
(1996) 10 J&K CK 0010
In the Jammu And Kashmir High Court
Case No : H.C. No. 311 of 1995

Mohammad Ramzan Dar

APPELLANT

Vs

State of J. and K.

RESPONDENT

Date of Decision : 04-10-1996

Acts Referred:

Constitution of India, 1950 — Article 21, 22
Criminal Procedure Code, 1973 (CrPC) — Section 3, 4, 54
Jammu and Kashmir Public Safety Act, 1978 — Section 10, 10A, 13, 13(1), 15
Ranbir Penal Code, 1989 — Section 120B, 307

Citation : (1997) CriLJ 649

Hon'ble Judges : M.Y. Kawoosa, J

Bench : Single Bench

Advocate : G.N. Shaheen, for the Appellant; R.A. Khan, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Kawoosa, J.—Through the medium of this Habeas Corpus petition, the detention of the detainee, ordered by District Magistrate,

Pulwama under the provisions of Jammu & Kashmir Public Safety Act, 1978, has been challenged. Notice in this petition was issued to the

respondents on 25-7-1995. Since then, despite opportunities granted, respondents have failed to file the counter-affidavit. The petition came up

for final hearing in pursuance of order dated 8-2-1996 on 20-8-1996.

2.1 have heard learned counsel for both sides and perused the material on record.

3. During the course of arguments, the learned counsel for the petitioner has invited my attention to the averments made in paras 2 and 3 of the

petition wherein the petitioner has averred that the detainee was arrested on

4-3-1994 by B.S.F. personnel at Marbal, Pulwama, and that, while in custody, he was served with an undated memo styled as grounds of detention, purportedly passed in exercise of the powers conferred under the provisions of J. & K. Public Safety Act. The said grounds of detention are appended with the petition. Referring to the grounds of detention on record, learned counsel for the petitioner argued that the detaining authority in this case has passed a composite order comprising the grounds of detention as well as the order of detention. Developing his argument, the learned counsel submitted that, as a matter of fact, the detaining authority has dispensed with the requirement of Section 8 of the J. & K. Public Safety Act which envisages passing of a separate order of detention on the grounds to be formulated separately. His second argument is that an order of detention can be passed only when the detaining authority is satisfied that the activities of the person sought to be detained are . prejudicial either to the maintenance of public order or to the security of the State. In this case, the learned counsel argued that, the detaining authority has not disclosed anywhere in the grounds that he was satisfied that the activities of the detainee were prejudicial either to the maintenance of public order or to the security of the State.

4. To appreciate the arguments advanced at bar by learned counsel for the petitioner, it would be appropriate to quote the grounds of detention

here-under:-

Office of the District Magistrate, Pulwama.

Sub:- Grounds of detention in respect of Mohmad Ramzan Dar S/o Mohmad Shaban Dar R/o. Marbal Tehsil and District Pulwama.

Your age is of about 40 years and are by profession a saw mill operator. You are affiliated with A1. Jihad, a banned militant organization having

its Hqs at PAK/POK. The organization has close links with ISI of Pakistan. It has sent many youths to Pakistan in order to get arms and

ammunition from that place. The Org. has involved many youths within its ranks on the pretext that the party had to launch a Jihad against Indian

occupation. The organization has started an armed rebellion and wants to secede the J. & K. State from Indian Union and annex it with Pakistan.

The Org. wants to overthrow the Government established by law. You are a PAK/POK trained militant of the said organisation.

Before joining militaricy you was supporter of Congress. In year 1991 'you was kidnapped by HM Group and was released after some time.

Again after two months HB group raided to your house and demanded 02 lac rupees. You was unable to pay a huge amount to the militants. You

crossed over the border in the month of Sep. 1992 via Kupwara. You then obtained training in arms and ammunition and returned to Valley in the

month of Nov. 1992. You handed over the weapon to A1. Jihad group. In the , month of Feb. 1993 on D. D. Khan District Commander issued

one shot gun to you for taking part in militant activities.

Finally you were apprehended by 182/Bn BSF on 4-3-1994 from your native Village and recovered prohibited arms and ammunition such as shot

gun -01, Mag - 01; Rds- 05, Receipt book of Al. Jihad-02, Letter Pad- 01, Dairy A1 'Jihad- 02 from you. This shows you were taking part in

militant activities. You are presently lodged in JIC arrested on 26-11-1994 u/s 54 Cr.P.C. incase FIR No. 108/94 u/s 3/4 Exp. Sub. Act. 120-B

307 RPC P/S Pulwama, but there is every likelihood that once you will be released you will continue illegal activities.

Therefore, you .Mohmad Ramzan' Dar S/o Mohmad Shaban Dar R/o Marbal. Pulwama are hereby detained under the provisions of J. & K.

PSA. 1978.

