

(2019) 02 J&K CK 0052

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 271 Of 2018

Mohammad Iqbal Wani

APPELLANT

Vs

State Of Jammu & Kashmir & Ors

RESPONDENT

Date of Decision : 12-02-2019

Acts Referred:

Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 — Section 3(3)
Jammu And Kashmir Public Safety Act, 1978 — Section 8
Constitution Of India, 1950 — Article 21, 22(5)

Citation : (2019) 02 J&K CK 0052

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Mir Shafqat Hussain, Mir suhail

Judgement

1) By virtue of order bearing No.61/DMP/PSA/2018 dated 22.10.2018, passed by respondent No.2-District Magistrate, Pulwama, in exercise of powers under clause (a) of Section 8 of the J&K Public Safety Act, 1978, Mohammad Iqbal Wani son Wali Mohammad Wani resident of Chewa Kalan Tehsil Pulwama, has been taken into preventive custody and lodged in Kot Bhalwal Jail, Jammu. Veracity of the said order is assailed in the instant petition on the grounds detailed out therein.

2) The petitioner's case, as set out in the petition, is that the detainee, on 21.09.2018 and thereafter impugned detention order was slapped upon him. The allegations/grounds of detention are stated to be vague and mere assertions. The respondents are stated to have ignored to provide material relied upon by the detaining authority while passing the impugned order of detention and thus deprived the detainee of his Constitutional and Statutory rights. Grounds of detention are stated to be vague, baseless, non-existent and unfounded.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and insisted that the activities of detainee are highly prejudicial to

the maintenance of public order. It is pleaded that the detention order and grounds of detention were handed over to the detenu and same were read over and explained to him. The grounds taken by the petitioner are legally misconceived, factually untenable and without any merit. The learned counsel for the respondents has made available detention records to lend support to the case set up in the counter affidavit.

4) Heard learned counsel for the parties and also perused the record.

5) Learned counsel for the petitioner contended that the detenu has been disabled from making an effective representation against the detention as the material, which formed base of the grounds of detention and consequent order of detention, has not been furnished to the detenu.

6) Perusal of the detention records reveals that the submission has weight. Nothing has been brought on record to show that the relevant material has been furnished to the detenu which would have enabled him to make an effective representation against the detention. Non-supply of the material would amount to violation of Article 22(5) of the Constitution of India, so deprivation of a valuable right. The Hon'ble Apex Court in the judgment rendered in the case of "Sophia Gulam Mohd. Bham v. State of Maharashtra & ors" (AIR 1999 SC 3051), has held as under:

"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 against the order of detention. 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 copies thereof are supplied to the person detained, in his own language."

7) It is also quite apposite to quote para 10 of the judgment of the Hon'ble Apex Court in "Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others", (1982) 3 SCC 440:

"10. Two propositions having a bearing on the points at issue in the case before us, clearly merge from the aforesaid resume of decided cases : (a) all documents, statements and other materials incorporated in the grounds by reference and which have influenced the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detenu along with the grounds or in any event not later than five days ordinarily and in the exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of his detention and (b) all such material must be furnished to him in a script or language which he understands and failure to do either of the two things would amount to a breach of the two duties cast on the detaining authority under Article 22 (5) of the Constitution. Relying upon this

legal position counsel for the petitioner urged before us that in the instant case a breach of the mandate contained in Article 22 (5) read with Section 3 (3) of the COFEPOSA is clearly involved because of three things that have happened, namely, (i) supply of Urdu translations of the bulk of documents and statements incorporated in the grounds and relied upon by the detaining authority was delayed beyond the normal period of 5 days without any exceptional circumstances obtaining in the matter, (ii) the alleged exceptional circumstances purporting to justify the delay and the fact that the reasons had been recorded in writing were not communicated to the detenu which has prevented him from making effective representation against his continued detention and (iii) Urdu translations of quite a few documents and statements incorporated in the grounds and relied upon by the detaining authority have not been supplied to him at all. As regards the first two aspects counsel relied upon two decisions of the Patna High Court, namely, *Bishwa Mohan Kumar Sinha v. State of Bihar and Ors.*(1) and *Bishwanath Prasad Keshari v. State of Bihar & Ors.*(2) where the Patna High Court has taken the view that not merely should the exceptional circumstances exist justifying the delayed supply of the grounds of detention but these should be communicated to the detenu to enable him to make an effective representation. Counsel urged that because of the aforesaid failure the continued detention of the petitioner must be held to be illegal. We find considerable force in these submissions made by the counsel for the petitioner."

