIR 35/98) u/s 5/25 IAA was registered at Police Station, Lalpora

Kupwara. While in custody in this case, the District Magistrate, Kupwara detained him u/s 8 of the Jammu and Kashmir Public Safety Act, 1978,

vide Order No. DMK/PSA/ 23, dated 30-1-1999 for a period of 16 months. This order of detention is challenged on number of grounds

including non-supply of detention order, grounds of detention and the material and documents, referred to as the basis of the detention.

2. Non-compliance with procedural safeguards envisaged by the Public Safety Act, vagueness of the grounds of detention and failure to record the

'compelling reasons' for ordering simultaneous detention under the Public Safety

Act at a time when the detenu was already in custody in the said regular case, are other grounds pleaded to challenge the order of detention.

3. The detaining authority has filed counter and asserted that the detention order has been passed on application of mind. The grounds and other

material was supplied to the detenu. The detenu was provided an opportunity to project his case before the Advisory Board, which he did. The

material relating to the substantive offences/regular case referred to above, was handed over along with grounds and other documents to detenu on

8-2-1999, when the order of detention was executed. The procedural and other safeguards mandated by law have been complied with.

4. The counsel for the petitioner canvasses that the order of detention was not accompanied by the dossier, FIR and other documents referred by

respondent No. 2, detaining authority, in his counter. In absence of any proof that these material and documents were given to the detenu, the

detenu was incapacitated to make representation against the detention order.

5. The Government Advocate, contends that these documents were supplied to the detenu and he was also made aware of his right to make a

representation. He has placed the detention record of the Home Department before the Court.

6. From record, it is found that the detenu was handed over copy of the detention order dated 30-1-99 on 7-2-99 and the grounds of detention

were served on him next day on 8-2-99 for which receipt has been obtained. Neither the receipt nor the report of the Executing Officer, nor report

of the Dy. Superintendent of Jail, Kotabalwal, where he was served with the order and grounds, shows that the detenu was supplied copies of

dossier, FIR, recovery memos and other material which the detaining authority has referred in his counter.

7. Admittedly, the detaining authority has not served the material and the documents in person. There is no affidavit of the person or authority or

officer who actually served the detention order, grounds and allegedly the other material and documents on record. From record, the counter-

allegation that ""the dossier received from SP, Kupwara and other relevant material pertaining to the indulgence in violence or potential threat posed

by the detenu were handed over to the detenu for perusal"", is not borne out on record. It appears to be just a mere routine bald assertion,

unsupported by any documentary or other proof. Even a semblance of some supporting material is not available on record. This assertion can be

further tested in the light of the record, in so far as while the detaining authority/deponent says that the whole material was handed over to the

detenu on 8-2-99, yet the record produced does not speak so. In fact, from record, it is seen that the detention order is alleged to be executed on

7-2-1999 and not on 8-2-1999. Further assertion that the material relating to the substantive offence under FIR No. 35 of 1998 u/s 7/25 Indian

Arms Act, registered at Police Station, Lalpora, was handed over to the detenu is actually devoid of any substance. It too is a bare assertion

unsupported by any material whatsoever. The pleaded and argued contention that the detenu was not supplied the material and documents, the

basis of the detention so as to incapacitate him from making a meaningful and effective representation, is on record sustainable. Contextually, it is

relevant to quote, His Lordship Hon'ble Syed Sagheer Ahmad, J. (speaking for the Court) in *Sophia Gulam Mohd. Bham Vs. State of*

Maharashtra and Others, a detention case dealt with under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of

1974), the learned Judge observed :

...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 detenu to make 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 detenu 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....

In *Naseer Ahmad Sheikh v. Addl. Chief Secretary, Home, Division Bench* 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, muchless 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.

8. In the circumstances, the detenu cannot be said to have been provided an opportunity and the means to make meaningful and effective

representation against the detention as guaranteed apart from provisions of Public Safety Act, by Article 22 of the Constitution. So long the

material, on which the facts or conclusions constituting the grounds and basis of subjective satisfaction of the detaining authority, is withheld from or

denied to the detenu, the detenu cannot be said to be communicated the grounds with material. If so detenu is denied opportunity to make

representation.

9. The counsel contends next that the detention is also legally bad as it is based on vague and indefinite grounds. The subjective satisfaction of the

detaining authority is lacking. On examination of the grounds of detention it is found that the detenu is stated to be the member of outlawed

organisation (HMT), the objective, purpose and activities of this organisation are stated to aim at cesseding ceding State of J. & K. from the Union

of India and to promote terrorism in the State. It also says that the detenu attended several meetings of this organisation and extended support to

the organisation by providing shelter and food and other assistance to the militants. These activities came to an end only when he was apprehended

on 20-5-98 in above FIR 35/98 and some arms and ammunition were seized from him. Apart from the Registration of the FIR and arrest of the

detenu in this FIR (35/98), no details, (even the minimum required) datewise, placewise, namewise, areawise etc. etc. are given in the grounds.

The grounds appear almost if I may say so, an essay type. It is quite omnibus and too generalised. Even the record which bears a copy of the

dossier is couched in the same terms. Sweeping allegations without reference to particulars and details of time, date, place, etc. could hardly suffice

to indicate that there has been an application of mind by the detaining authority and from all that it cannot be said that the detaining authority has

drawn required subjective satisfaction. The only specific incriminating allegation is based and covered by FIR 35/98, supra. No acts of omission

and commission are specified to have taken place after 1998 and for that matter even the activities mentioned earlier to 30-5-98 when detenu

was taken into custody are not specified and particularised date or yearwise. The

live link between the detention order and the purpose sought to

be achieved by such order is not at all discernible from record. Obviously, the grounds of detention are vague and not proximate in point of time to

the order of detention.

10. Lastly the counsel contends that the detenu was taken in custody on 20-5-98 in an offence of recovery of arms and ammunition in FIR 35/98

(supra). The detaining authority while passing the detention order on 30-1-99 has failed to specify the reasons which compelled him to pass

simultaneously detention order while the detenu stood arrested and in custody as an accused in the said case. Though the awareness is shown in

the grounds, but no reasons have been spelled out to prompt the detaining authority to pass detention order in question.

11. Mr. Bazaz, submits that once awareness is shown by the detaining authority of custody of the detenu in a substantive offence and the reasons

for such detention are disclosed in the grounds then the order is not bad. There is no dispute that an order of detention can be passed against a

person who is in custody, but the fact remains that not only the awareness of pre-custody is to be disclosed by the detaining authority, but the

detaining authority is further required to show that there were 'compelling reasons' for ordering of simultaneously preventive detention order under

Public Safety Act. The compelling reasons would obviously mean cogency of material before the detaining authority on which satisfaction is drawn

that the petitioner may succeed to get bail in near future and further having regard to the detenus anti-incidental activities after his release, he would

again indulge in activities prejudicial to or endangering the security of the State. The detaining authority has failed to specify in the grounds that the

detenu is likely to be released on bail and in that eventuality he is to endanger the security of the State. A vague omnibus reference is no substitute

for a definite and specific ground to make up the requirement of disclosing the compelling reasons to warrant the detention.

12. In the result, for the aforesaid reasons, the detention order is invalid. The order being legally vitiated, is quashed. Respondents/competent

authority or officer having custody of corpus of the detenu shall set him at liberty and release him forthwith, provided the detenu is not required in

any other substantive offence or case (including FIR 35/98, registered at Police

Station Lalpora, Kupwara). Communicate this order to the concerned authority having physical custody of the detenu with copy free of cost to the petitioner.