

(2017) 03 J&K CK 0027
In the Jammu And Kashmir High Court
Case No : 549 of 2016 MP no 01 of 2016

Hilal Ahmad Itoo

APPELLANT

Vs

State of J&K and others

RESPONDENT

Date of Decision : 02-03-2017

Acts Referred:

Constitution of India, Article 21, Article 22(5), Article 22(3)(b) -
Amendment of the Schedule - Protection against arrest and detention in certain cases
- Protection against

Citation : 2017 0 CriLJ 3055

Hon'ble Judges : Tashi Rabstan

Bench : SINGLE BENCH

Advocate : G. N. Shaheen, M.A. Wani

Final Decision : Allowed

Judgement

1. Detenu - Hilal Ahmad Itoo son of Ab. Ahad Itoo resident of Rahmoo Tehsil Rajpora District Pulwama, through his wife, seeks quashment of

detention order No.88/DMP/PSA/16 dated 17th September 2016, passed by District Magistrate, Pulwama (for brevity ""Detaining Authority""),

directing preventive detention of detenu, on the grounds detailed in petition on hand.

2. Respondents filed their counter and resisted the petition.

3. Heard learned counsel for the parties at length and considered the matter.

4. Learned counsel for petitioner states that detenu was required to be supplied all documents, statements and other material relied upon in the

grounds of detention, so as to enable him to make effective and meaningful representation against detention and failure to supply such

material/documents, amounts to violation of Article 22(5) of the Constitution of India His further contention is as to delay in passing of detention

order and no explanation given by detaining authority and for this reason detention order, according to learned counsel, is liable to be quashed. In

support of his submission, learned counsel refers to judgements passed in Rajinder Arora v. Union of India (2006) 4 SCC 796; Shahmali v. State

and others 2010 (1) SLJ 56; Dilawar Magray v. State of J&K & ors 2010 (II) SLJ 696; and Sajad Ahmad Khan v. State & ors 2010 (II) SLJ

743.

5. Learned counsel for respondents states the detention order has been passed on subjective satisfaction by detaining authority and the petition is

not maintainable and liable to be dismissed.

6. Preventive detention, as held in A. K. Gopalan v. State of Madras (1950) SCR 88 and reiterated in Rekha v. State of Tamilnadu (AIR 2011

SCW 2262), is, by nature repugnant to democratic ideas and an anathema to the rule of law. The Supreme Court in Rekha's case (supra), while

emphasising that Article 22(3)(b) Constitution of India is to be read an exception to Article 21 of the Constitution of India and not allowed to

nullify the right to personal liberty guaranteed under Article 21, observed since, however, Article 22(3)(b) of the Constitution of India permits

preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be

taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It

follows, therefore, that if the ordinary law of the land (Indian Penal Code and other penal statutes) can deal with a situation, recourse to a

preventive detention law will be illegal. The Supreme Court further observed that it must be remembered that in case of preventive detention no

offence is proved and the justification of such detention case is suspicion or reasonable probability, and there is no conviction which can only be

warranted by legal evidence. Preventive detention is often described as "jurisdiction of suspicion", The Detaining Authority passes the order of

detention on subjective satisfaction. Since Clause (3) of Article 22 specifically excludes the applicability of Clauses (1) and (2), the detenu is not

entitled to a lawyer or the right to be produced before a Magistrate within 24

hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital. The Supreme Court making reference to law laid down in *Kamleshwar Ishwar Prasad Patel Vs. Union of India and Others* (1995) 2 SCC 51 (para 49) observed the history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of the nature of alleged activities of the detenu. The Supreme Court quoted with approval the observation made in *Ratan Singh Vs. State of Punjab and others* 1981 (4) SCC, emphasising the need to ensure that the Constitutional and Statutory safeguards available to a detenu were followed in letter and spirit observed: ""But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at-least those safeguards are not denied to the detenu"s.

7. The procedural requirements are the only safeguards available to a detenu since the Court is not expected to go behind the subjective satisfaction of Detaining Authority. As laid down by the Apex Court in *Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and anr.* (1987) 2 SCC 22, the procedural requirements are, therefore, to be strictly complied with, if any value is to be attached to the liberty of the subject and the Constitutional rights guaranteed to him in that regard.

8. The baseline, that emerges from the above overview of case law on the subject of preventive detention, is that whenever preventive detention is called in question in a court of law, first and foremost task before the Court is to see whether procedural safeguards guaranteed under Article 22(5) of the Constitution of India and Preventive Detention Law pressed into service to slap the detention, are adhered to.