8) Next it is contended by the learned counsel for the petitioner that the detenu has also been disabled from making an effective representation by not supplying him the translated copies of the ground of detention which are in English language besides being in a hyper technical language which the detenu is not in a position to understand being illiterate.

9) The records, as produced by the learned counsel for the respondents, do not suggest that the translated copies of grounds of detention have been supplied to the detenu, therefore, infringement of right guaranteed under Article 22(5) of the Constitution. The service of the grounds of detention on the detenu is a very precious constitutional right and the object behind the same is to enable the detenu to file an effective representation. It will be an empty formality to supply the grounds of detention to the detenu unless he is in a position to understand the same. In my view I am fortified by the judgment rendered by the Hon'ble Apex Court in the case "*Chaju Ram Vs. The State of Jammu & Kashmir*" reported in AIR 1971 SC 263. Following portion from para 9 of the judgment shall be quite apposite to be quoted:

"..... The detenu is an illiterate person and it is absolutely necessary that when we are dealing with a detenu who cannot read or understand English language or any language at all that the grounds of detention should be explained to him as early as possible in the language he understands so that he can avail himself of the statutory right of making a representation. To hand over to him the document written in English and to obtain his thumb impression on it in token of

his having received the same does not comply with the requirements of the law which gives a very valuable right to the detenu to make a representation which right is frustrated by handing over to him the grounds of detention in an alien language. We are therefore compelled to hold in this case that the requirement of explaining the grounds to the detenu in his own language was not complied with."

10) Para 13 of the judgment in Ibrahim Ahmad Batti's case (supra) shall also be quite apposite to be reproduced herein:

"Lastly, Urdu translations of quite a few documents and statements referred to in the grounds of detention and relied upon by the detaining authority were admittedly not supplied to the detenu at all and the only explanation given by the counsel for the respondents at the hearing has been that most of these documents (Urdu translations whereof were not supplied) comprised statements of accounts which had figures in English with some English words written in capital letters and some documents were in Hindi and Gujarati and the record (statements of Rekha, her sister Indi and one Jayantilal Soni, all co-conspirators of the detenu, recorded during the investigation) clearly shows that the petitioner knows English figures, understands English words written in capital letters and can also converse or talk in Hindi and Gujarati and as such the non-supply of Urdu translations of these documents cannot be said to have caused any prejudice to the petitioner in the matter of making a representation against his detention. In our view, the explanation is hardly satisfactory and cannot condone the non-supply of Urdu translations of these documents. Admittedly, the petitioner is a Pakistani national and Urdu seems to be his mother tongue and a little knowledge of English figures, ability to read English words written in capital letters and a smattering knowledge of Hindi or Gujarati would not justify the denial of Urdu translations to him of the material documents and statements referred to as incriminating documents in the grounds and relied upon by the detaining authority in arriving at its subjective satisfaction. In fact, the claim made before us on behalf of the detenu that he only knows Urdu cannot be brushed aside as false especially in view of the fact that the same was accepted on the earlier occasion by the Advisory Board who had actually opined that failure to supply Urdu translations of grounds of detention and documents had vitiated the earlier order of detention and following this opinion respondent No. 1 had revoked the said order. Moreover, with the assistance of counsel on either side we have ourselves gone through many of these documents and statements and it is not possible to say that most of them are merely statements of account containing figures in English with English words written in capital letters. These documents recovered from three flats in three different societies, include, for instance, documents like bills and vouchers showing purchases made from some shops, while a large number of documents are in Hindi and Gujarati and relate to transactions in contraband articles like gold, silver, watches, etc., and comprise accounts of such transactions, the figures as well as recitals pertaining to which are entirely in Gujarati. All these, in our view, are material documents which

