

(1987) 11 J&K CK 0004
In the Jammu And Kashmir High Court

Hakim Ghulam Hassan

APPELLANT

Vs

State of J. and K. and Another

RESPONDENT

Date of Decision : 18-11-1987

Acts Referred:

Constitution of India, 1950 — Article 22

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 1, 4

Citation : (1988) CriLJ 1282

Hon'ble Judges : S.M. Rizvi, J

Bench : Single Bench

Judgement

S.M. Rizvi, J.—In this writ of habeas corpus the detention order No. PSA/DMS/1/87 dated 4-4-1987 passed by the District Magistrate,

Srinagar, detaining Mohammad Yusuf Shah S/o Ghulam Rasool Shah r/o Soibugh, Budgam Kashmir, u/s 8 of the Jammu and Kashmir Public

Safety Act (hereinafter referred to as ""Act"") has been challenged on many grounds, details whereof are given in the petition.

2. Firstly, it would be advantageous to reproduce the grounds of detention, as below, for the sake of reference:

OFFICE OF THE DISTRICT MAGISTRATE SRINAGAR

To,

Shri Mohammad Yousuf Shah

s/o Ghulam Rasool Shah,

R/o Soibugh-Badgam Kashmir.

Sub.:— Grounds of detention.

There is a report against you that you and your party of which you are Nazim-e-Allah (shoba Tulba) a youth wing of the Jamati-Islamia) is habitual

to challenge openly the accession of Jammu and Kashmir with Union of India and also engaged to exploit stray incidents for the purpose of

creating serious communal disharmony. In the 'Dargahs and Ijtimaha' managed and controlled by your party under your leadership you are

organizing Muslim students militant force by imparting them necessary training and guidance thereby endangering peaceful atmosphere of the State.

It is further reported that you have decided to collect arms and ammunition for disturbing peace in the State, and send the Muslim Youths of

Kashmir across the border to receive training for handling of the arms and to create communal disharmony and to prove your party to compel the

minority community to leave the State. The following are some references in this behalf:

1. On 17-1-1985 in a meeting of your party workers arranged by you at Batmaloo you reiterated your statement that Kashmir question was

unresolved and that the Central Government had occupied the State against the wishes of the people. You also stated in the meeting that your

party had resolved to bring a revolution in the State and annex the same with Pakistan.

2. In a meeting held at Soura on 27-2-1985 you challenged the accession of State with India and instigated the Muslim Youth to launch an armed

struggle like the people of Afghanistan and Pakistan so as to achieve freedom from Hindu dominated India.

3. On 17-3-1985 in a meeting held by you at Tankipora you stated that Indian Government had promised to settle the Kashmir question through

plebiscite as the state was occupied by India forcibly. It was also announced by you that keeping in view the Muslim Majority in the valley it is their

birth right to accede to Pakistan and establish 'Nizam-i-Mustaffa' in the State.

4. In another meeting of workers held at Kanganon 9-4-1985 you said that the primary duty of your party was to liberate the State from Hindu

dominated India as the Muslims in India were being killed like dogs and the mosques were used as urinals.

5. On 11-5-1985 you declared in a meeting organised by you that Muslims of the State have not accepted Constitution of India and that some

leaders for the sake of their personal ends have deceived the people of State. You advised your workers to destroy vital installations of the Central

Government so that the centre would realize that it was not possible to purchase the Kashmiries.

6. In a meeting held at Maisuma on 29-6-1985 you stated that the Central/State Governments had introduced such a system of education in the

state which was taking away the Muslim students from the path of religion. It was further pointed out by you that your party had decided to hoist

Pakistani flags on religious places and vital installations so that that public disorder is created in the minds of minority community with a view to

compelling them to leave the valley. You also instigated the participants to construct mosques on the land belonging to the Hindu Shrines:

7. In another meeting organized by you at Badgam on 12-7-1985 you said that the Indian Muslims were unsafe and the leaders of India wanted to

convert the majority of the State into minority. In order to take a revenge you incited your workers to compel the minority community to leave the

Kashmir valley.

8. On 16-8-1985 you challenged the accession of J. & K. with India in a meeting held at Soura. You further said that the youth should struggle to

end this slavery and sacrifice their lives and property for the sake of establishing an Islamic type of Government in the State:

9. On 6-9-1985 at Badgam you preached the participants to stand for revolt and 'Jehad' against the Central Government and further said to advise

muslims to attend their party centres where necessary training is being imparted to them for 'Jehad' like the people of Afghanistan:

For this unlawful activity you have been detained by this office under the provisions of J.&K. Public Safety Act, 1978 vide order No.

