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(2020) 09 J&K CK 0049

In the Jammu And Kashmir High Court

Case No : Writ Petition (C) No. 674 Of 2019

Nasir Ahmad Mir — APPELLANT

Vs

Union Territory Of J&K And Others — RESPONDENT

Date of Decision : 22-09-2020

Acts Referred:
Jammu And Kashmir Public Safety Act, 1978 — Section 13
Constitution Of India, 1950 — Article 21, 22(3)(b), 22(5)

Citation : (2020) 09 J&K CK 0049

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : M. Ashraf Wani, B. A. Dar

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) Challenge in this petition is thrown to the order No.DMS/PSA/144 dated 30.11.2019, issued by District Magistrate, Srinagar (for brevity "Detaining Authority") whereby Shri Nasir Ahmad Mir son of Abdul Rashid Mir resident of Malik Mohalla Habbak Chanpora District Srinagar (for short "detenu") has been placed under preventive detention directing his lodgement in Central Jail, Srinagar.

2) Petitioner has contended that the Detaining Authority has passed the impugned detention order mechanically without application of mind, inasmuch as the grounds of detention are mere reproduction of the dossier. It has been further contended that the Constitutional and Statutory procedural safeguards have not been complied with in the instant case. It has been further urged that the allegations made against the detenue in the grounds of detention are vague and that the translated version of the documents/grounds of detention has not been provided to the detenue who is a semi literate persons. It has also been contended that the petitioner has not been informed as to before which authority

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he had to make a representation.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and stated that they have followed the provisions of J&K Public Safety Act. It is contended that the detenue has been detained only after following due procedure; that the grounds of detention were read over to the detenue; that there has been proper application of mind for detaining the detenue and that the detenue has been provided all the material. The learned counsel for the respondents also produced the detention records to lend support to the stand taken in the counter affidavit.

4) I have heard learned counsel for parties and I have also gone through detention record.

5) Learned counsel for the petitioner, while seeking quashment of the impugned order, projected various grounds but the main grounds that have prevailed during discussion are:

(I) That the grounds of detention are verbatim copy of the dossier, which shows that the detaining authority has not himself prepared the grounds of detention which is pre-requisite for him before passing any detention order, thus non-preparation of grounds of detention by the detaining authority renders the impugned order bad in law;

(II) That the detenue has been disabled from making an effective representation against his detention as the translated copies of grounds of detention have not been supplied to him.

6) In rebuttal, the learned counsel for the respondents has made an attempt to justify the passing of the order impugned by contending that the detenue was a habitual stone pelter, inasmuch as there were two FIRs pending against him and on this basis, the Detaining Authority was well within its jurisdiction to pass the impugned order of detention so there was every likelihood of the detenue indulging in similar activities. It has been further contended that all the documents relied upon by the Detaining Authority were, provided to the detenue and in token of having received the same, the detenue has signed the receipt. It is also urged that the contents of the documents were read over and explained to the detenue in the language understood by him.

7) Before considering rival contentions of the parties, it will be necessary to understand the backdrop of the legal position pertaining to application of preventive detention laws. The said laws have the effect of depriving a person of his liberty which is precious, however, deprivation thereof at times becomes indispensable. For justifying such deprivation, the safeguards as are provided by law are also required to be respected. A person who dares to threaten maintenance of public order has to be dealt with iron hand but the Constitutional safeguards as are available are also to be followed. Article 21 of the constitution of India has protected the life and personal liberty of people by providing that no

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person shall be deprived of his life or personal liberty except according to the procedure established by law. The word "established" is used in Article 21 in order to denote and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the precise extent of such deprivation. If a person is to be deprived of his life or liberty, the authority concerned is under a constitutional mandate to follow the procedure established by law, the procedure prescribed for depriving a person of his life or liberty has to be reasonable, fair and just. The protection contained in the article does not extend to only citizens but to all persons. The law providing for preventive detention has to be strictly construed keeping in view the delicate balance between social security and citizen freedom. Thus if the preventive detention has not been ordered in strict conformity with law authorizing detention, the detenue is entitled to be released.

