
(2010) 04 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : HCP No. 25 of 2010

Masarat Alam Bhat

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 08-04-2010

Acts Referred:

Constitution of India, 1950 — Article 21, 22

Citation : (2010) 2 JKJ 652

Hon'ble Judges : Gh. Hasnain Massodi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Gh. Hasnain Massodi, J.—Challenge is to order No. DMS/PSA/65/2009 dated 02.02.2010 whereby District Magistrate Srinagar -

Respondents No. 2 herein, has ordered preventive detention of Shri Masarat Alam Bhat S/o Abdul Majid Bhat R/o Zaindar Mohalla Srinagar

(herein after referred to as detainee) and directed his lodgment in District Jail Kathua. It remains to be known whether detention order has found

approval of the Government required u/s 8 (a) of the Public Safety Act 1978 (Act for short) or the matter has been placed before the State

Advisory Board in compliance of Section 13 of the Act and approved by the State Advisory Board. There is not even a whisper in this regard in

the counter affidavit filed by the Respondents.

2. It appears that the detainee has been in continuous custody since 5.9.2008. The detainee was placed under preventive detention vide order No.

DMS/PSA/20/2008 Dated 9.9.2008. The detention order was questioned before this Court and quashed on 27.12.2008. The Respondents

instead of releasing the detainee, slapped one more detention order No. DMS/PSA/41/2009 dated 21.1.2009 on the detainee. Challenge was

thrown to the aforesaid order before this Court and the Detention Order met the same fate on 25.5.2009. The detainee, however, was not released

and the Respondents vide order No. DMS/PSA/14/2009 dated 09.06.2009 directed preventive detention of the detainee and his lodgment in

District Jail Rajouri. The said detention order became subject matter of HCP No. 108/2009. This Court on 18.08.2009 again quashed the

detention order and directed immediate release of the detainee. The Respondents did not abide by the Court order and instead vide order No.

DMS/PSA/39/2009 dated 12.09.2009 ordered preventive detention of the detainee and directed the detainee to be lodged, this time, in District Jail

Udhampur. The detainee un-tired by the successive detention orders approached once again this Court with HCP questioning legality of the

Detention Order. The Respondents during pendency of the petition, on 29.10.2009, revoked the detention order dated 12.09.2009. The

Respondents, nonetheless, avoided to release the detainee and once again ordered preventive detention of the detainee vide order No.

DMS/PSA/39 dated 19.11.2009. The fresh detention order was again assailed before this Court as violative of the fundamental rights of the

detainee. The challenge to the detention order dated 19.11.2009 succeeded on 30.12.2009 and Respondents were directed to release the

detainee. The Respondents, however, not in a mood to release the detainee, symbolically arrested the detainee in connection with case FIR No.

34/2006 P/S Nigeen and thereafter FIR No. 7/2010 P/S Maisuma while the detainee continued to be in custody. The Respondent No. 2 thereafter

on 2.2.2010 made a fresh detention order which is subject matter of the present petition. Even prior to 5.9.2008, the detainee was put under

preventive detention in 1990, 1993, 1997, 2001, 2003, 2007 and 16.1.2008. The averments made in this regard do not find any reply in the

counter affidavit sworn by the Respondents.

3. The Petitioner throws challenge to the latest detention order (No. DMS/PSA/65/2009 dated 02.02.2010) broadly on following grounds:

1) That the Petitioner immediately after his detention under the impugned order was not informed that the detainee had a right to make a

representation against his detention to the Respondent No. 2 and also to the Government and the Respondents by omitting to follow the mandate

had violated the constitutional and statutory safeguards, available to the detainee.

2) That the Respondents did not supply the material that was said to have persuaded the Respondent No. 2 to order preventive detention of the

detenue and by their failure to provide said material, the Respondents had in effect deprived the detainee of his constitutional and statutory right to

make an effective representation against his detention.