PSA/DMS/170/85 dated, 21-10-1985 and the same was approved by the Government vide Govt. order No. Home-ISI-500 of 1985 dated 19-

2-1985 for a period of twelvemonths. In spite of this detention, you after the expiry of detention continued to indulge in a manner prejudicial to the

maintenance of Public Order and security of the State. Some of the instances are given below:

1. On 17-11-1986 you organised a public meeting and rally at Iqbal Park and the rally afterwards became violent which created a sensation of

terror in the city of Srinagar. For this a case FIR No. 924/86 u/s 4(2) T& D.A. stands registered at P/S. Shergari.

2. In the last week of Dec. 1986 your party under your leadership created disturbance in the city of Srinagar by resorting to violence, stone

throwing and also tried to disturb the communal harmony in the valley on an article published in the Daili 'Wadi KI Aawaz'" Consequent upon this

three cases FIR Nos : 313/86 under Sections 295 Am 153/A (P/S Maisuma) 985/86 u/s 295-A, 153, 153 A, 120 E, RPC (Shergari) and 986/86

under Ss; 147, 148, 353, 336, 152 RPC (Shergari) stand registered in Police Station Maisuma and Shergari.

3. On 24-2-1987 at Lal Chowk you demanded in public Speech that Kashmir question is still unresolved according to United Nations resolutions.

On this a case FIR No. 30/87 u/s 4(2) T & DA (P) A stands registered in P/S Maisuma.

4. On 4-3-1987 at Iqbal Park Srinagar you again challenged the accession and made statements which were likely to hurt the feelings of minority

community in the State. For this a case FIR No:123/87 u/s 1(2) T & DA (P) A stands registered in P/S Shergari.

5. On 8, 9, 10-3-1987 in public meetings at Armwari Zero Bridge, Solina and Ziarat Batmallooyou criticised the role of Governor for dismissal of

many muslim employees, conversion of Babri Mosque and closure of Secretariat mosque. You propagated the creation of MUF as a result of

atrocities on muslims. Your preachings in these meetings were of communal frenzy.

6. In order to achieve political support your party (Jammai Islami) under your leadership created a Liasion with other like minded communal

groups just to contest State Legislative Assembly elections and for this you and your party were found visiting houses of muslims, forcing them to

swear support on the name of Holy Quran in your favour as the elections were projected by you as plebiscite for future of Kashmir.

The above mentioned facts are indicative of the fact that you are bent upon creating chaos and confusion in the valley by spreading communalism

and developing separatist tendencies and also creating public disorder thereby endangering security of the State and public order. I am therefore

satisfied that your remaining at large will pose a great threat to the maintenance of Public order. Hence you are detained under the provisions of J.

& K. Public Safety Act, 1978 for which orders have accordingly been issued.

Sd/- (G. 0- Pardesi)

District Magistrate

Srinagar.

3. The order of detention has been assailed inter alia on the following grounds:

(a) That the order of detention has been passed by the respondent No. 2 at a time when the detenu was in police custody. In the grounds of

detention as also in the letter dated 6-4-1987, it is nowhere indicated by the respondent No. 2 that while ordering the detention of the detenu, he

was conscious of the fact that the detenu was in police custody/in Central Jail Srinagar and that his detention was warranted for the alleged

activities described by him in the grounds of detention. Failure of respondent No. 2 to indicate the aforesaid fact in the grounds of detention and

the order of detention, renders the detention of the detenu liable to be quashed.

(b) That according to the grounds of detention, the detention of the detenu has been ordered on the basis of a report. However, it is not indicated

as to who has submitted the report and what does that report contain. The detenu has not been supplied with the copy of the report and therefore

a valuable right of his, as guaranteed to him by Article 22(5) of the Constitution stands infringed. The detention of the detenu on ground as well is

liable to be quashed.

(c) That the respondent, No. 2 has not recorded his satisfaction while passing the order of detention against the detenu as envisaged by Section 8

of the Public Safety Act of 1978. The detention of the detenu is liable to be quashed on this ground as well;

(d) That the detention of the detenu has been ordered on the activities alleged to be prejudicial to the security of the State and Public order since

an order of detention which has been passed on the alleged activities prejudicial to the security of State and Public order, has been held to be

invalid therefore, also the detention of the detenu is invalid, unconstitutional, and unsustainable.

(e) That otherwise also, the grounds of detention are vague, unreal, uncertain, indefinite and against the object sought to be achieved under the Act

of 1978. The grounds of detention have a preamble. The preamble is so vague that nothing can be made out of it and consequently no effective

representation could be made by the detenu against the order of detention. The detention on this ground as well lacks its validity and is therefore

liable to be quashed;

(f) That the incidents of 17-1-1985, 17-3-1985, 14-5-1985, 16-8-1985 and 6-9-1985 have been made the basis for detaining the detenu under

the Act of 1978. According to the law of preventive detention, the detention can, be ordered only on the grounds which are proximate in time.

