
(2006) 05 J&K CK 0022
In the Jammu And Kashmir High Court
Case No : OWP 358 Of 2003

Nasir Ahmad Malik

APPELLANT

Vs

State of J&K and Ors.

RESPONDENT

Date of Decision : 18-05-2006

Acts Referred:

Public Safety Act, 1978 — Section 25, 7, 8(4)

Citation : (2006) 3 JKJ 395 : (2007) SriLJ 78

Hon'ble Judges : J.P.Singh, J

Bench : Single Bench

Advocate : M.Ashraf Wani, M.A.Rathore, Advocates appearing for the Parties

Judgement

1. Nasir Ahmad Malik has filed this petition to seek quashing of Order No. DMS/PSA/22 dated 20.06.2003, whereby he has been ordered to be

detained in preventive custody for a period of one year by District Magistrate, Srinagar.

2. Sh. Mohd. Ashraf, learned counsel for the petitioner, makes a short submission that the District Magistrate had proceeded on a wrong premise

in treating the petitioner to be in custody, whereas the petitioner stood already released on bail when the District Magistrate had issued orders for

his preventive detention. Learned counsel relies on the certified copies of the order passed by Judge, Small clauses Court, Judicial Magistrate 1st

Class, Srinagar, dated 27.03.2003, and order dated 24.06.2003 passed by Principal Sessions Judge, Srinagar, in file No.81 of 07.06.2003. He

submits that the order of the learned Magistrate is arbitrary besides being violative of the provisions of the J&K Public Safety Act, 1978.

3. Sh. M. M. Rathore, learned Addl. AG on the other hand, submits that the petitioner's writ petition was not maintainable because he cannot

question his detention unless he first surrenders to custody. He supports the detention on order as having been passed on valid grounds.

4. I have considered the submissions of learned counsel for the parties.

5. Facts necessary to the decision of this petition may be summarized, thus;

6. District Magistrate, Srinagar, appears to have issued the order impugned in this petition on the ground that the petitioner was a local trained

militant of Hizbullah outfit and had been assigned the task of motivating young boys to join militancy. Petitioner is alleged to have been providing

arms and ammunition to the militants for carrying subversive activities against the security forces. The grounds of detention further indicate that on

20.03.2003, a police party apprehended Haroon Majid and Ahsan UI Haq Gujree, whose preliminary questioning revealed that they had one more

associate, who was waiting for them at Fruit Mandi, ByePass Gate. Police is, accordingly, alleged to have apprehended the petitioner, which

resulted in registration of F.I.R. No. 61/2003 under Sections 7/25 Arms Act. Learned District Magistrate has specifically recorded in his order of

detention that the petitioner had not been admitted to bail and was lodged in Central Jail, Srinagar, under judicial remand.

Certified copies of the judicial records placed on record by the petitioner, however, indicate that the petitioner was not in custody since March,

2003, because of his having been released on bail by Judge, Small Causes Court, Judicial Magistrate 1st Class, Srinagar.

7. On this petition coming up for motion hearing, this Court vide its order dated 16.12.2003 restrained the State respondent from executing the

order of detention of the petitioner. This interim order continues to operate till date. Since 2003, the State and its functionaries do not appear to

have taken any steps to oppose this petition by placing on records any material to justify detention of the petitioner or to rebut the facts and

documents pleaded and placed on records by the petitioner.

8. Although I do not dispute the proposition propounded by Sh. M. M, Rathore, learned Addl. AC, that the detainee must surrender before

questioning his preventive detention in terms of the law laid down by the Hon'ble Supreme Court of India, yet in view of the peculiar circumstances

of this case, I am not inclined to accept the submission of Sh. Rathore. The circumstances, which desist me in not accepting the submission of Sh.

Rathore, are that the detention order, because of the operation of the order dated 16.12.2003 of this Court, has lost its sting and efficacy. Conduct of the State Government and its functionaries in not filing objections/counter affidavit to this petition for about three years and likewise omitting to place anything on records to rebut the case set up by the petitioner, constrain me to disallow the submission of Sh. Rathore for rejecting the petition on the preliminary ground raised by Sh. Rathore as to the nonmaintainability of this petition because of petitioner's having opted not to surrender to custody before questioning his detention.

9. State respondent having opted not to place any material on records to justify the order of detention issued by District Magistrate and to rebut the allegations made by the petitioner in his writ petition, leaves no other option with me except to consider the challenge of the petitioner to the detention order on the basis of material placed by the petitioner on records. It is on the basis of this uncontroverted material that I would proceed to see the validity of the detention order impugned in this petition.

10. The impugned order proceeds on the premise that the petitioner was in custody in F.I.R. No. 61/2003 under Sections 7/25 Arms Act. This order, however, is significantly silent as to on what basis the preventive detention of the petitioner had been ordered when he was already stated to be in custody. I do find any reasons, much less material, on the basis whereof the District Magistrate could have recorded the satisfaction contemplated by the Public Safety Act that the activities of the petitioner were highly prejudicial to the security of the State and his remaining at large will be a threat to the security of the State. As against this, documents placed on records by the/petitioner show that he was not in custody and had been attending trial before learned Principal Sessions Judge, Srinagar at the time when the detention order was issued by District Magistrate, Srinagar.

11. All these facts indicate that incorrect information appears, to have been fed to the District Magistrate, who, in turn, acted arbitrarily and in a mechanical fashion in passing a routine order directing the detention of the petitioner in preventive custody.

12. Not only this, learned District Magistrate while directing the detention of the petitioner in custody for a period of one year ordered that his

detention would remain in force for a. period of thirty days. This direction of the learned Magistrate is contrary to Section (4) of the Public Safety

Act, 1978, which provides only twelve days, for which, the order of District Magistrate could remain in force unless, of course,

confirmed/approved by the State Government in the meantime. For facility of reference, Section 8(4) of the Public Safety Act, 1978, is

reproduced hereunder

Section 8(4) When any order is made under this section by an officer mentioned in subsection (2), he shall forthwith report the fact to the

Government together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter,

and no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the

Government.

13. For all what has been stated hereinabove, I find the order impugned in the writ petition, unjustified besides being violative of Article 14 of the

Constitution of India and Section 8 of the J&K Public Safety Act, 1978.

14. While allowing this petition, I would, therefore, quash the impugned order.

15. No order as to costs.