

(2010) 02 J&K CK 0028
In the Jammu And Kashmir High Court

Ghulam Qadir Khandey

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 10-02-2010

Acts Referred:

Constitution of India, 1950 — Article 21, 22
Criminal Procedure Code, 1973 (CrPC) — Section 196

Citation : (2010) 1 JKJ 816

Hon'ble Judges : Gh. Hasnain Massodi, J

Bench : Single Bench

Judgement

Gh. Hasnain Massodi, J.—Preventive Detention is anathema to a democratic polity having its foundation on personal liberty and rule of law.

The Supreme Court almost at the dawn of independence in the very first petition to challenge Preventive Detention and ""invoke guaranteed

protection of the Court"", reported as A.K. Gopalan Vs. The State of Madras, called Preventive Detention ""Sinister-looking feature, so strangely

out of place in a democratic constitution."" The Court observed ""Preventive detention laws are repugnant to democratic constitutions and they

cannot be found to exist in any of the democratic Countries of the World."" Preventive detention laws, all the same in words of Supreme Court

have taken root"" and ""have become a permanent part of the statute book of this Country.

2. Preventive Detention, over the years has come to be accepted as a tool to prevent activities of an individual detrimental to public order and

security of the State so that the rights guaranteed under the Constitution remain meaningful to the people at large. The Apex Court in Union of India

v. Chaya Ghoshal commenting on the need to have Preventive detention Laws on

the statute book has observed:

The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty, would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a "jurisdiction of suspicion", and the compulsion to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of individual liberty....

3. Preventive detention, and Preventive laws nevertheless, have always attracted "Hard look" from the Courts. It has been endeavour of the courts to see that the preventive detention laws, that enable the State to put behind the bars a person without formal charge or trial, are in conformity with Constitutional mandate and are not misused.

4. The Supreme Court in *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, observed:

....Preventive detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.

5. The Courts have emphasized time and again that rights of detenu detained under preventive detention laws, guaranteed under Article 22, must be respected and the Constitutional safeguards strictly observed.

6. In *Union of India (UOI) and Another Vs. Shrimati Chaya Ghoshal and Another*, , the Supreme Court observed that:

....the laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguard, however, technical, is mandatory.

7. In *Dhananjay Das Vs. District Magistrate, Darrang and Another*, , the Supreme Court held:

The law is by now well settled that the detenu has two rights under Article 22(5) of the Constitution: (1) to be informed, as soon as may be of the grounds on which the order of detention is made, that is, the grounds which led to the subjective satisfaction of the detaining authority, and (2) to be afforded the earliest opportunity of making representation against the order of detention, that is to be furnished with sufficient particulars to

enable him to make representation which on being considered may obtain relief to him....

8. A right to be informed of the grounds on which the order of detention is made and the right to make representation against the order of

detention, are two independent rights. In order to make the right to representation against the order of detention effective and meaningful, it is

imperative for the detaining authority to make available the material facts on which the authority arrived at subjective satisfaction that the person on

whom the preventive detention is slapped, is required to be placed under preventive detention. The Supreme Court in AIR 1992 SC 1315 further

observed:

....therefore, if the grounds are vague and indefinite that would amount to an infringement of the second right of the appellant. It is by virtue of the

second right that the detaining authority has to supply the material facts on the basis of which subjective satisfaction was derived for passing the

order of detention and this is how the facts from which the inference is drawn also become a part and parcel of the grounds.

9. The Court though having no jurisdiction to assess whether the material facts that persuaded the detaining authority to pass detention order were

sufficient, nonetheless is under constitutional duty to see whether the rights and safeguards provided under Article 22(5) of the Constitution, have

been followed, respected and not violated. In case the grounds that weighed with the detaining authority to order detention are vague, the right of

the detainee to make representation against his detention, is taken to have been infringed and the constitutional mandate violated.

10. In *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, , the Apex Court held:

....the petitioner has the right, under Article 22(5), as interpreted by this Court by a majority, to be furnished with the particulars of the grounds of

his detention ""sufficient to enable him to make a representation which on being considered may give relief to him."" We are of the opinion that this

constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained....

11. In *Sophia Gulam Mohd. Bham Vs. State of Maharashtra and Others*, , it has been laid down:

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 the copies thereof are supplied to the person detained in his own language.

