
(2003) 03 J&K CK 0013
In the Jammu And Kashmir High Court
Case No : HC Petition No. 112 of 2001

Mohammad Yousuf Sofi

APPELLANT

Vs

State of Jammu & Kashmir

RESPONDENT

Date of Decision : 19-03-2003

Acts Referred:

Jammu and Kashmir Public Safety Act, 1978 — Section 13

Citation : (2003) CriLJ 4141 : (2003) 2 JKJ 123

Hon'ble Judges : Y.P. Nargotra, J; Syed Bashir-Ud-Din, J

Bench : Division Bench

Advocate : R.Q. Gadda, GA, for the Appellant; None, for the Respondent

Judgement

Y.P. Nargotra, J.—Whether the proposition of law propounded in the judgment rendered in the case Showkat Ahmad Bakhshi v State and

Ors. reported in 2000 SLJ 700 lays down the correct position of law; is the question referred to us for determination by the Ld. Single bench of this court.

2. In Showkat Ahmad Bakhshi's case, Hon'ble Justice G.D Sharma as his lordship then was, has expressed the following view:

9. The arguments advanced at the bar have been considered. At the outset the breach of procedural safeguard enshrined in Section 13 of the Act

is detected. The section mandates that 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, but not later than ten

days from the date of detention communicated to him 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. On the date when the order was passed on 17.01.2000, the detainee admittedly was

in the custody of the respondents and the order was served on 24.01.2000. There is unexplained delay of six days for executing the impugned

order. This basic infirmity is a sufficient ground to vitiate the impugned order.

3. His lordship Sharma 'J' seems to be of the opinion that unexplained delay in execution of a detention order on a person who is already in

custody of the police tantamounts to causing delay in communication of the grounds of detention, whereafter only the detainee can make effective

representation to the government against his detention when the mandate of the Section 13 is that an earliest opportunity for making the

representation must be afforded to the detainee.

4. In order to understand the scope of Section 13 correctly it will be beneficial to take note of the section, so it is being reproduced hereunder:

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 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.

5. From the opening words ""when a person is detained in pursuance of a detention order"" used in the section it is clearly indicated that it envisages

the stage after a detention order has been executed upon a person and he is detained, it is only then the duty of communicating the grounds of

detention to the detainee starts. The detaining authority under this section is bound to communicate, 'as soon as may be' but not later than five days

ordinarily and in exceptional circumstances and for reasons to be recorded in writing not later than ten days, the grounds of detention to such

detainee and to afford him earliest opportunity of making a representation against the order to the Government. It can also not be disputed that

without the availability of the grounds on which a detainee has been detained such detainee cannot make an effective representation.

6. Section 13 of the Act thus enacts procedural safeguards for a detainee and

mandatory obligation for the detaining authority for ensuring that liberty and freedom of a person guaranteed by the Constitution is not curtailed arbitrarily except for the reasons and on the grounds specified by law. From the plain reading of the section it also clearly emerges out that such safe-guards/rights of detainee and obligations of detaining authority come into play after the execution of the detention.

7. Whether unexplained delay in execution of a detention order issued u/s 8 upon a person who is already in custody can lead to the infraction of the rights of the detainee granted by Section 13. In Showkat Ahmad Bakhshi's case (supra) his lordship Sharma 'J' has expressed the view that such delay causes breach of the procedural safeguards enshrined in Section 13.

8. The view of his lordship Sharma 'J' is in consonance with the view expressed by Hon'ble Justice Khan (as his lordship then was) in the case

Balkar Singh v. State of J&K and Ors. reported in 1992 SLJ 116 His Lordship Justice Khan has observed:

8. Situations are conceivable where detaining authority may have reasons for not executing an order with reasons for not executing an order with

reasonable despatch. It may be difficult and even impossible in certain cases e.g. where person to be detained is absconding. In such cases no

grave prejudice is liable to be caused. But where a person is already in police custody and an order of detention has been passed against him,

delay in executing order of detention unsupported by any explanation, as natural corollary, entails consequences of delaying communication of

grounds of detention in turn: Therefore, any such delay is bound to defeat and even subvert the very safeguards contained in Section 13. Therefore,

I have no reluctance in holding that when delay caused in execution of an order of detention leads to delaying of communication of grounds of

detention and disable a detainee from making representation at earliest opportunity, there is infraction of mandatory provisions of Section 13 of the

Act, rendering order of detention liable to be quashed. I derive support for this from Hem Lall Bhandari Vs. State of Sikkim and Others, .

