
(1991) 08 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : File No. 386 of 1989

Mushtaq Ahmad Bhat	Vs	APPELLANT
State of J. and K. and Others		RESPONDENT

Date of Decision : 12-08-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 22, 22(5)
Jammu and Kashmir Public Safety Act, 1978 — Section 10A, 13(1), 8

Citation : (1992) CriLJ 3403

Hon'ble Judges : S.M. Rizvi, J

Bench : Single Bench

Advocate : J. Indrabi, for the Appellant; Nemo, for the Respondent

Judgement

S.M. Rizvi, J.—In this writ petition of Habeas Corpus the validity of detention of Mr. Bashir Ahmad Bhat s/o Late Abdul Rashid Bhat r/o

Mohalla Shaksaz, Anantnag under No. 367/ 51/89 dated 23-10-1989 passed by the District Magistrate Anantnag u/s 8 of the J. & K. Public

Safety Act, has been challenged inter alia on the following grounds:--

(a) That the impugned order emanates from non-application of mind on the part of respondent No. 2. The respondent No. 2 has failed to show his

awareness and apply his mind to the fact that the detenu had been detained by police station Anantnag on 12-10-1989 and continued to be in

detention of the police at the time of passing of impugned order viz. 23-10-1989. It was incumbent upon respondent No. 2 to show his awareness

regarding the fact that the detenu was in detention at the time of passing of the impugned order of detention of police and that the respondent No. 2

had to record his satisfaction to the fact that even though the detenu was in detention at the time of passing of order of detention, it was till

necessary to pass an order of detention under the provisions of the P.S.A. against the detenu. The impugned order has been passed by

respondent No. 2 in a mechanical manner, without application of his mind and is violative of the right guaranteed to the detenu under Articles 14,

21 and 22 of the Constitution of India and is as such liable to be quashed on this ground alone.

(b) That in the grounds of detention the respondent No. 2 has referred to various FIRs alleged to have been registered against the detenu, but the

copies of the said FIRs and even the desier furnished by the police to the respondent No. 2 on the basis of which he has proceeded to pass the

impugned order of detention, have not been furnished to the detenu along with the grounds of detention furnished to him. The detenu has been

seriously prejudiced in making an effective representation against this order of detention in the absence of documents and FIRs referred to in the

said grounds of detention by the detaining authority. Under Article 22(5) of the Constitution of India read with Section 13(1) of the J. & K.

P.S.A., the detenu has a right to make an earliest effective representation against the grounds of detention furnished to him. Since the documents

and material mentioned in the grounds of detention have not been furnished to the detenu along with the grounds of detention, the detenu has been

denied the right to make an earliest effective representation against the grounds of detention furnished to him along with the communication dated

23-10-1989. The right guaranteed to the detenu under Article 22(5) of the Constitution of India read with Section 13(1) P.S. Act has been

infringed by the respondents with impunity and the impugned order is, therefore, vitiated on this ground also.

That the detenu is entitled to the relief prayed for on this grounds also.

(c) That all the grounds furnished to the detenu are totally vague and lacking in essential material particulars which would enable the detenu to

make an effective representation against the grounds of detention furnished to him which right is guaranteed to the detenu under Article 22(5) of the

Constitution of India read with Section 13(1), P.S. Act. The impugned order of detention therefore is liable to be quashed, on this ground alone.

(d) That none of the grounds mentioned in the grounds of detention constitute any activity prejudicial to the maintenance of security of the state and

the same have no rational nexus with the object of detaining him and for passing an order u/s 8 of the P. S. Act. The grounds are totally irrelevant

and cannot be relied upon to pass an order of detention under the P. S. Act against the detenu. The impugned order is, therefore, totally illegal and

unconstitutional and liable to be quashed on this ground also.

This petition was admitted to hearing on 28-11-1989 and notices issued to the respondents. Despite service nobody appeared for the respondents

to contest the case. When the case came up before the Court on 22-2-1989, the respondents were absent despite service and nobody appeared

on their behalf. However, the Court directed that the District Magistrate Anantnag, respondent No. 2, be directed to file the counter within two

weeks time and make arrangements for arguing the case on behalf of the respondents. The D. M. appears to have been informed accordingly by

the registry but nothing was done by him. Neither the counter was filed and nor anybody appeared for the respondents on any subsequent date

thereafter, whenever the case was listed. The case used to come before the Court for hearing once and again but for one reason or the other, the

arguments of the learned counsel for me petitioner could not be heard, even in ex parte.

2. Last of all on the last date of hearing when the case came up for hearing in the regular cause list, the Addl. Advocate-General, shown in the

cause list for the respondents did not appear. While the case was being argued by the learned counsel for the petitioner, three Govt. Advocates,

namely Mr. Kotwal, Mr. Mansotra and Mr. Pant were present in the Court. They were specifically, asked by the Court if any one of them would

argue the case for the respondents, but (they declined to do so.

3. I have heard the learned counsel for the petitioner at length and also gone through the file.

4. Needless to mention that there is nothing on the file to controvert the allegations and averments made on affidavit in the petition. The

respondents have not chosen to appear and contest the case despite service. They have not filed any counter to rebut the allegations made in the

petition. The record also was not produced before the Court by the respondent for its perusal and appraisal. The result of the apathetic attitude of

the respondents adopted in this case would be that the allegations made in the

petition on an affidavit are to be taken as correct. They have remained un rebutted in absence of the counter and non-production of record by the respondents.

