

(1998) 03 J&K CK 0008

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Pctn. No. 441 of 1997

Haji Ghulam Muhammad Shah

APPELLANT

Vs

District Magistrate Srinagar and Another

RESPONDENT

Date of Decision : 17-03-1998

Acts Referred:

Constitution of India, 1950 — Article 22(5), 226
Criminal Law (Amendment) Act, 1932 — Section 10, 11
International Airports Authority Act, 1971 — Section 25, 3
Jammu and Kashmir Constitution Act, 1996 — Section 103
Ranbir Penal Code, 1989 — Section 121A, 122, 302, 489
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3(1)

Citation : (1998) CriLJ 4289

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

Bench : Single Bench

Advocate : Z.A. Shah, for the Appellant; G. Mustaffa, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Syed Bashir-ud-Din, J.—The order of detention dated 12-4-1997 of one Ishtiyag Ahmad Shah S/o Haji Gh. Mohammad Shah R/o Malik

Saheb Nowhatla, Srinagar passed by District Magistrate Srinagar (Annexure-A) is challenged in this writ petition u/s 103 of the Constitution of

Jammu and Kashmir State corresponding to Article 226 of the Indian Constitution on the following grounds :-

The detainee Asstt. Executive Engineer, Srinagar Municipality was picked up by B.S.F-. 106 Bn. on the intervening night of 3/4 March, 1997 from

his residence and was with them till 10-3-97 when he was handed over to Police Station Nowhatta. On 26-3 1997 detainee was admitted to bail

by the Chief Judicial Magistrate, Srinagar after report was submitted to the

Magistrate that he is involved in FIR 28/97 u/s 489(b), 121, 121(a), 122, 10/1 1,13 VLAP Act. However, he was not released. He continued to be in detention with J.I.C. Srinagar till 10-5-1997. It was only on 1-5-97 that he was shifted to Kathua and was served a copy of detention order at District Jail Kathua. The grounds of detention (Annexure-B) have been denied one by one. It is alleged that the copies of photographs, fax message, Video cassettes etc. have not been provided to him. The Pass book as also the amount deposited in the Pass book, is claimed to be detainee's money, which he has earned from business earlier to his joining the service. One of the grounds for detention is that the detainee is involved in FIR 28/97 u/s 489, 121-A, 122 RPC 10/11 Criminal Law Amendment Act, 13 VLAP Act registered at Police Station Nowhatta and FIR No. 203/92 u/s 302, RPC 3/25, IAA, 3(1) TADA, registered at Police Station Shaheed-Gunj. In FIR No. 28/97 he has been already admitted to bail, whereas, he is not even arrayed as accused in FIR No. 204/92 in which challan has been produced by CBI in Court on 26-5-1995, against three persons and the detainee is not one of them nor he is shown in any way connected with the case. Similarly, use of Maruati Car JKE-5711 for transporting arms from place to place is false as no such vehicle was ever owned by the detainee nor was such a vehicle under his occupation or use. All the material referred in the grounds of detention has not been supplied to the detainee.

2. The facts that the detainee was not involved in FIR No. 204/92, though shown in the grounds as involved in the case and that the accused had been admitted to bail in FIR 28/97 though not so indicated in the grounds and that the detainee was not involved in FIR No. 204/92 (Supra) in which challan had been produced in the Court much earlier to the order of detention, reveal and demonstrate that the detaining authority has been unaware of such developments and has passed the order in ignorance of the facts. Even the other grounds mentioned in the grounds of detention have not been properly adverted to nor considered in their proper context. It is further alleged that all these facts speak non-application of mind by the detaining authority while passing the impugned order of detention.

It is also pleaded that on behalf of the detainee three representations were made to the Minister of State (Home), the Governor of Jammu and

Kashmir and Chief Minister of the State (Annexures E, F and G). These representations were made under the instructions and on behalf of the

detenue, but the representations have not been considered and decided till date. It may be noted that the petition has been filed on 13-8-1997 and

the representations filed earlier thereto have not been decided despite lapse of several months and in any case not less than seven months have

passed by. Copies of the representations reveal that the Minister of State for Home has endorsed representation to Inspector General of Police,

CID, CIK, Jammu on 11-4-97, while as the other two representations have been submitted thereafter. In all the representations the subject is the

detention of Ishtiaq Ahmad Shah, the detenue seeking release on grounds stated thereto.