3) That the grounds of detention claimed to have led the Respondent No. 2 to believe that preventive detention of the detainee was necessary to

achieve the objects spelt out in Section 8 of the Act, are vague, sketchy and ambiguous and practically made it impossible for the detainee to make

a representation against his detention.

4) That the grounds claimed by Respondent No. 2 to have led him to find it ""expedient to issue detention warrant against"" the detainee under the

Act, are foreign to the grounds contemplated by Section 8 of the Act.

5) That the Respondent No. 2 while making the detention order in question, failed to apply his mind to the material placed before him and the

impugned order was thus made in a mechanical manner.

4. The Respondents in their counter affidavit have merely reproduced the grounds of detention, recorded by the Respondent No. 2 and insisted

that the activities of detainee were considered to be highly prejudicial to the security of the State. The Respondents have insisted that the detainee

was informed about his right to submit his representation against the detention to the Government and as per requirements of the Act, the grounds

of detention were also served on the detainee. The activities of detainee highlighted in grounds of detention, according to Respondents, were by

themselves compelling reasons to detain the detainee under the Act. The Respondents in their counter affidavit have insisted that detention order

was perfectly valid and issued in accordance with the provisions of the Act.

5. Heard and considered.

6. Challenge to the detention order No. No. DMS/PSA/65/2009 dated 02.02.2010 whereby the Respondent No. 2 has ordered preventive

detention of the detainee and his lodgment in District Jail Kathua, must succeed

on the following grounds:

(I) The detention record made available by Ld. AAG, does not indicate that the detinue was at the time of execution of the detention

order/warrant, informed that the detinue had a right to make a representation to the Respondent No. 2 i.e Detaining Authority, as also to the

Government against his detention. Article 22(5) Constitution of India ("Constitution" for short) requires the authority making the detention order, to

afford the detinue the earliest opportunity of making a representation against the order. The constitutional safeguard can be made operational only

when the detinue is informed at the time of execution of the detention order/warrant that the detinue has a right to make a representation not only

to the Government but also to the Detaining Authority. The expression "earliest opportunity" makes the intention of framers of constitution very

clear that the opportunity to make representation, is to be afforded immediately after the detinue is put under detention. The detention order in

terms of Section 8 of the Act is to come to an end within a period of 12 days from the date the detention order is made, unless it finds approval of

the Government.

Having regard to the constitutional mandate, there is no reason to infer that the detinue has to exercise his right to make a representation against his

detention only after the period of 12 days. The constitutional safeguard finds expression in Section 13 of the Act. In the present case, as already

stated there is nothing on the record to suggest that the detinue was informed at the time the detinue was detained in pursuance of the detention

order that the detinue had a right in terms of article 22(5) of the Constitution as also Section 13 of the Act to make a representation against his

detention. There has been thus gross violation of constitutional and statutory rights of the detinue. Reference in this regard may be made to law laid

down in State of Maharashtra v. Santosh Shanker Acharya AIR 2000 2504.

(II) The detention order in question makes mention of "material record such as dossier and other connected documents" to have been gone through

by the detaining authority and relied upon, while making the detention order. The detention record does not indicate anywhere that the "material

record" was at the time of detention order or thereafter provided to the detinue. The grounds of detention, likewise make a mention of the

previous detention orders slapped on the detainee as also his involvement in case FIR No. 34/2006 P/S Nigeen u/s 13 ULAP Act and 153-A

RPC , FIR 7/2010 P/S Maisuma. The said material has admittedly weighed with the Detaining Authority while recording its subjective satisfaction

regarding placement of the detainee under preventive detention. The material viz. copies of FIR, material collected during investigation, does not

appear to have been supplied to the detainee at the time of the execution of the detention order or at any time thereafter. These documents were

necessarily to be made available to the detainee so as to enable the detainee to make an effective representation to the Detaining Authority or the