12. It follows that even if one amongst various grounds relied upon by the detaining authority is vague or material to which reference is made in

grounds of detention is not made available to the detenu, the right of detenu to make representation against his detention is infringed as it impinges

upon right of the detenu to make representation guaranteed under Article 22(5) of the Constitution.

13. After a brief overview of law governing the subject, focus is to shift on the present petition.

14. The petitioner has been put under preventive detention under the order of District Magistrate, Doda - respondent- 2 herein vide order No.

PSA/DM/JC/10-12 dated 21-3-2009 executed on 27-3-2009 and lodged in Central Jail, Kot Bhalwal, Jammu. The petitioner assails the

detention order on the ground that the safeguards provided under Article 22(5) of the Constitution have been violated by the respondents and that

petitioner's detention deserves to be quashed. The grounds spelt out in the instant Habeas Corpus Petition to question the detention order are as

under:

9. That the detention order is violative of the provisions of J & K Public Safety Act, 1978 as also Articles 21 and 22 of the Constitution.

10. That the order of detention has not been confirmed by the Government within the prescribed time in terms of provision of J & K Public Safety

Act. It is insisted that petitioner's case was not even referred to the Advisory Board constituted under the Act to opine, whether the detention was

justified; and that the grounds of detention are vague having in proximity with the objectives sought to be achieved; that the criminal charge thrown

by the Trial Court having been brought in violation of Sections 196-A of the Cr.P.C. has been made basis of the preventive detention and thus, the

preventive detention order was not tenable under law in as much as preventive

detention was not to be substituted for penal action.

11. That the detaining authority has failed to record its satisfaction regarding desirability of placing the petitioner under preventive detention.

12. That the petitioner has not been produced before the Advisory Board within the prescribed time nor has been relevant material placed before

the Advisory Board so as to enable the Board to discharge its statutory duty.

13. That the documents provided to the petitioner by the detaining authority are illegible, making impossible for the petitioner to make

representation against the detention order; and further that the documents relied upon by the detaining authority are in English the language in which

the petitioner was not familiar and failure of the respondents to provide the documents translated in vernacular language has also deprived the

petitioner of his right to make representation.

14. That the copy of the dossier has not been provided to the petitioner, leading to the presumption that respondent-2 had no such document

before him while making the order of preventive detention of the petitioner and thus, the preventive detention order was made without application

of mind.

15. That the detention order was executed one week after it was made and thus, because of the delay in execution, the order was liable to be

quashed.

16. That the representation made by the petitioner made on 6-4-09 against proper receipt having not been decided by respondent -1, delay in

disposal of said representation, rendered the preventive detention of the petitioner illegal and liable to be quashed.

15. The respondents in their reply have disputed all the averments made in the petition. It is stated that the petitioner is an Upper Ground Worker

of banned HM Organization and respondent -2 after going through the relevant record, arrived at subjective satisfaction that remaining at large of

the petitioner, was threat to the security of the State and the Union of India and therefore, ordered preventive detention of the petitioner. It is

relevant that the detention order is made on 21-3-2009 and executed on 28-3-2009; and that the officer executing the order, read over the

grounds of detention and explained the contents thereof in Urdu to the petitioner and the petitioner after understanding the grounds of detention,

put his signatures on the executing report; and that the grounds of detention were supplied to the petitioner against the proper receipt on 28-3-

2009 itself; and that the detention order was approved by the Government on 30-3-2009. It is averred that the case of the petitioner was referred

to the Advisory Board constituted u/s 14 of the J & K Public Safety Act, 1978; and that the Advisory Board after going through the record, found

the petitioner to be involved in terrorism and concluded that his remaining at large was danger to the security of the State. It is pleaded that the

detention order has been confirmed by the Government on 22-5-2009. It is denied that the grounds of detention are vague as pleaded by the

petitioner. It is insisted that the grounds of detention furnished and also explained to the petitioner are elaborate and substantiate that the activities

of the petitioner were prejudicial to the security of the State. It is denied that there has been any delay in deciding the representation of the

petitioner.

16. I have gone through the petition, reply as also the detention record made available by the learned Counsel for the respondents.