8) Preventive detention, in effect, is an invasion to personal liberty which infringes the right to liberty guaranteed by Article 21 of the Constitution of India. Preventive detention, being an exception to Article 21, has to be reasonable and not based on the ipse dixit of the detaining authority. Preventive detention, wherever permissible, has to adhere to the procedural safeguards. Infraction of safeguards renders the order of detention unsustainable. The Supreme Court in a catena of judgments has made it clear as to what is the value of the ? constitutional safeguard? and as to what is the value of right to liberty guaranteed under Article 21 of the Constitution of India. In this context, it shall be quite relevant to quote paras 37 and 38 of the judgment rendered by the Supreme Court in case captioned "Rekha Vs. State of Tamil Nadu and anr", reported in (2011) 5 SCC 244:

"37. As observed in Abdul Latif Abdul Wahab Sheikh v. B. K. Jha vide SCC para 5: (SCC p.27)

"5....The procedural requirements are the only safeguards available to a detenu since the court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard."

As observed by Mr. Justice Douglas of the United States Supreme Court in Joint Anti-Fascist Refugee Committee v. McGrath:(US p. 179)

"...It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards are the main assurances that there will be equal justice under law".

38. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society?s assurances that the authorities will behave properly within rules distilled from long centuries of concrete experience".

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9) Preventive detention, as held in "A. K. Gopalan v. State of Madras" [1950 SCR 88] and reiterated in "Rekha v. State of Tamil Nadu"[AIR 2011 SCW 2262], is by its very nature repugnant to democratic ideals and an anathema to the rule of law. The Supreme Court in Rekha's case (supra), while emphasizing that Article 22(3)(b) of Constitution of India, is to be read as an exception to Article 21 of the Constitution and not allowed to nullify the right to personal liberty guaranteed under the later, observed as under:

"Since, however, Article 22 (3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal, but we must confine the power of preventive detention to very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of Constitution of India, which was won after long arduous, historic struggle. It follows therefore that if law of land (Indian Panel Code and other penal statues) can deal with the situation, recourse to the preventive detention law will be illegal."

10) The Court further observed:

"It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as jurisdiction of suspicion. The Detaining Authority passes the order of detention on subjective satisfaction. Since Clause (3) of Article 22 specifically excludes the applicability of Clauses (1) and (2), the detenue is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital."

11) In "Kamleshwar Ishwar Prasad Patel Vs Union of India and Others" [(1995) 2 SCC 51] the Supreme court observed:

"The history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of the nature of alleged activities of the detenue."

12) The baseline, that emerges from the above overview of case law on the subject of preventive detention is that whenever preventive detention is called in question in a court of law, the first and foremost task before the Court is to see whether the procedural safeguards, guaranteed under Article 22(5) Constitution of India and Preventive Detention Law pressed into service to slap the detention, are adhered to.

13) Keeping in view the hallmark of the cherished right to liberty in keeping with the object of Article 21 of the Constitution of India, while exercising power to order preventive detention, various procedural and other safeguards available

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have to be respected and adhered to. It is the bounden duty of the detaining authority to derive subjective satisfaction before passing the order of detention. If record suggests that there is non-application of mind, that ipso facto means that subjective satisfaction is missing.

14) While going through the detention records, as produced, the first ground projected by the learned counsel for the petitioner gets support from the material on record. The grounds of detention are replica of dossier with interplay of some words here and there, which exhibits non-application of mind and in the process deriving of subjective satisfaction has become a causality. While formulating the grounds of detention, the Detaining Authority has to apply its own mind. It cannot simply reiterate whatever is written in the dossier. Here it will be apt to notice the observations of the Supreme Court in the case of "Jai Singh and ors vs. State of J&K" (AIR 1985 SC 764), which are reproduced hereunder:

"First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur, to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father?s name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of ....."

Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is" into "you Jai Singh, S/o Ram Singh, resident of village Bharakh, Tehsil Reasi". Thereafter word for word the police dossier is repeated and the word "he" wherever it occurs referring to Jai Singh in the dossier is changed into ?you? in the grounds of detention. We are afraid it is difficult to find proof of non- application of mind. The liberty of a subject is a serious matter and is not to be trifled with in this casual, indifferent and routine manner."

15) From a perusal of the aforesaid observations of the Supreme Court, it is clear that the ground of detention and the dossier, if in similar language, go on to show that there has been non-application of mind on the part of the Detaining Authority. Adverting to the facts of the instant case, it is clear from the record that the dossier and the grounds of detention contain almost similar wording which shows that there has been non-application of mind on the part of the Detaining Authority.

