

(2000) 03 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : H.C. Petition No. 155 of 1999

Mohd. Yousuf Rather

APPELLANT

Vs

State of J. and K.

RESPONDENT

Date of Decision : 30-03-2000

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(3)
Constitution of India, 1950 — Article 22, 22(5)
Jammu and Kashmir Public Safety Act, 1978 — Section 13, 8

Citation : (2001) CriLJ 1569

Hon'ble Judges : Syed Bashir-Ud-Din, J

Bench : Single Bench

Advocate : N.A. Ronga, for the Appellant; A.M. Watali, for the Respondent

Final Decision : Allowed

Judgement

Syed Bashir-Ud-Din, J.—Mohammad Yousuf Rather S/o Ghulam Mohammad Rather R/o Sandipora Budgam, has been taken in

preventive detention u/s 8 of the Jammu and Kashmir Public Safety Act, Pursuant to District Magistrate Budgam's detention order PSA/DMB-

99/106 dated 19-7-1999. The order of detention prescribes eight months detention on ground of preventing the subject from indulging in activities

prejudicial to the security of the State. The detention as also the order is impugned on available grounds, as envisaged by Article 22 of the

Constitution and provisions of Jammu and Kashmir Public Safety Act. The two grounds pressed to assail the detention as also the order of

detaining authority thereto are:--

First, the counsel submits the grounds have not been communicated to the detainee as spelt in para 8 of the petition. The non supply of grounds

with material and documents referred in the grounds, is not specifically refuted in counter in so far as in para 8 of the counter, it is stated that the grounds of detention as supplied to the detainee alone were required to be supplied to him. Second, the counsel argues that the detainee has not been afforded any opportunity to make representation against the order of detention to the Government. The detainee's father has been informed/addressed a communication Annexure P2, which in terms informs him to make a representation to the Government against the detention order if he so desired. The detainee at no point of time was informed of his right to make a representation. No record whatsoever, has been made available to show that the petitioner was at any time afforded an opportunity to make representation against the order to the Government as contemplated by Section 13 of the Jammu and Kashmir Public Safety Act and as provided by clause (5) of Article 22 of the Constitution.

2. Mr. A.M. Watali, Government Advocate, in reply submits that as no documents or material is referred in the grounds of detention, therefore, no documents have been supplied to detainee. He has been supplied the copy of grounds. He is not prejudiced to make representation. Besides, the counsel contends that the detainee was informed of his right to make representation, through father and thereby he was given an opportunity to make representation.

3. The Apex Court in *Mangalbai Motiram Patel Vs. State of Maharashtra and Others*, while focusing on the procedural safeguards and constitutional imperatives in the matter of preventive detention, observed (Para 7):--

...This Court has forged certain procedural safeguards in the case of preventive detention of citizens. The constitutional imperatives indicated in Article 22(5) are twofold; (1) the detaining authority must as soon as may be, that is, as soon as practicable, after the detention, communicate to the detainee the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detainee the earliest opportunity of making a representation against the order of detention. The right to make a representation implies what it means 'the right of making an effective representation'. Where certain documents are relied upon in the grounds of detention, the grounds would be incomplete without such

documents. The detenu, therefore, has the right to be furnished with the grounds of detention alongwith the documents relied upon.

The connotation, scope and range of term "communication of grounds of detention", in order to constitute compliance with Article 22(5), as laid

down by the Supreme Court in Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, , is (Para 6):--

...what is meant is that the grounds of detention in their entirety must be furnished to the detenu. If there are any documents, statements or other

materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated in the grounds of

detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them. It would not

therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other

materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to Clause (6) of

Article 22 in order to constitute compliance with Clause (5) of Article 22 and Section 3, Sub-section (3) of the COFEPOSA Act....

4. In Naser Ahmad Sheikh v. Addl. Chief Secretary Home 1999 Cri LJ 241 a Division Bench of this Court, to which I was a party observed:--

...The grounds of detention give out that the alleged prejudicial activities came to be attributed on the basis of the reports made available to the

detaining authority by the concerned SSP. Nowhere is it pleaded, muchless shown, that the copy/copies of these reports of the police on which the

detaining authority based its satisfaction to pass the detention order were supplied/provided to the detenu so as to enable him to make an effective

representation against the order.

5. In Sophia Gulam Mohd. Bham Vs. State of Maharashtra and Others, , the Apex Court in the context of "communication of grounds" held (Para

14):--

...The right to be communicated the grounds of detention flow 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 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

detenue 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...

