
(2003) 04 J&K CK 0027
In the Jammu And Kashmir High Court
Case No : HCP No. 73 of 2002

Mohd. Younis Khan

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 10-04-2003

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Jammu and Kashmir Public Safety Act, 1978 — Section 13, 8

Citation : (2003) 2 JKJ 580

Hon'ble Judges : Y.P. Nargotra, J

Bench : Single Bench

Advocate : S.T. Hussain, for the Appellant; T.H. Khawaja, for the Respondent

Judgement

Y.P. Nargotra, J.—The detaining authority passed the following order under No. DMS/PSA/69 dated 6.2.2002.

Whereas I, Abdul Hamid , IAS District Magistrate Srinagar am satisfied on the basis of records received from SSP Srinagar that with a view to

prevent Sh. Mohd. Younis Khan S/o Shri Gh. Qadir Khan R/o Tarbal Nawa Kadal Srinagar, from acting in any manner prejudicial for the

maintenance of security of the state it is necessary to do so.

Now, therefore, in exercise of the powers conferred by Section 8 of the J&K Public Safety Act, 1978, I, District Magistrate Srinagar hereby

direct that the said Sh. Mohd. Younis Khan S/o Sh. Gh. Qadal Khan R/o of Tarbal Nawa Kadal Srinagar be detained and lodged in Kot Bhalwal

Jail Jammu.

2. The detenu was already in the custody of the police for having been arrested on 12th of November 2001 in connection with FIR 209/2001 u/s

7/25 Indian Arms Act registered in Police Station Safa Kadal Srinagar. Pursuant

to the detention order the detenu was taken into preventive custody on 15th Feb. 2002. The detention order has been challenged in this Habeas Corpus petition on various grounds. LC for the petitioner has however restricted the grounds of challenge which are being dealt with hereunder;

3. Firstly LC for the petitioner has argued that detenu was already in custody and had not applied for bail, therefore, there was no likelihood of his being released on bail and as such the detention order is illegal. In support of his contention he has relied upon the case reported in (2001) 1 SCC

341 In this case the Hon'ble Supreme Court has held as follows:

4. In Augustin decision this court also placed strong reliance on an earlier but of cited decision of this Court in Binod Singh v. District Magistrate

Dhanbad wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of

detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that

the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be ipso dixit of the

officer passing the order concerned in the matter under reference ought to be noticed and the same reads as below:

Even though prosecution proceedings under the Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against Shri Amrital. I

am satisfied that there compelling necessity in view of the likelihood of his moving an application for bail, and in the event of his being granted bail,

the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in illicit traffic in narcotic

drugs as is evident from the trend of his activities to detain him under the prevention of illicit Traffic in Narcotic Drugs and Psychotropic Substances

Act, 1988.

5. It is this reasoning which the Ld. Advocate contended that the High Court should have held to be completely erroneous in the matter of being on

the basis of an order of detention.

6. The requirement as noticed above in Binod Singh case that there is ""likelihood of the petitioners being released on bail"" however is not available

in the reasoning as provided by the officer concerned. The reasoning available is

the "likelihood" of this moving and application for bail which is different from likelihood to be released on bail'. The reasoning in our view, is not sufficient compliance with the requirements as laid down.

4. On the basis of the aforesaid judgment Ld. Counsel has argued that in the absence of bail application the detaining authority could not have validly drawn the satisfaction that there was any likelihood of release of the detenu in the near future. On the other hand. Ld. Counsel for the State has argued simply because the detenu was already in the custody of the police when the detention order was passed. The detention order is not rendered invalid because it could be validly passed when the detaining authority was satisfied that detenu was likely to engage in the activities prejudicial to the security of the state after his release. In Dharmendra Suganchand Chelawat and another Vs. Union of India and others, it was held by their Lordships".