Since the grounds relied upon against the detenu are too stale in point of time, therefore in accordance with law laid down by Supreme Court, the

detention is liable to be quashed.

(g) That the incident dt/- 17-11-1986 does not make out a ground for detaining the detenu. After organizing the rally at Iqbal Park, who became

violent and what did he do after becoming violent is not indicated in the grounds, of detention under reference. Consequently the ground is

untenable in the eyes of law for detaining the detenu.

(h) That in so far as the incident relatable to Dec. 1986 is concerned, it is alleged that the party of the detenu by resorting to violence, stone

throwing tried to disturb the communal harmony in the valley. What kind of violence was resorted to by the party is not indicated in the said ground

of detention. Where did the stone throwing take place and how the communal harmony had disturbed and where, is not also pointed out in the said

ground of detention. Merely for the reason that a case has been registered by police station Maisuma and Shergar, the respondent No. 2 is not

justified in detaining the detenu' under the Act of 1978.

(i) That incident dt/- 24-2-1987 is again not relatable to the detention of the detenu. Assuming that the statement was made by the detenu on 24-

2-1987, it hardly renders him liable for detention. By saying that Kashmir question is still unresolved according to the United Nations Resolution,

the detenu has not committed a sin muchless an act which would bring him within the ambit of preventive detention. Freedom of expression is a

cherished and guaranteed right under the Constitution of India and cannot be abridged by detaining a person under the provisions of the Act of

1978 (J). That the incident dt/- 4-3-1987 is again unfounded, what kind of statement was made by the detenu and how it hurt the feelings of

minority community which admittedly is the Muslim community) in the Indian

Union is not indicated in the aforesaid ground of detention.

Registration of cases hardly advances the case of the respondents.

(k) That the incidents of 8th, 9th and 10th of March 1987 hardly warrant the detention of the detenu, Where these statements were made in the public meetings, it is not made clear in the ground of detention. How communal harmony was affected by these statements is not also indicated in the ground of detention. Therefore, the grounds of detention are clearly untenable and consequently the detention of the detenu is rendered invalid.

(l) That the grounds concerning the creation of liason with other like minded communal groups for fighting elections cannot be made a ground for detaining the detenu. By asking people to vote for a particular party, no violation of provisions of Section 8 of the Public Safety Act can be said to have been committed This ground as well is legally unsustainable and is consequently liable to be declared void.

(m) That from the facts and circumstances explained above, the detention of the detenu is wholly unwarranted and is not within the competence and authority of respondents. The detenu has been deprived of his liberty on unfounded and baseless grounds. The grounds of detention as has been stated herein above are totally vague, unreal and indefinite. No detention can be therefore be maintained on these grounds against the detenu.

4. On admission of the petition to hearing, notice was issued to the respondents. They were represented by Mr. Mufti Mehraj-ud-Din, Additional

Advocate, General. Despite numerous opportunities given to him, he failed to file the counter-affidavit on behalf of the respondents. With the result

that the case was heard in absnece of the same. Non-filing of the counter-affidavit will have an important bearing on the factual position of the case,

and the allegations made in the writ petition will remain unrebutted.

5. I have heard the learned Counsel for the parties and have also gone through the file thoroughly.

6. It may be stated at the very outset, that in view of Section 16A of the Act, each and every ground of detention shall have to be scrutinized.

Firstly, it is alleged that the detenu was in police custody when the order of detention was passed against him and the detaining authority has

nowhere either in his letter dated 6-4-1987 or in the grounds of detention, showed his awareness of this important fact. From the perusal of the

letter dt/- 6-1-1987 and the grounds of detention attached therewith, it is manifest that the detaining authority has not mentioned the factum of arrest of the detenu anywhere. This allegation of the petitioner is supported by an affidavit which stands uncontroverted. It was the duty of the detaining authority to indicate his awareness about the detenu having been under arrest at the time of issuance of the detention order. It was necessary for him to indicate as to why the detention order was required to be passed when he was already in the custody of police. Having taken recourse to the preventive detention in respect of a detenu who was already in police custody. It should have been indicated that the detenu could not be dealt with effectively under the ordinary law. Having failed to show his awareness about the arrest of the detenu, it is to be held that the detaining authority has not applied his mind and has passed the order arbitrarily and mechanically.