16) There is yet another aspect of the matter which exhibits the mechanical manner of functioning of the Detaining Authority. It is clear from the dossier as well as the grounds of detention that at the time of passing of the impugned order, the detenue was in custody. In spite of this, it is recorded in the grounds

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of detention that "the detenue is presently playing an active role in implementing programmes of secessionist elements on ground by resorting to illegal activities such as stone pelting etc." If the detenue was in custody, it would not have been possible for him to indulge in activities like stone pelting etc. This goes on strengthen the contention of the learned counsel for the petitioner that the grounds of detention have been formed in a mechanic al manner in this case.

17) Next it is contended by learned counsel for the petitioner that the detenue has been disabled from making an effective representation by not supplying him the translated copies of the grounds of detention which are in English language besides being in a hyper technical language which the detenue is not in a position to understand being a semi literate person.

18) As per the record produced by the learned counsel for the respondents, the qualification of detenue is 9th pass, therefore, he would not be in a position to understand the contents of the grounds of detention. The record also does not suggest that the translated copies of grounds of detention have been supplied to the detenue. The right of making effective representation against the detention order has been rendered nugatory in this case, resulting in infringement Constitutional right of the petitioner guaranteed under Article 22(5) of the Constitution.

19) The service of the grounds of detention on the detenue is a very precious constitutional right and the object behind the same is to enable the detenue to file an effective representation. It will be an empty formality to supply the grounds of detention to the detenue unless he is in a position to understand the same. In my view I am fortified by the judgments rendered by the Supreme Court in the case "Chaju Ram Vs. The State of Jammu & Kashmir" reported in AIR 1971 SC 263. Following portion from para 9 of the judgment shall be quite apposite to quote:

"..... The detenu is an illiterate person and it is absolutely necessary that when we are dealing with a detenu who cannot read or understand English language or any language at all that the grounds of detention should be explained to him as early as possible in the language he understands so that he can avail himself of the statutory right of making a representation. To hand over to him the document written in English and to obtain his thumb impression on it in token of his having received the same does not comply with the requirements of the law which gives a very valuable right to the detenue to make a representation which right is frustrated by handling over to him the grounds of detention in an alien language. We are therefore compelled to hold in this case that the requirement of explaining the grounds to the detenu in his own language was not complied with."

20) The observations made by the Supreme Court in Ibrahim Ahmad Batti's case (supra) are also relevant to the context and the same are reproduced herein below:

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"Lastly, Urdu translations of quite a few documents and statements referred to in the grounds of detention and relied upon by the detaining authority were admittedly not supplied to the detenu at all and the only explanation given by the counsel for the respondents at the hearing has been that most of these documents (Urdu translations whereof were not supplied) comprised statements of accounts which had figures in English with some English words written in capital letters and some documents were in Hindi and Gujarati and the record (statements of Rekha, her sister Indi and one Jayantilal Soni, all co-conspirators of the detenu, recorded during the investigation) clearly shows that the petitioner knows English figures, understands English words written in capital letters and can also converse or talk in Hindi and Gujarati and as such the non-supply of Urdu translations of these documents cannot be said to have caused any prejudice to the petitioner in the matter of making a representation against his detention. In our view, the explanation is hardly satisfactory and cannot condone the non-supply of Urdu translations of these documents. Admittedly, the petitioner is a Pakistani national and Urdu seems to be his mother tongue and a little knowledge of English figures, ability to read English words written in capital letters and a smattering knowledge of Hindi or Gujarati would not justify the denial of Urdu translations to him of the material documents and statements referred to as incriminating documents in the grounds and relied upon by the detaining authority in arriving at its subjective satisfaction. In fact, the claim made before us on behalf of the detenu that he only knows Urdu cannot be brushed aside as false especially in view of the fact that the same was accepted on the earlier occasion by the Advisory Board who had actually opined that failure to supply Urdu translations of grounds of detention and documents had vitiated the earlier order of detention and following this opinion respondent No. 1 had revoked the said order. Moreover, with the assistance of counsel on either side we have ourselves gone through many of these documents and statements and it is not possible to say that most of them are merely statements of account containing figures in English with English words written in capital letters. These documents recovered from three flats in three different societies, include, for instance, documents like bills and vouchers showing purchases made from some shops, while a large number of documents are in Hindi and Gujarati and relate to transactions in contraband articles like gold, silver, watches, etc., and comprise accounts of such transactions, the figures as well as recitals pertaining to which are entirely in Gujarati. All these, in our view, are material documents which have obviously influenced the mind of the detaining authority in arriving at its subjective satisfaction and these are all in a script or language not understood by detenu, and, therefore, the non-supply of Urdu translations of these documents has clearly prejudiced the petitioner in the exercise of his right to make an effective representation against his detention and hence the safeguard contained in Article 22(5) is clearly violated."