9. Balkar Singh's Judgment had not been cited before Justice Sharma by the parties. The judgment rendered in Balkar Singh's case (supra) came

up for consideration before a Division Bench of this court in LPA No. 17/99. Hon'ble Justice Kawoosa speaking for the bench held as follows:

10. "The ratio of the above judgment in Balkar Singh's case seems to be that the time limit for communication of grounds in respect of a person

already in custody starts from the date of the order. Let us see what does Section 13 of the Act prescribe in this behalf. Section 13 is extracted

below:-

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 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.

11. It is clear from a bare reading of this provision of the Act that grounds of detention have to be communicated to the person when he is detained

in pursuance of a detention order. This provision of the Act does not say that the grounds have to be communicated (within the time prescribed)

from the date of the order, but the words used are "When a person is detained," meaning thereby when the order of detention is executed upon the

detenue and he is actually taken into preventive custody. Communication of grounds of detention is an event subsequent to, or simultaneous with,

the execution of detention order. Section 13 of the Act does not envisage an eventuality of communication of grounds from the date of making of

the order.

12. We have also gone through the judgments reported in Hem Lall Bhandari Vs. State of Sikkim and Others, relied upon by the Ld. Judge in

Balkar Singh's case. In Hem Lall Bhandari Vs. State of Sikkim and Others, there was a delay of about 19 days caused in communication of the

grounds of detention. The order of detention issued by the Sikkim State was served on the detenue at Bombay on 25.9.1986 and the grounds of

detention were served on him on 14-10-1986. In the case reported in 1986 KLJ 85 (supra) a Single bench of this court has made a passing

reference to the delayed execution of the order of detention while the detenue was in custody. There was an assertion made on the part of

petitioners that the orders of detention were a camouflage and appeared to be antedated. The court in that case has not separately dealt with the issue of delayed execution of the order of detention, while the detainees were in custody of the police. No other law was cited or brought to our notice on the point.

13. Therefore Ld. Division Bench of this Court did not concur with the view expressed in Balkar Singh's case and therefore view expressed on the point was no longer a good law. Unfortunately this Division Bench Judgment of this court too was not brought into the notice of the Hon'ble Justice

Sharma during the course of hearing and his lordship has expressed his view without taking into consideration the judgment of the Division Bench.

The view expressed in Showkat Ahmad Bakhshi's case being contrary to the ratio of the Division bench judgment cannot be regarded as correct preposition of law.

14. Another ancillary question arises for consideration. That is, if unexplained delay is caused in execution of a detention order upon a person who

is already in the custody, whether such delay affects the validity of the detention order even when it does not contravene the mandate of Section

13.

15. Ordinarily if a person commits violation of any penal statute he is tried under the ordinary criminal law and if found guilty he is then given

sentence prescribed by the law but Public Safety Act makes a departure from the ordinary criminal law being preventive in nature. Section 8 of the

Act provides for issuance of detention order for detaining a person who may be engaged or likely to engage in the activities enumerated in the

section with a view to prevent him from carrying out such activities. Therefore the purpose and object of the detention appears to us to be that

such person is promptly and at the earliest is de-activated for the prescribed period. By such detention two objects can be achieved; one, he is

immediately stopped from carrying out the activities which are prejudicial to the security of State and public order; two, the detainee is kept away

under supervision and gaze of the authorities to enable him to introspect and opt for becoming a law abiding citizen. But where such person

happens to be already in the custody of the police, it can be argued that in the case of such person there can be no question of preventing him from

engaging in prejudicial activities.

16. In Dharmendra Suganchand Chelawat and another Vs. Union of India and others, , their lordships of the Supreme Court have held:

An order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must

show that (i) the detaining authority was aware of the fact that the detainee is already in detention; and (ii) there were compelling reasons justifying

such detention despite the fact that the detainee is already in detention. The expression ""compelling reasons"" in the context of making an order for

detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be

satisfied that (a) the detainee is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent

activities of the detainee, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in

order to prevent him from engaging in such activities.