3. Despite opportunities right from 19-8-1997, the State of Jammu and Kashmir and the District Magistrate, Srinagar represented by Mr. Ghulam

Mustaffa, G.A. have not filed any counter. At least six opportunities spreading over last six months have been granted to the respondents through

Mr. G. Mustaffa, GA, to file counter, but for reasons best known to Respondents, counter has not been filed.

4. The matter has been heard in absence of counter.

5. Mr. Mustaffa, GA, at the hearing produced the record Of District Magi strate, which comprises of either leaves, out of which first two leaves

are correspondance between Government Advocate and Distt. Magistrate Srinagar and Additional Chief Secretary (Home) arid the third leaf is

record memo of an intimation of some warrant addressed to the detenue. Fourth leaf, is the letter of District Magistrate, Srinagar requesting

Additional Chief Secretary (Home) for approval of the order of detention. The 5th leaf is copy of warrant of detention. Sixth leaf is intimation to

the detenue regarding the option open to the detenue to appear before the Advisory Board and to make representation against the detention to the

Government. The remaining two leaves are copies of ground of detention and the dossier.

6. Mr. G. Mustaffa, G A, despite directions by the Court has not been able to produce the record of the Home Department in the case and has

shown his inability to produce the record before the Court. He that as it may, the parties have been heard and the matter considered.

7. Obviously, there is no return to the Rule nisi and the assertions in the petition, which remain uncontroverted in absence of returns, shall have to

be treated as admitted. State of Bihar Vs. Kameshwar Prasad Verma, and AIR 1968 SC 355 dated 18-12-68).

8. As the allegations of failure to supply the material/information referred to in the grounds of detention, has also remained uncontroverted, the

detention order is rendered bad and entitles-the detenue to release. Thakor Mulchandani Vs. Assistant Secretary to the Government of

Maharashtra and Others, .

9. There is nothing on record to show that the three representations made by the petitioner to the Government since 11-4-1997, have been either

considered or decided. As already stated no counter has-been filed. The non-consideration of the representation is not refuted. No record or

material has been produced to indicate that the representations were considered.

10. Mr. G. Mustaffa, GA, has submitted that he is not in a position to controvert the allegations of non-consideration of the representations made

by the petitioner as he has not been given any record or information to show that the representations were ever considered by the Government.

11. In absence of counter and in the light of the statement of the Govt. advocate, the allegation of receipt of representations by the Govt. and its

non-consideration remains uncontroverted and has to be treated legally speaking as admitted. This being so, the Government is under a legal

obligation to consider the detenue's representations. The representations to the Government in terms of Article 22(5) of the Constitution is separate

and independent of the consideration of the detenue's case by the Advisory Board. Consideration by the Board may be additional safeguard, but

not a substitute for consideration of the representation by the Government. Smt. Gracy Vs. State of Kerala and another, .

12. In 1992Suppl(3.)SCC65,ithasbeenheld that right to representation under Article 22(5) includes, right of expeditious disposal by the

Government. Expedition is the Rule and the delay defeats the Article 22(5).

13. In Raghavendra Singh Vs. Superintendent, District Jail, Kanpur and Others, , it has been laid down that inordinate and unexplained delay on

the part of the Government to consider the representation renders the detention illegal. Even, unexplained delay in considering the representation of

the detenue would render the detention invalid as held in Mahesh Kumar Chauhan alias Banti Vs. Union of India and others, .

14. In Rama Dhondur Borade Vs. V.K. Saraf, Commissioner of Police and Others, 28 days delay in the disposal of the representation from date of

receipt was held, in the facts and circumstances of the case, as unreasonable delay and as the satisfactory explanation did not come forth, the detention was held invalid on that score.

15. For the aforesaid reasons, the detention Order No. DMS/PSA/26/97 dated 12-9-97 (Annexure-A) is held legally bad and invalid. With the

result the detention order is quashed. At this stage the counsel for the petitioner submits that the detenue is out and presently on parole. The

detention order having been declared as invalid, the detenue Ishtiyag Ahmed Shah S/o Shri Ghulam Mohammad Shah R/o Malik Sahib Nowhatta,

Srinagar cannot be detained any further under the impugned order of detention. Orders accordingly.