5. Though this petition can be disposed of on the sole ground that the detaining authority has not disclosed his satisfaction, as is required of him u/s

8 of the J. & K. Public Safety Act and, which, as a matter of fact, is the basis of an order under which a citizen can be detained, yet the first part of

the argument advanced by learned counsel for the petitioner, relating to the composite nature of the order (comprising grounds of detention as well

as the order of detention) gives rise to, the following important question of law:

Whether an authority, exercising powers under the J. & K. PSA, 1978 for purposes of detaining a citizen, can dispense with the requirement of

issuance of a formal order of detention, as required u/s 8 of J. & K. Public Safety Act and, instead thereof, incorporate the order of detention in

the grounds of detention and serve such composite order to the detenu.

6. At the out-set, it may be mentioned here that this Court does not have the benefit of counter-affidavit or the original detention records since the

respondents have chosen to do none of these. However, at the hearing, the

learned Government Advocate, though handicapped for want of counter-affidavit and the original detention records, argued that the petitioner has not taken such a plea in the petition that he was not served with copy of detention order, or that the separate order of detention did not exist at all. He submitted that such a point has been taken by the learned counsel for the petitioner for the first time at the hearing.

7. I have considered this argument of the learned Government Advocate. The petitioner in Para No. 3 of the petition has clearly stated that, ""while in custody he (the detainee) has been served with and/ or the petitioner has received information about an undated memo styled as grounds of detention purportedly passed in exercise of the powers conferred under the provisions, of the J. & K. Safety Act."" Further in Para No. (III) under the caption 'Grounds of challenge' the petitioner has stated as under:-

That from the perusal of the detention, grounds it is abundantly clear that the detainee has been detained for a period of, two years without strict compliance of the procedure established under law and/or in utter disregard to the rights guaranteed to the detainee under Article 22 of the Constitution.

In Para (VIII), the petitioner has averred as under:-

That the detainee has neither been served with the order of detention, nor the material referred to in the grounds of detention.. ...

In Para No. (IX) the petitioner has averred as under:-

That the detention of the detainee is not only derogatory to the provisions of J. & K. Public Safety Act, but his detention as well as the empowering

Statute is ultra vires to the Constitution as applicable to the State. The petitioner craves leave to make detained submissions on this account at the time of hearing of the case by the Hon'ble Court.

In the light of the aforesaid specific pleas taken in the petition by the petitioner, it cannot lie in the mouth of the learned Government Advocate that

the petitioner or his counsel has taken this plea for the first time at the hearing of the case. The petitioner has taken all the necessary pleas relating

to the point raised in the petition. In that view of the matter, the objection raised by the learned Government Advocate during the course of

arguments is not sustainable. The argument is, accordingly, rejected as

misconceived.

8. Coming to the main point at issue, raised during the course of arguments, this Court is first required to see as to whether a detaining authority is

bound to issue a separate order of detention. In order to find answer to this question, one has not to travel too far, for, a bare perusal of Clause (5)

of Article 22 of the Constitution of India and the provisions of J. & K. Public Safety Act, 1978 would unambiguously make it clear that there has

to be a separate order of detention and that requirement is mandatory in character.

9. Clause 5 of Article 22 of the Constitution of India reads as under:-

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.

As can be seen, the aforesaid constitutional provision opens with the words, ""when any person is detained in pursuance of an order...."" It clearly

means that when any person is sought to be detained under any law providing for preventive detention, the detaining authority has to issue an order

directing detention of such person. The person can be arrested and detained only when there is an order of detention. The service and

communication of grounds of detention on such person is an act subsequent to his arrest in pursuance of the detention order. The constitutional

provision thus clearly mandates that the detaining authority has to pass an order of detention and that such- order has to precede the arrest of the

person concerned.

9A. Clause 5 of Article 22 of the Constitution of India refers to ""any law providing for preventive detention"" and such law in the instant case is the

J. & K. Public Safety Act, 1978. A perusal of the various provisions of the J. & K. Public Safety Act also clearly shows that there has to be a

separate order of detention. Constitution is the fountain-head of all the laws and so is Clause 5 of Article 22 of the Constitution the fountain-head

of all the laws providing for preventive detention. Therefore, any law providing for preventive detention and the actions taken thereunder have to

be in consonance and in conformity with the constitutional provision referred to

above.

10. Chapter IV of the J. & K. Public Safety Act deals with power to make orders detaining certain persons. Section 8 under the aforesaid

Chapter of the Act empowers the Government, Divisional Commissioners and District Magistrates; to make an order directing that such person be

detained. The relevant extract of Section 8 of the Act is quoted hereunder:-

8. Detention of certain persons:

1. The Government may:

(a) If satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to:-

(1) the security of the State or the maintenance of the Public order, or

(a-1) If satisfied with respect to any person that with a view to preventing him from:-

i...to v...

(b) If satisfied with respect to any person who is___

i...

ii...

it is necessary so to do, make an order directing that such person be detained.

(2) Any of the following Officers, namely:

(3) (i) Divisional Commissioner,

(ii) District Magistrates,

may, if satisfied as provided in sub-clauses (i) and (ii) of Clause (a) or Clause (a-1) of Sub-section (1), exercise the powers conferred by the said

subsection.