9. In addition to above, the Supreme Court in *Dr. Ram Krishan Bhardwaj v. The State of Delhi and Ors.*[1953 SCR 708], while interpreting Article 22(5) of the Constitution, observed as under:

.....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. In this case, the petitioner has the

right, under article 22(5), as interpreted by this Court by majority, to be furnished with 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 opinion that this

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

course to a claim of privilege under clause (6) of article 22. That not having been done in regard to the ground mentioned in sub-

paragraph (e) of paragraph 2 of the statement of grounds, the petitioner's detention cannot be held to be in accordance with the

procedure established by law within the meaning of article 21. The petitioner is therefore entitled to be released and we accordingly

direct him to be set at liberty forthwith.

10. The right which the detenu enjoys under Article 22(5) is of immense importance. In order to properly comprehend the submissions of the

detenu, Article 22(5) is reproduced as under:

22(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority

making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall

afford him the earliest opportunity of making a representation against the order.

This Article of the Constitution can be broadly classified into two categories: (i) the grounds on which the detention order is passed must be

communicated to the detenu as expeditiously as possible and (ii) proper opportunity of making representation against the detention order be

provided.

11. The preventive detention law makes room for detention of a person without a formal charge and without trial. The person detained is not

required to be produced before the Magistrate within 24 hours, so as to give an opportunity to the Magistrate to peruse the record and decide

whether the detenu is to be remanded to police or judicial custody or allowed to go with or without bail. The detenu cannot engage a lawyer to

represent him before the detaining authority. In the said background it is of

utmost importance that whatever procedural safeguards are guaranteed

to the detenu by the Constitution and the preventive detention law, should be strictly followed. The Supreme Court in *Rekha v. State of Tamil*

Nadu Through Secretary to Government and Anr. [(2011) 5 SCC 244], while emphasizing need to adhere to the procedural safeguards,

observed:-

It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is

suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is

often described as "jurisdiction of suspicion", The Detaining Authority passes the order of detention on subjective satisfaction. Since

Clause (3) of Article 22 specifically excludes the applicability of Clauses (1) and (2), the detenu is not entitled to a lawyer or the

right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of

preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in

our opinion, mandatory and vital.

12. The Court making reference to law laid down in *Kamleshwar Ishwar Prasad Patel Vs. Union of India and Others* (1995) 2 SCC 51 (para 49)

observed:

the history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and

enforced by the Court and their rigour cannot be allowed to be diluted on the basis of the nature of alleged activities of the detenu".

13. The Supreme Court also quoted with approval following observation made in *Ratan Singh Vs. State of Punjab and others* (1981) (4) SCC

1981) :-

But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty

are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenu's

14. Law on the subject was succinctly laid down by the Apex Court in *Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and another* (1987) 2 SCC

22) in following words:

The procedural requirements are the only safeguards available to a detainee since the court is not expected to go behind the

subjective satisfaction of the Detaining Authority. The procedural requirements are, therefore to be strictly complied with if any value

is to be attached to the liberty of the subject and the Constitutional rights guaranteed to him in that regard"".

15. The Constitution of India - Article 22(5) and Section 13, J&K Public Safety Act 1978, guarantee two important safeguards to the detainee -

first that the detainee is informed of grounds of detention that prompted the detaining authority to pass the detention order and second that the

detainee is allowed to represent against his/her detention immediately after the detention order is made or executed. The Constitutional and Statutory

safeguards guaranteed to the detainee are to be meaningful only if the detainee is handed over the material referred to in the grounds of detention that

lead to subjective satisfaction that the preventive detention of detainee is necessary to prevent him from acting in any manner prejudicial to the

security of the State or public order and further it is ensured that the grounds of detention are not vague, sketchy and ambiguous so as to keep the

detainee guessing about what really weighed with the detaining authority to make the order.

16. The detention order makes mention of material record such as dossier and other connecting documents relied upon by the detaining authority

while making detention order. The detention record does not convincingly establish that all the documents referred to in the detention order were

actually supplied to the detainee. The grounds of detention make reference to various FIRs to have been registered against detainee. The involvement

of detainee in the cases/FIRs appears to have weighed with detaining authority while making detention order. The counter affidavit, however, does

not indicate that copies of First Information Reports, statements recorded under section 161 Cr.P.C. and other material collected in connection

with investigation of case(s) mentioned in grounds of detention, were ever supplied to detainee. The material, mentioned in grounds of detention, thus

assumes significance in the facts and circumstances of the case. It needs no emphasis that detainee cannot be expected to make a meaningful

exercise of his Constitutional and Statutory rights guaranteed under Article 22 (5) of Constitution of India and Section 13 of Jammu and Kashmir