The decision referred to above lead to the conclusion that an order for detention can be validly passed against the person in custody and for that

purpose, it is necessary that the grounds of detention must show that (i) that the detaining authority was aware of the fact that the detenu is already

in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression

compelling reasons" in the context of making an order for detention of a person already in custody implied that there must be cogent material

before the detaining authority on the basis of which it must be satisfied that (a) the detenu is likely to be released from custody in the near future;

and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that, after his release from custody, he would indulge in

pre-judicial activities and it is necessary to detain him in order to prevent him from engaging in such activities. When the above principles are

applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of

detention indicate the detaining authority's awareness of the fact that; the detenu was in judicial custody at the time of making the order of detention

the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averments made in grounds

of detention that if the aforesaid Surya Prakash Sharma is released on bail he

may again indulge in serious offences causing threat to public order.

To put it differently, the satisfaction of the detaining authority that the detenu might to indulge in serious offences causing threat to public order,

solely on the basis of a Solitary murder cannot be said to be proper and justified.

5. From the above quoted authorities of the Apex Court the legal position which emerges is that a detaining authority can pass a detention order

against the person who is already in the custody of the police, where there is cogent material available to show that the detenu was likely to be

released in near future and if released he would engaged himself in the activities prejudicial to the security of the state. The cogent material in my

view can be the material showing the nature the allegations for which the detenu was detained in the custody of the police, if the nature of the

offence based upon such allegations is such that there is likelihood of the release of detenu on bail in near future, the detention order u/s 8 of the

Public Safety Act can be validly passed. In the instant case the detenu was in custody in connection with the offence u/s 7/25 Indian Arms Act and

this offence is not of such kind where bail can never be granted. The fact of the not making of the bail application in my view is of no consequence

therefore, there is no merit in the submission of the Ld. Counsel.

6. It has been next contended by Ld. Counsel for the petitioner that in the instant case the detaining authority has drawn the satisfaction that detenu

was likely to engage in the activities prejudicial to the security of the state in the event of his release in the near future on the basis of material

furnished by SSP Srinagar but alongwith the grounds of detention copies of such material were not supplied to the detenu and it has rendered his

detention illegal, being violative of Section 13 of the PSA and Article 22(5) of the Constitution of India. LC for the state has admitted that no such

material has been furnished to the detenu. However, according to him this failure does not render the detention illegal, because the grounds of

detention supplied to the detenu have referred to the same elaborately.

7. The question arises is there is any requirement of law providing for furnishing of such material to the detenu. In 2002 2 SLJ 574 it has been held:

4. Obviously the basic facts given in the grounds and subjective satisfaction of the detaining authority District Magistrate Srinagar is based and

derived from the report given by SPP Srinagar to the detaining authority. On the

detention file it is found that the dossier/feed back report of SSP

Srinagar is available. Admittedly neither this report nor other material referred in the grounds like FIR and recovery of arms and ammunition have

been supplied to detenu. The record also shows that the detenu has been furnished the order and the grounds alone but not the material the basis

of the basic facts and information subject of the detention order. In such circumstances compliance with the mandatory provisions of Article 22(5)

is not complied with, in absence of material/document/report referred in the grounds, the detenu cannot be said to be communicated detention

order with grounds. This being so the compliance with second limb of affording detenu meaningful and effective representation against the Govt. is

equally denied to him.

8. In the present case it is the admitted position that the detaining authority has drawn the satisfaction on the basis of the material supplied to him by

SSP Srinagar, that material undisputedly has not been supplied to the detenu, therefore, there is breach of safeguards enshrined in Section 13 of

the PSA and Article 22(5) of the Constitution of India, which renders the detention order and the detention of the detenu illegal.

9. For the aforesaid reasons without referring to the other grounds of challenge the detention order appears to be invalid and, as such, is quashed

and it is ordered that the detenu namely Mohd. Younis Khan S/o Ghulam Qadir Khan R/o Tarbal Nawakadal Srinagar be released forthwith, if not

required in any other case.