The aforesaid provisions of law make it sufficiently clear that the detaining authority has to make an order in respect of a person sought to be

detained.

11. Section 9 of the Act provides for execution of the detention orders made u/s 8 of the Act and reads as under:-

9. Execution of detention order. A detention order may be executed at any place in the manner provided for the execution of warrants of arrest

under the Code.

Section 10 of the Act provides for power to regulate the place and conditions of detention and reads as under:-

Any person in respect of whom a detention order has been made u/s 8 shall be liable.

Again Section 10-A of the Act relates to the grounds of detention severable and opens with the words:-

Where a person has been detained in pursuance of order of detention u/s 8....

Similar reference to "an order of detention" is also found in various other provisions of the Act, including Sections 15, 16, 17, 18 and 19 thereof.

12. A bare reading of the aforesaid provisions of the J. & K. Public Safety Act, 1978 makes it clear that the same envisage that the detaining

authority has to issue an order of detention and that such an order has to proceed the arrest of the person concerned. The question whether such

an order can be combined with the grounds of detention is answered by Section 13 of the Act itself. Section 13 reads as under:-'

13. Grounds of order of detention to be disclosed to persons affected by the order:

(1) When a person is detained in pursuance of a detention order. the authority making the order shall, as soon as may be but ordinarily not later

than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention

communicate to him the grounds on which the order has been made; and shall afford him the earliest opportunity of making a representation against

the order to the Government. (2) Nothing in Sub-section (1) shall require the authority to disclose facts which it considers to be against the public

interest to disclose.

Section 13 of the Act opens with the words, "when a person is detained in pursuance of a detention order." meaning thereby that when an order is

made u/s 8 of the Act and the person concerned is arrested and detained in pursuance of that order, the detaining authority has to disclose or

communicate to such person the grounds of such detention. Communication of grounds of detention is an act subsequent to the arrest and

detention of the person concerned. There is no provision in the Public Safety Act wherefrom it could be gathered, even impliedly, that the detaining

authority can pass a composite order containing the grounds as well as the order

of detention. It is the cardinal principle of law that when a law provides for an act to be done in a particular manner, that act has to be done in that manner alone.

13. Article 21 of the Constitution of India guarantees the right to personal liberty. The only exception being that such deprivation of personal liberty can be ordered only according to the procedure established by law. Article 21 of the Constitution reads as under:-

Protection of life and personal liberty:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

The aforesaid provision of the Constitution guarantees the most essential of rights. Though deprivation of personal liberty is permitted by the

Constitution, but that has to be in Accordance with the "procedure established by law." The word procedure includes both act and the manner of

proceeding to take away a man's personal liberty. The manner in which such an action can be taken involves certain steps to be taken in the order,

and sequence prescribed by the law providing for preventive detention. The right to personal liberty, being the most precious rights the authority

exercising powers under such laws is, required to exercise the powers with utmost caution and, while doing, so, every step involved to achieve the

object, has to be taken in the prescribed sequence. Before a person is deprived of his personal liberty, the act of the competent authority has to be

in the manner prescribed by law. Every bit of the prescribed requirements has to be complied with true to the letter of the word. Where that is not

done, the act would be violative of the procedure established by law and therefore, unconstitutional.

14. The various provisions of the J. & K. Public Safety Act referred to herainabove, prescribe a definite mechanism, method and manner in which

a person can be detained. The import of the law is that all the steps prescribed by the Act are to be taken in accordance with the sequence thereof

contained in the Act itself. This is so because such detentions are only preventive in nature and not penal. The service of the grounds of detention

being an act subsequent to the other steps to be taken by the detaining authority i.e. passing of the detention order, execution thereof on the person

concerned which cannotes his arrest and detention, it would be preposterous to

say that the detaining authority can pass a composite order comprising the grounds of detention as well as the order of detention.

15. For the foregoing reasons, it is held that passing of a separate order of detention by the detaining authority u/s 8 of the J. & K. Public Safety

Act is mandatory and the law does not empower or authorise passing of a composite order comprising grounds of detention as well as the order of

detention, The detaining authority cannot dispense with the requirement of issuing a separate order of detention. Where the detaining authority fails

to issue a separate order of detention, and, instead incorporates, it in the grounds of detention, the presumption would be that there is no detention

order. In that event also the arrest and subsequent detention of a person would be rendered illegal. This is also so because a detained person has

been guaranteed a right to make a representation against the order of detention. If there is no order of detention, the consequences would be that

such detained person is deprived of an opportunity to make such representation in exercise of his guaranteed right.

16. In the instant case since the detaining authority has not issued any detention order and, in any case, since the respondents have failed to show

that there existed any detention order having been issued by the detaining authority in conformity with the provisions of law, the detention of the

detenue is rendered unconstitutional and illegal. The net result is that this petition deserves to be allowed.

17. Accordingly, the petition is allowed. The impugned detention order is quashed. Respondents are directed to set the detenue at liberty forthwith,

if he is not involved in any substantive offence.