Government explaining his conduct and making an effort to dispel apprehension nursed by the Detaining Authority as regards alleged activities of

the detainee. The detainee resultantly has been deprived of exercising his Constitutional and Statutory right guaranteed under Article 22(5) of the

Constitution and Section 13 of the Act to file an effective and meaningful representation against his detention. The Respondents thus, have

observed their Constitutional and Statutory obligation in breach. The Respondents by withholding the material that was perused and relied upon to

order detention of the detainee, to conclude that the activities of the detainee were prejudicial to the security of the state, have made the detention

order liable to be quashed. The conclusion drawn finds support from law laid down in Dhananjay Das Vs. District Magistrate, Darrang and

Another, , Sophia Gulam Mohd. Bham Vs. State of Maharashtra and Others, , Union of India (UOI) Vs. Ranu Bhandari, Syed Aasiya Indrabi v.

State of Jammu and Kashmir and Ors. And Thahira Haris etc. Vs. Government of Karnataka and Others, .

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

Act 1978 in the present case, to make a representation against his detention. It needs no emphasis that a detainee on whom preventive detention

order is slapped, is held in custody without a formal charge and a trial. The detainee is held in custody on a mere suspicion that his apprehended

activities may be prejudicial to the security of the State or to maintenance of the public. Article 22(5) of the Constitution and Section 13 of the Act,

thus make it obligatory for the Detaining Authority to provide the detainee an earliest opportunity of making a representation against his detention.

The object is to enable the detainee to convince the Detaining Authority and the Government, as the case may be, that all apprehension regarding

his activities, are grossly misplaced and his detention is unwarranted. To make the constitutional and statutory right available to the detainee

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

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

representation against his detention.

In the present case, the reasons spelt out in the grounds of detention include an apprehension that there has been no change in detainee's "thought,

process" and that detainee is "incorrigible secessionist" who is threatening the police officers even when the detainee is under detention. The other

ground that he is claimed to have weighed with the Detaining Authority, is that the detainee has a "well knit group" backing the detainee. The

detainee is informed that his activities do not only create "law and order problems" but also create "socio economic problems" because the

detainee, in words of Detaining Authority is "mentor of enforcing hartals, strikes and other such activities which hamper the growth and

development". The grounds of detention ex facie are vague, ambiguous and sketchy and not clear and unambiguous enable a man of common

prudence to explain his stand much less make an effective representation. The detainee is not informed with clarity about his alleged "thought

process", "well knit group" at the back of the detainee and the activities that "create law and order problem". The detainee is not informed who are

the people who constitute the "well knit group" at back of the detainee, what changes were expected to be made by the detainee in his "thought

process". What are law and order and "socio-economic" problem that the detainee is likely to create and how are such problems intended to be

created. The detainee is not informed about "socio economic problem" that the activities attributed to the detainee result in. The grounds of

detention thus are vague, sketchy and lacking in essential details. The Respondents, by their conduct, have deprived the detainee of his

constitutional and statutory rights guaranteed under Article 22(5) and Section 13 of the J&K Public Safety Act. It is well settled law that even if

one amongst various grounds of detention, is found to be vague, the Constitutional and statutory safeguards available to the detainee are to be held

to have been violated. Reference in this regard may be made to law laid down in Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others, ;

Chaju Ram Vs. The State of Jammu and Kashmir, ; Mohd. Yousuf Rather Vs. State of Jammu and Kashmir and Others, ; and Syed Aasiya

Indrabi v. State of J&K and Ors. 2009 (1) SLJ 2009 219.