17. I have heard learned Counsel for the petitioner as well as learned Deputy Advocate General.

18. From the perusal of the grounds of detention claimed to have persuaded respondent-2 to derive subjective satisfaction that the petitioner was

required to be put under preventive detention to prevent the petitioner from acting in a manner pre judicial to the security of the State. From

paragraphs 1 to 16 referred to the activities of the petitioner and his brothers S/ Shri Mohd. Hanief and Abdul Rashid for the period 1991 to 2004,

it appears that Case FIR No. 157 of 2004 under Sections 121, 122, 123, 120-B RPC read with 25 Arms Act 4/5 E.S. Act, registered with

Police Station, Doda against the petitioner regarding the allegations detailed in Paragraphs 1 to 16. However, the charge as emanating from the

case, it was filed without sanction under Sections 196 and 196A Cr.PC. The grounds 17 to 25 which assume significance against the back drop of

constitutional safeguards embodied under Article 22(5) may be extracted hereunder:

17. You have again established links with militants in the year 2008 and is helping the cause of militants in general area of Doda District by way of

providing information regarding movement of STF, Police and Security Forces. You are also harboring militants and providing other logistic

support to them.

18. You are also acting as front line OGW of LeT and HM militants group headed by militants who have recently been killed by STF in general

area of Doda. You are also threatening the local population specially the government employees, contractors and extorting money on behalf of

militants.

19. Recently you were also motivating the youths to join militant rank. Number of boys joined militancy on your behest. You were also seen along

with militants in general area of Doda/Gundna in suspicious circumstances to carry out the militants activities.

20. You are also exhorting influence over the contractors who are working on different roads of District Doda which are under construction and

you are forcibly collecting money from them on behalf of militant organization.

21. In recent days you are also putting pressure on VDC members who are mostly belonging to minority community of Doda District threatening

them of dire consequences if they will not help the cause of militants.

22. You are also threatening the people and persons sympathetic towards the security forces/police, of dire consequences in case they continue

support to the STF and security forces. You are also threatening people not to act as informer/source of police or Army otherwise they will be

killed by militants for their activities.

23. Keeping in view the action and your activities, it has become crystal clear that you are an OGW of HM outfit with criminal background. You

have also been found involved in bribery cases of which the challans are pending disposal in Vigilance Court, Jammu. You are an active OGW of

HM & LeT outfit since 1991-92 and have introduced so may militants with OGWs for spreading militancy. You have tried your best to provide

food, shelter, clothing, phone, mobile sim cards, passports and driving licences to the militants of HM outfit.

24. That you being the Government employee and an educated person and well aware of the fact that whatever you are doing is illegal and

punishable under law as the militancy and militant organizations namely HM and LeT are illegal anti national and banned organizations and any

body helping them in any way commits illegal and anti national acts punishable under law. You had helped LeT and HM organizations and their

members to the best of their abilities and capabilities so your acts are anti national and needs to be dealt with strictly under law.

25. As you are a hardcore, dedicated OGW of HM and LeT having links with dreaded militants of HM and LeT so the people in general fear to

speak against you or depose against you before any court under law as a witness.

19. Ground-17 speaks of petitioner's having established links with militants in the year 2008 in general area of Doda District and providing

information regarding movement of STF, Police and Security Forces and also harboring militants and providing other logistic support. The grounds

does not give details of activities attributed to the petitioner, militants with whom the petitioner is alleged to have established links or the details of

information claimed to have provided by the petitioner to the unnamed and unidentified militants. Ground-18 speaks of petitioner being a front line

OGW of LeT and HM militants group headed by militants who have recently been killed by STF in general area of Doda. The petitioner is also

alleged to be threatening the local population, government employees and contractors and extorting money on behalf of the militants. This ground

again does not nominate the militants who have been recently killed, the person or the persons whom the petitioner has threatened or from whom

the petitioner has extorting money and on behalf of whom. The petitioner in Ground -19 is stated to have motivated the youths to join militant rank

and number of boys joined militancy at the behest of the petitioner. The names of the boys or the persons are not mentioned in this ground to

whom the petitioner approached with the request to join militancy. Same is about Ground 20, wherein the petitioner is alleged to be exhorting

influence over the contractors working in District Doda and forcibly collecting money from them on behalf of the militants. Grounds 21 and 22 also

level general and vague allegations against the petitioner without disclosing the names of VDC members or the police/army informers, whom the

petitioner was threatening and intimidating. Grounds 23 to 25 detail conclusion drawn from the activities mentioned in other grounds. Grounds 17

to 25 are thus, sweeping and vague in nature.