17. Therefore in our view detention order u/s 8 of the Act cannot be issued against a person unless it is shown;

(a) That the detaining authority was aware of the fact that detainee was already in detention and (b) that there are compelling reasons justifying such

detention because the person to be detained already being in custody cannot be expected to engage himself in the prejudicial activities and

compelling reasons would imply that there must be cogent material on the basis of which the detaining authority is satisfied (i) that detainee is likely

to be released in the near future and (ii) that taking into account the nature of the antecedent activities of the detainee it was likely that after his

release from custody he would indulge in the prejudicial activities and that it was necessary to detain him in order to prevent him from engaging in

such activities.

18. Once these tests are satisfied a detention order u/s 8 can be issued against a person who is in custody. Can unexplained delay in execution of

the detention order defeat the object of the detention even if person to be detained under Section 8 is still in custody at the time of execution of the

detention order? Section 8 or any other provision of the Act does not prescribe any limit within which the detention order is to be served.

19. The Ld. Division Bench of this court in Ghulam Rasool's case (supra) has held: In the present case the detenue was available with the executing agency, being lodged in judicial custody in connection with a criminal case. No explanation has been tendered for the delayed execution of the order of detention. Therefore, there is a reasonable ground to think that the delay in execution of the detention warrant was occasioned by the respondents deliberately to gain time and to ensure that the detenue is kept in custody for a longer period of time. This object, as in the case at hand, can be achieved by respondents by a simple way. The detenue is first kept in custody in connection with criminal case for as long a period as can be, while the execution of the warrant of detention is kept pending. As and when the executing agency apprehends that the accused detenue is likely to be bailed out, or a considerable long period has elapsed since the date of issue of the detention order, they execute the detention warrants at their whim and will. Thus their object of prolonging the custody/detention of a citizen is achieved. This is simply mala fide on the part of the concerned authorities. Situations are conceivable, as rightly observed by brother Khan J, in the judgment (supra), where detaining authority may have reasons for not executing an order with reasonable despatch. It may be difficult and even impossible in certain cases, e.g. where the person to be detained is absconding or concealing himself. In such cases delayed execution may be justified. But where a detenue is available with the respondents, any delay, more-so unexplained in execution of the detention warrant tantamounts to manipulations on the part of the detaining authority as well as the executing agencies. Where there is an unexplained, or even unsatisfactory, delay between the date of its execution such a delay would throw a serious and considerable doubt on the genuineness of the subjective satisfaction of the detaining authority, leading to a legitimate inference that the detaining authority was not really and genuinely satisfied about the necessity of detaining the detenue with a view to preventing him from acting in a prejudicial manner. That being so, the detention of the detenue in the instant case is rendered illegal.

20. Thus as per the view of Ld. Division Bench any delay more-so unexplained in execution of the detention warrant tantamounts to manipulation on the part of the detaining authority as well as the executing agencies, such delay

throws doubt on the genuineness of the satisfaction of the detaining authority and therefore detention is rendered illegal. We concur with the view of Division Bench. That in the facts and circumstances of a case, unreasonable delay may vitiate detention. We may add here another reason for holding that unexplained delay affects the legality of the detention. If undue delay of such a nature is allowed to occur in the execution of the detention order from which it can be assumed that the nexus and proximity between detention and the object of the detention has broken, such delay will render the detention illegal. In K.P.M. Basheer Vs. State of Karnataka and another, , the Apex Court has observed:

11. Under these circumstances we are of the view that the order of detention cannot be sustained since the 'live and proximate link' between the grounds of detention and the purpose of detention is snapped on account of the undue and unreasonable delay in securing the appellant/detenué and detaining him. As we have now come to the conclusion that the order of detention is liable to be set aside on this ground alone. We are not dealing with other contentions raised in the Memorandum of appeal as well as in the writ petition.

21. For the reasons stated above we answer the reference by saying:

(a) The judgment rendered in the case Showkat Ahmad Bakhshi v. State and Ors. reported in 2000 SLJ 700 does not lay down the correct position of law.

(b) Inordinate unexplained delay in execution of the detention order upon a person in custody does not contravene the safeguards enshrined in

Section 13 of Public Safety Act. However such delay vitiates the detention order and detention under the Public Safety Act.

The case shall now be listed before the Ld. Single Bench for disposal under law.