(IV) Section 8 of the Act, empowers the Government to order preventive detention of any person with a view to prevent such person from acting

in any manner prejudicial to (i) security of the State or (ii) maintenance of the public order. In other words the Government before making a

detention order is to be satisfied that the activities of the person proposed to be placed under preventive detention, are prejudicial to the (i) security

of the State or (ii) maintenance of the public order. Section 83 (1) (a-1) identifies prevention of some other activities like smuggling etc to prevent

which the detention order may be made. Section 8(1) (a-1) admittedly is not relevant to the present case. The law makers have not used

expression ""security of the State"", and ""maintenance of public order"" without purpose. The Detaining Authority is expected to realize that a

democratic polity like ours is edified amongst others on the ideal of personal liberty. Article 21 of the Constitution of India guarantees life and

liberty of every person and mandates that no person shall be deprived of his life or personal liberty except according to the procedure established

by law. The procedure, it needs no emphasis, has to be just, reasonable and fair. The preventive detention does not go hand in hand with the ideals

of personal liberty that run through weft and warp of the Constitution of India. The Supreme Court in A.K. Gopalan Vs. The State of Madras,

called Preventive Detention ""Sinister looking feature, so strangely out of place in democratic constitution.

In words of Supreme Court ""preventive detention laws are repugnant to democratic constitutions and they cannot be found to exist in any of the

democratic countries of the world"". The law makers alive to the spirit of the Constitution, in their wisdom, have restricted power to order

preventive detention to two extreme situations that may pose threat to the very foundation of society. It is not in each and every case where

apprehended activities of a person are suspected to pose a threat to law and order, peace and progress, industrial development or like matters that

power u/s 8 of the Public Safety Act can be exercised. The administration may, in day in and day out, come across a number of problems and face

a number of challenges which are to be dealt with by recourse to available law(s), it is not that the Government or its officers mentioned in Section

8(2) may at any time at their whim and caprice use preventive detention as a tool to find solution to the problems that are to be dealt with in a

routine and normal manner. In the present case the reasons that the Detaining Authority has found so compelling as to order preventive detention of

the detainee are ""law and order problems"", ""socio economic problems"", ""interest of law and order"", ""peace and security"" and ""growth in

development of the people"". It needs no emphasis that all such apprehended problems are foreign to Section 8 of the Public Safety Act. The law

requires nothing short of ""security of State"" or ""maintenance of public order"" to slap preventive detention on a person. The officer holding the post

of District Magistrate of the Principal District of the State, is expected to be alive to the ambit and scope of his powers u/s 8 of the Public Safety

Act. The Respondent No. 2 thus has acted in a callous and irresponsible manner while, ordering preventive detention of the detainee.

(V) The application of mind to the facts and circumstances, is a sine qua non in an executive action/order even if the authority has to arrive at

subjective satisfaction while making such order. The Detaining Authority u/s 8 of the J&K Public Safety Act while making a detention order, is

required to apply its mind to the facts and circumstances of the case and only after such application of mind draw conclusion that preventive

detention of a person is warranted to prevent such person from acting in any manner prejudicial to the security of the State or the maintenance of

the public order. The Detaining Authority is expected to be conscious of the fact that the detention order results in curtailment of personal liberty of

the detainee. In the instant case non application of mind is writ large on the record. The detention order is made on 02.02.2010 and a copy thereof

is forwarded to Financial Commissioner Home and other officers including Sr. Superintendent District Jail Kathua vide No.

DMS/PSA/JUD/09/347-51/2009 dated 02.02.2010. However, the Detaining Authority has put his signatures on the grounds of detention on

03.02.2010 i.e a day after the detention order was made. In the circumstances the grounds of detention on which reliance was placed and the

detention order made, were spelt out a day after the detention order was made. The Respondent No. 2 intriguingly has signed, the detention order

on 3.2.2010. This is sufficiently indicative of the non application of mind and the detention order warrants quashment on this ground alone.

6. In the circumstances, for the reasons discussed above the detention order No.DMS/PSA/65/2009 dated 02.02.2010 impugned in the present

petition does not stand legal scrutiny and is liable to be quashed. The detaining order, is accordingly quashed and the detenue namely Shri Masarat

Alam Bhat S/o Abdul Majid Bhat R/o Zaindar Mohalla Srinagar directed to be released forthwith unless of course the detenue is required in

connection with any other case warranting his custody or detention.