The learned counsel for the petitioner, firstly, argued with vehemence that the material as mentioned in the grounds of detention including the copies of FIRs, upon consideration of which the detaining authority has arrived at the conclusion that the activities of the detenu were allegedly prejudicial to the security of State, have not been supplied to him, with the result that he could not make any representation, muchless effective representation, to the Government against the order of his detention. According to him the non-supply of such material is violative of the guarantee as enshrined in Article 22(5) of the Constitution of India, vitiating the order of his detention.

5. In order to appreciate his arguments, I examined the grounds of detention as also the letter of the D. M. forwarding the same to him. In the forwarding letter there is an endorsement for the depot. District Jail Udhampur asking him to handover the grounds of detention to the detenu.

There is no, mention of any FIR or other enclosure, not even of the leaves comprising of the same.

6. In the grounds of detention wherever there is a mention of FIR, it is stated that copy of the same is enclosed. This is a question of fact under

law, as to whether it is correct or not. When it is denied by the detenu that it was not supplied to him, the burden of proof is on the detaining

authority to prove that it was supplied to him. This could be proved either by an affidavit of the Superintendent Jail concerned or by the D. M.

concerned or by production of record whereupon the receipt was to be obtained from the detenu at the time of delivering of such documents. As

already stated above, the respondents have not filed any counter and not produced any record to controvert the allegations of the petitioner made

on affidavit. The unfortunate part of it is that the detenu continues to be in detention for the last 21 months and the respondents have not moved a

little finger either to file the counter or to produce the record. On top of it nobody ever appeared on their behalf to argue the case or contest the

Same. This is really deplorable on the part of j respondents to deal with the fundamental rights of citizens of India in such a callous manner.

7. From the perusal of the grounds of detention, it appears that six FIRs were

registered against the detenu. The FIR Nos. 132 of 1989, 133 of 1989, 134 of 1989, 135 of 1989 and 136 of 1989 pertain to an occurrence of a single day i.e. 5-4-1989. If it was about one occurrence what was the need to register 5 cases, has not been explained anywhere. However, thereafter two more FIRs have been registered against him on 7-10-1989 and 8-10-1989. However here the Court is not required to go into the legality or otherwise of registration, of such cases. We have only to see as to whether the copies of the said FIRs were supplied to the detenu to enable him to make a representation against the order of his detention. In the concluding para, while assuming the subjective satisfaction for coming to the conclusion that the activities of the detenu were prejudicial to the security of the State, the detaining authority appears to have considered the said FIRs only. He has said so in specific terms that after applying his mind to the facts "enumerated herein above", he came to such a conclusion. The facts enumerated by him above the concluding para relate to the allegations as contained in the said FIRs. He has not mentioned it anywhere that there was any other material before him to arrive at such conclusion. If it is so, the supply of copies of the FIRs was indispensable, and its non-supply cannot be overlooked by the Court, lest that would tantamount to flagrant infraction of the constitutional guarantee. It is the bounden duty of this Court under the Constitution to zealously guard encroachments on the liberty of the citizen.

8. In Ahmedhussain Shaikhhussain @ Ahmed Kalio Vs. Commissioner of Police, Ahmedabad and Another, it has been held that though the satisfaction of the detaining authority is not open to judicial review but it is well established that a citizen is entitled to protection within the meaning of Article 22(5) of the Constitution of the procedural guarantees envisaged by law. The Court frowns upon any deviation or infraction of the procedural requirements. This in fact is the only guarantee to the citizen against the State's action of preventive detention.

9. Considering all these facts and circumstances I am constrained to hold that non-supply of material to the detenu, upon consideration of which the detaining authority has assumed satisfaction for detaining him, has deprived him of his right as guaranteed in Article 22(5) of the Constitution to make an effective representation against the order of his detention. This

challenge to the order of detention having been upheld, the said order gets vitiated and cannot be sustained in the eye of law. Non-supply of material to the detenu goes to the root of the validity of detention order itself knocking out its very bottom. This infraction of a constitutional guarantee is of such a nature that there is no need to go into the merits of other grounds of detention as required u/s 10-A of the J. & K. Public Safety Act. Even then I have examined all grounds of detention. The challenge thrown to them in the petition has remained un rebutted for want of counter and non-production of record by the respondents.

10. The detenu was allegedly arrested on 12-10-1989, and it has not been controverted by the respondents in any manner whatsoever. The order of detention impugned has been passed on 23-10-1989. The detaining authority has not mentioned it anywhere and nor shown his awareness about the arrest of the detenu. This is a clear case of non-application of mind on the part of the detaining authority.

11. In AIR 1989 SC 2265 it has been held that there must be awareness in the mind of the detaining authority that the detenu is in custody at the time of the service of the order of detention on him and cogent relevant materials and fresh facts have been disclosed which necessitate the making of an order of detention.

12. The grounds of detention are all vague. No particulars of the allegations mentioned in the grounds of detention have been given. No time and place of the alleged activities of the detenu has been given in the grounds of detention, and nor the names of his alleged associates mentioned anywhere. Such grounds cannot under law constitute the activities prejudicial to the security of the State, muchless in absence of any rebuttal.

13. In these circumstances of the case, the detention order impugned in this petition is held as bad in law and hereby quashed. The detenu is ordered to be set at liberty forthwith. The Superintendent, District Jail Udhampur, is directed accordingly. If the detenu has been shifted to any other jail, the Superintendent of that Jail and the Addl. Chief Secretary (Home) J. & K. State are directed to implement this order and release the detenu forthwith.