7. Secondly, it is alleged that the copy of the report as mentioned in the preamble of the detention order and which was relied upon by the detaining authority for passing the detention order has not been supplied to the petitioner which has deprived him of his fundamental right to make a representation against such order. This allegation too stands unrebutted as no counter-affidavit has been filed by the respondents. Making of representation against the detention is a fundamental right of a detenu, guaranteed to him under Article 22(5) of the Constitution. If the material forming the basis of the subjective satisfaction of the detaining authority has not been supplied to the detenu, it shall be deemed to have deprived him of his fundamental right to make the representation to the competent authority against such detention and would invalidate the very order of such detention. This is a lacuna which goes to the root of the detention and knocks out its very base.

8. Thirdly, the detention order has been passed for preventing the detenu from his alleged activities which are prejudicial to the security of the State as also to the maintenance of public order. Such type of order is against the mandate as contained in Section 8 of the Act. The detenu could be detained either for his activities prejudicial to the maintenance of public order or the security of the State, and not for both at one and the same time. Both grounds could not be clubbed together. The expressions 'Public order' and 'security of State' are two separate and distinct concepts

and have been clearly defined in Section 8(3)(a) and 8(3)(b) of the Act. Therefore, their clubbing together for the purposes of detaining a citizens

of India will be violative of Section 8 itself. The detaining authority has to strictly comply with the provisions of Section 8 while passing an order

thereunder. Any departure from the established procedure as provided by law shall affect the very detention order.

9. In *G.M. Shah Vs. State of Jammu and Kashmir*, , it has been ruled that detaining a detenu by placing reliance on both the basis i.e. for

preventing him from acting in any manner prejudicial to the security of the State or maintenance of public in the grounds furnished to him is illegal.

10. Fourthly, the perusal of the preamble of the grounds of detention shows that it is really vague. The vagueness is writ large on it, because it is not

stated as to when the detenu challenged the accession of Jammu and Kashmir with Union of India and where and in what manner he trained the

muslim students and when and where he decided to collect arms and ammunition and from whom? This vagueness of the preamble of the grounds of

detention must be deemed to have taken away the right of the detenu to make an effective representation against the detention order, which was

his fundamental right. Moreover, it has deprived the detenu of his right to know the basis of the order of detention which led to the subjective

satisfaction of the detaining authority.

11. Fifthly, the incidents of 17-11-1985, 17-3-1985, 14-5-1985, 16-8-1985 and 6-9-1985 are all so stale in point of time and are not proximate

with the order of detention of the detenu. Detention order on the basis of stale grounds which are too remote in point of time have no nexus with

the object sought to be achieved.

12. In *Mohd. Yousuf Rather Vs. State of Jammu and Kashmir and Others*, , it has been held. that irrelevant and vague grounds have no

connection with the satisfaction of the authority making the order of detention under the Act.

13. Sixthly, as regards the incident of 7-11-1986, it too does not make out a ground for the detention of the detenu under the Act. Nothing has

been said as to what sort of violence was resorted to in consequence of such public meeting unless banned under law is the fundamental right of

citizens and would not be a ground for detaining him under the Act.

14. Seventhly, as regards the incident of Dec. 1986, it is also vague. Even, the date and place where disturbance was caused is not known to the

detaining authority. Srinagar city is a big city and mere saying that disturbance was created in the city is not a good ground to detain a citizen of

India under the Act. Where did the stone throwing take place and how the communal harmony was disturbed and where, has not been indicated in

the said ground of detention. If this is not a vague and stale ground, what else can be termed as such?

15. Eighthly, the incident on 24-2-1987 at Lal Chowk also has no nexus with the object sought to be achieved, and will not attract the provisions of

Section 8 of the Act. The incident of 4-2-1987 is also of the same kind what kind of statement was made by the detenu and how did it hurt the

feelings of minority community is not indicated therein. Same is the case with the incidents of 8th, 9th and 10th of March, 1987.

16. Mr. Qayoom submitted that in March, 1987, the elections to the Jammu and Kashmir Assembly were held and the detenu was also a

candidate from the Amirakadal Constituency opposing the candidate of the ruling party. According to him all the speeches, allegedly, made by the

detenu in March, 1987, were in connection with the canvassing in the elections and therefore, could not attract the provisions of Section 8 of the

Act.

17. The last ground of detention also concerns the Assembly elections in March, 1987, and cannot be a valid ground for the detention of the

detenu.

18. For the reasons made above, I allow the petition and hold that the detention order of the detenu dt/- 4-4-1987 passed by the District

Magistrate Srinagar is illegal, unconstitutional and not sustainable in the eye of law. The said order is, therefore, hereby quashed. The detenu is

ordered to be set at liberty forthwith. The Superintendent, Sub Jail Hiranagar, Jammu, shall be informed accordingly.

19. Let the file be consigned to records.