20. The detaining authority while setting out vague and general grounds, has left

the detenu guessing about the exact omission and commission attributed to the petitioner and prevented the petitioner to make effective use of the constitutional safeguards to make representation against his preventive detention. In effect, there has been infringement of rights of the petitioner guaranteed under Article 22(5) of the Constitution. The detention order is liable to be quashed on this ground alone.

21. The vagueness of detention and consequential infringement of petitioner's right to make representation against his preventive detention, apart

there are other violations of constitutional mandate, which render the preventive detention liable to be set aside.

22. The endorsement on reverse of detention order made on 28-3-2009 by Shri Mohd. Mumtaz, ASI No. 755679/EXJ, Police Station Doda,

Executing Officer mentions that the grounds of detention were served upon the petitioner at the time of his detention. The endorsement does not

make mention of any other material including the police dossier, copy whereof is available on the detention record having been made available to

the petitioner. The lapse assumes significance in view of the mention of "material" having been made in Government Order whereby the detention of

the petitioner has been approved and Government Order No. 634 of 2009 dated 30-3-2009 making mention of grounds of detention and "other

relevant material" to have been examined and considered by the Government. The Government vide order No. Home/PB-V1002 of 2009 dated

22-5-09 likewise makes mention of "other relevant material" having been placed before the government. The material that in the opinion of the

government was relevant for ordering preventive detention of the petitioner, ought to have been supplied to the petitioner so as to enable the

petitioner to make effective representation against his detention. The respondents by keeping back the relevant material have again infringed the

right to file representation against his detention order. Article 22(4) of the Constitution makes mandatory for the respondents to place the matter

before the Advisory Board constituted in accordance with Article 22(4) whenever the detenu is proposed to be detained for a period longer than

three months. Detention beyond the aforesaid period can be ordered only after the Advisory Board is of the opinion that there is sufficient cause

for such detention. The Supreme Court in *Puranlal Lakhanpal Vs. Union of India*

(UOI), held:

Clause 4 of Article 22 does not state that the Advisory Board has to determine whether the person should be detained for more than three months.

What has to be determined, is whether the detention is at all justified. The setting up of an Advisory Board to determine whether such detention is

justified is considered as a sufficient safeguard against arbitrary detention under any law of preventive detention which authorizes detention for

more than three months. The matter before the Advisory Board is the subject of detention of the person concerned and not for how long he should

be detained....The expression ""such detention"" in Article 22(4) refers to preventive detention and not to how long the person is to be detained.

23. The placement of the matter before the Advisory Board being an important safeguard against misuse of the power under preventive detention

law, the Advisory Board to make the safeguard meaningful and is expected to make appraisal of material before it and arrive at conclusion well

based on such material that whether the preventive detention is justified.

24. In the present case, the matter pertaining to preventive detention of the petitioner appears to have been placed before the Advisory Board on

4-5-2009. The Advisory Board after giving resume of the grounds of detention and the material placed before it, observed as under:

In the year 1995 he exfiltrated to Pak for obtaining weaponry training and came back in the year 1997. It is observed that the detenu is totally

involved in terrorism and his remaining at large is dangerous for the security of the State. The Board after approving the action of the District

Magistrate, Doda advises the Government to keep the detenu in detention in accordance with the provisions of PSA, 1978. Hence the file is sent

down to the Government for appropriate action as per law.

25. The Advisory Board surprisingly held the petitioner to have exfiltrated to Pakistan for obtaining weaponry training and to have come back in

the year 1997. When the grounds of detention did not at any place allege the petitioner having gone to Pakistan in the year 1995, obtained

weaponry training and came back in 1997. The Advisory Board thus, failed to objectively peruse and evaluate the material before it and rushed to

the conclusion on the ground not set out in the grounds of detention. The Advisory Board has thus failed to discharge its constitutional duty.

26. In the circumstances and for the reasons discussed above, the detention order violates/infringes the constitutional safeguards and is liable be set aside. Resultantly, the preventive detention of Ghulam Qadir Khandey ordered vide order No. PSA/DM/JC/10-12 dated 21-3-2009 is quashed.

The detenu is directed to be set at liberty unless of course he is involved in any other offence.