6. In Ghulam Mohammad Mir Vs. State of J. and K. and Another, , it is recorded (Para 8) :â?

...In the circumstances, the detenue cannot be said to have been provided an opportunity and the means to make meaningful and effective representation against the detention as guaranteed apart from provisions of Public Safety Act, by Article 22 of the Constitution. So long the material, on which the facts or conclusions constituting the grounds and basis of subjective satisfaction of the detaining authority, is withheld from or denied to the detenue, the detenue cannot be said to be communicated the grounds with material. If so, detenue is denied opportunity to make representation.

7. It is manifest that the basic facts and material having a bearing and influencing detaining authorities subjective satisfaction and conclusion must be communicated to the detenue. This is the basic requirement of first safeguard laid in Article 22(5) of the Constitution. Once this is done, the second obligation of the State to afford detenue an opportunity to make representation to the Govt. comes into play. Whether there is non-compliance with this mandatory provision of Article 22(5) is to be judged in the overall facts and circumstances of a case. The right to make representation means and conveys right to make an effective and meaningful representation. If certain documents and material is relied in the grounds of detention, the grounds would be incomplete without such documents/material. The detenue has a right to be furnished with grounds of detention alongwith the documents/material relied on. In absence of supply of such documents/material, detenue would be deemed deprived of the opportunity of making an effective representation. The detention record produced reveals that the subjective satisfaction and application of mind of District Magistrate Budgam, to pass the impugned detention order, is based on material/record, like dossier and other connecting documents produced before him by the Superintendent of Police (Ops) Budgam, under his No. SP-OPS/PSA/Bgm/99-1061-65 dated 11-6-1999. The detention order PSA/DMB/99/106 dated 19-7-1999 impugned in this petition is based on the

above material/documents. The detaining authority has recorded that after going through the dossier, record and other material produced before him vide above communication, he has drawn his satisfaction on application of mind that the detention of Mohd. Yousuf Rather is imperative in order to prevent him from acting in any manner prejudicial to the security of the State. Hence the order of detention of eight months u/s 8 of the J&K Public Safety Act 1978. The record shows that the order is accompanied by the grounds drawn from the said material, record, dossier, and other documents furnished to the detaining authority, District Magistrate, Budgam, by Superintendent of Police (OPs) Budgam. Even copy of dossier as also the copy of FIR and seizure memos regarding recovery of arms and ammunition, is available on record.

8. In view of these facts and circumstances, the following quoted para 8 of the counter is a complete lie :â?

8. That the material in the shape of grounds of detention stand duly supplied to the detainee. No other record/material was required to be supplied

to the detainee. No doubt the FIR has a passing reference in grounds of detention, but it has not been relied for detaining the detainee.

Obviously, the detainee has not been at all supplied the record/material/documents referred in the grounds and the basis of the detention in

question. For failure to supply the dossier, record, material and other communicated documents including FIR, recovery memos, statements etc.

the detainee cannot be said to have been communicated the basic facts and the material which had a bearing and in fact is the basis of detaining

authority's subjective satisfaction and conclusion of likelihood of detainee's indulgence in activities prejudicial to the security of the State. All that has

not been at all supplied to the detainee. The very mandate of requirement of Article 22(5) has been thereby violated. Even express provision of

Section 13 of the Jammu and Kashmir Public Safety Act, has been as well breached. The detainee cannot be said to have been provided an

effective and meaningful opportunity to make representation to the Government against the detention, a right guaranteed to the detainee by the

Constitutional provisions of 22(5) and Section 13 of the Jammu and Kashmir Public Safety Act. Not only so, the record reveals that the detainee

has not been afforded any legal and real opportunity to make representation

against the order as envisaged by Section 13 of the Act, in so far as
detenue's father and not detenue, who was being held in custody in FIR 109/99,
registered at Police Station Budgam, was addressed a
communication (Annexure P2) that, if he chose so, he could make a
representation to the Government against the detention order. Such type of
communication is not envisaged by law. The opportunity is to be provided to the
detenue, which is not the case here.

9. In result, for the aforesaid reasons, the detention as also the impugned order
of detention is held vitiated and illegal. In consequence whereof, the
detention order is quashed. Respondents/detaining authority/officer having
corpus of the detenue, is directed to release him from custody and set
him at liberty forthwith, provided the detenue is not required in any case or
substantive offence. Communicate this order to the concerned authority
having physical custody of the detenue Mohammad Yousuf Rather S/o Ghulam
Mohammad Rather R/o Sandipora Budgam, Give copy free of
cost to the petitioner.