have obviously influenced the mind of the detaining authority in arriving at its subjective satisfaction and these are all in a script or language not understood by detenu, and, therefore, the non-supply of Urdu translations of these documents has clearly prejudiced the petitioner in the exercise of his right to make an effective representation against his detention and hence the safeguard contained in Article 22(5) is clearly violated."

11) It shall also be quite apposite to quote following portions from paras 3 and 5 of the judgment rendered by the Hon'ble Apex Court in the case captioned "Smt. Raziya Umar Bakshi Vs. Union of India" (AIR 1980 SC 1751):

"3.....The service of the grounds of detention on the detenu is a very precious constitutional right and where the grounds are couched in a language which is not known to the detenu, unless the contents of the grounds are fully explained and translated to the detenu, it will tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention ex-facie."

5.....in case where the detaining authority is satisfied that the grounds are couched in a language which is not known to the detenu, it must see to it that the grounds are explained to the detenu, a translated script is given to him and the grounds bear some sort of a certificate to show that the grounds have been explained to the detenu in the language he understands."

12) In "Powanammal Vs. State of T. N. and another" reported in (1999) 2 SCC 413, Hon'ble Supreme Court has observed as under:

".....The amplitude of the safeguard embodied in Article 22(5) extends not merely to oral explanation of the grounds of detention and the material in support thereof in the language understood by the detenu but also to supplying their translation in script or language which is understandable to the detenu. Failure to do so would amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making a representation against the order."

13) Preventive laws have the effect of depriving a person of his liberty which is precious, however, deprivation thereof at times becomes indispensable. For justifying such deprivation, the safeguards as are provided by law are also required to be respected. A person who dares to threaten maintenance of public order has to be dealt with iron hand but the Constitutional safeguards as are available are also to be followed. The Article 21 of the constitution of India has protected the life and personal liberty of people by providing that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The word established is used in Article 21 in order to denote and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the precise extent of such deprivation. If a person is to be deprived of his life or liberty, the authority concerned is under a constitutional mandate to follow the procedure established by law, the procedure prescribed for depriving a

person of his life or liberty has to be reasonable, fair and just. The protection contained in the article does not extend to only citizens but to all persons.

14) The law providing for preventive detention has to be strictly construed keeping in view the delicate balance between social security and citizen freedom. Thus if the preventive detention has not been ordered in strict conformity with law authorizing detention, the detainee is entitled to be released.

15) Preventive detention, in effect, is an invasion to personal liberty which infringe the right to liberty guaranteed by Article 21 of the Constitution of India. Preventive detention, in view of exception to Article 21, has to be reasonable, shall not be on the ipse dixit of the detaining authority. Preventive detention wherever permissible shall adhere to the procedural safeguards. Infraction of safeguards renders the order of detention unsustainable. The Hon'ble Supreme Court in catena of judgments has made it clear as to what is the value of the 'constitutional safeguard' and as to what is the value of right to liberty guaranteed under Article 21 of the Constitution of India.

16) Keeping in view the hallmark of the cherished right to liberty in keeping with the object of Article 21 of the Constitution of India, while exercising power to order preventive detention, various procedural and other safeguards available have to be respected and adhered to. It is the bounden duty of the detaining authority to derive subjective satisfaction before passing the order of detention. If record suggests that there is non-application of mind, that ipso facto means that subjective satisfaction is missing.

17) The cumulative effect of the aforesaid discussion leads to the only conclusion i.e. the order of detention impugned bearing No. 61/DMP/PSA/2018 dated 22.10.2018, passed by respondent No.2-District Magistrate, Pulwama, is not valid, as such, quashed. The detainee is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

18) The record, as produced, be returned to the learned counsel for the respondents.