Public Safety Act, 1978, unless and until the material on which detention order is based, is supplied to him. It is only after detenu has all said

material available, that he can make an effort to convince the Detaining Authority and thereafter Government that their apprehension as regards his

activities are baseless and misplaced. If the detenu is not supplied material, on which detention order is based, he cannot be in a position to make

an effective representation against his detention order. The failure on the part of detaining authority to supply material relied at the time of making

detention order to detenu, renders detention order illegal and unsustainable. While holding so, I draw support from law laid down in Thahira Haris

Etc. Etc. v. Government of Karnataka [AIR 2009 SC 2184]; Union of India v. Ranu Bhandari [2008, Cr. L. J. 4567]; Dhannajoy Dass v. District

Magistrate [AIR, 1982 SC 1315]; Sofia Ghulam Mohammad Bam v. State of Maharashtra &ors [AIR, 1999, SC 3051]; and Syed Aasiya

Indrabi v. State of J&K &ors [2009 (I) S.L.J 219]; and Union of India v. Ranu Bhandari (2008 Cr. L. J. 4567);

17. Article 22(5) of Constitution provides a precious and valuable right to a person detained under preventive detention law - J&K Public Safety

Act 1978, to make a representation against his detention. It needs no emphasis that a detenu, on whom preventive detention order is slapped, is

held in custody without a formal charge and trial. The detenu is held in custody on a mere suspicion that his apprehended activities may be

prejudicial to the maintenance of public order or security of the State. Article 22(5), Constitution of India and Section 13 of the Act, thus make it

obligatory for Detaining Authority to provide detenu an earliest opportunity of making an effective and meaningful representation against his

detention. The object is to enable the detenu to convince the Detaining Authority and Government, as the case may be, that all apprehensions

regarding his activities are grossly misplaced and his detention is unwarranted. To make the Constitutional and Statutory right available to detenu

meaningful, it is necessary that detenu be informed with all possible clarity what is/are apprehended activity/ies that persuaded Detaining Authority

to make detention order. In case grounds of detention are vague, ambiguous and confusing, the detenu cannot be expected to make a

representation against his detention. In the instant case, detenu is alleged to have provoked/ instigated youth against government establishment and create law and order problem. The detenu is also alleged to have motivated and instigated youth to create law and order problems, and inciting youth for stone pelting upon security forces. The detenu was not provided the particulars of youth, who are alleged to have been instigated/provoked by detenu. The detenu, in absence of such details, could not be expected to have been in a position to give his side of story and persuade detaining authority and other respondents that the allegations against him were bereft of any basis. To sum up, the grounds of detention that constitute basis for detention order in question are ambiguous, vague, uncertain and hazy. A person of ordinary prudence would not be in a position to explain his stand in reply to the grounds of detention detailed by the detaining authority. The detenu has been kept guessing about the facts and events that weighed with detaining authority and prompted detaining authority to record subjective satisfaction regarding sufficiency of the material to warrant preventive detention of detenu. These are only few instances to illustrate that grounds of detention are vague and ambiguous and bound to keep detenu guessing about what really was intended to be conveyed by detaining authority. It is well settled law that even where one of grounds relied upon by Detaining Authority to order detention is vague and ambiguous, Constitutional and Statutory right of detenu to make an effective representation against his detention are taken to have been violated. Reference in this regard may be made to law laid down in State of Maharashtra & ors v. Santosh Shankar Acharya [AIR 2000 SC 2504]; Chaju Ram v. State of J&K [AIR 1971 SC 263]; Dr.Ram Krishan v. The State of Delhi & ors. [AIR 1953 SC 318]; Mohd Yousuf Rather v. State of J&K [AIR 1979 SC 1925]; and Ghulam Nabi Shah v. State of J&K & ors. [2005(I) SLJ 251].

18. For the reasons discussed above, the petition is allowed and detention order No.88/DMP/PSA/16 dated 17thSeptember 2016, passed by the District Magistrate, Pulwama - respondent No. 2, directing detention of Shri Hilal Ahmad Itoo son of Ab. Ahad Itoo resident of Rahmoo Tehsil Rajpora District Pulwama, quashed. The respondents, in view of quashment of detention order, are stripped of any authority to continue to detain

the detenu under order No.88/DMP/PSA/16 dated 17thSeptember 2016. Resultantly, the respondents are directed to release the detenu from preventive detention, ordered vide order No.88/DMP/PSA/16 dated 17thSeptember 2016. Disposed of.

19. Record be returned to counsel for respondents.