21) It shall also be quite apposite to quote the following portions from paras 3 and 5 of the judgment rendered by the Supreme Court in the case captioned

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"Smt. Raziya Umar Bakshi Vs. Union of India"(AIR 1980 SC 1751):

"3.....The service of the grounds of detention on the detenue is a very precious constitutional right and where the grounds are couched in a language which is not known to the detenu, unless the contents of the grounds are fully explained and translated to the detenu, it will tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention ex-facie."

5.....in case where the detaining authority is satisfied that the grounds are couched in a language which is not known to the detenu, it must see to it that the grounds are explained to the detenue, a translated script is given to him and the grounds bear some sort of a certificate to show that the grounds have been explained to the detenue in the language he understands."

22) Further, in "Powanammal Vs. State of T. N. and another" reported in (1999) 2 SCC 413, the Supreme Court has observed as under:

".....The amplitude of the safeguard embodied in Article 22(5) extends not merely to oral explanation of the grounds of detention and the material in support thereof in the language understood by the detenu but also to supplying their translation in script or language which is understandable to the detenu. Failure to do so would amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making a representation against the order."

23) The detention record produced by the learned counsel for the respondents carries a copy of Execution Report dated 14.12.2019, perusal of which shows that the grounds of detention have been read over and explained to the detenue by one ASI Shair Ahmad (No.2127/S) of Police Station, Nigeen. It is the case of the respondents that the said executing official has read over and explained the grounds of detention to the detenue. For supporting this contention, it was incumbent on the respondents to place on record a duly sworn in affidavit of the said official, but no such affidavit has been filed. To eradicate all the doubts, it was incumbent on the part of the person, who did the exercise of handing over the documents and conveying the contents thereof to the detenue, to file an affidavit in order to attach a semblance of fairness to his actions. Support, in this behalf, can be taken from the law laid down by the Supreme Court in the case of "State Legal Aid Committee, J&K Vs. State of J&K & others", reported in AIR 2005 SC 1270, wherein it has been held as under:

"Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to show that the requirements of Section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of order of detention to be disclosed/ communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assesse and he was informed about his right to make a representation

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against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detenue refused to receive copy of the detention order and also refused to put his signatures on the documents. The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement LPA (HC) 107/2017 10 of 16 to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of Section 13 of the Act."

24) Para 5 of the judgment of our own High Court rendered in the case of "Mohammad Shaban Chopan Vs. State and another" reported in 2003 (II) S.L.J 455, shall also be advantageous to be quoted here-under:-

"5. Thus the stand taken by the detaining authority is that ASI Gh. Ahmad explained the grounds of detention to the detenue in Urdu and Kashmiri. However, affidavit of said ASI has not been filed. I have perused the record made available by Learned Counsel for the respondents. In the record there is a photocopy of C/Certificate of said ASI to that effect when the Learned Counsel was asked to produce the original, he expressed his inability to do so. The un-authenticated photocopy does not deserve to be noticed. Therefore, neither there is affidavit of said ASI nor any reliable document available on record to substantiate the fact that ASI Ghulam Ahmad had actually explained the grounds of detention to the detenue in his own language. Bare statement of the detaining authority in this behalf is of no consequence as has been held by the Hon?ble Supreme Court in the above quoted authority. The detention order thus cannot be sustained being violative of mandate of law on the aforesaid ground alone."

25) Para 20 of judgment rendered by the Supreme Court in the case of "Lallubhai Jogibhai Patel vs. Union Of India &Ors" reported in AIR 1981 SC728, is also relevant to the context and the same is reproduced as under: an endorsement LPA (HC) 107/2017 10 of 16 to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of Section 13 of the Act."

"20. It is an admitted position that the detenu does not know English. The grounds of detention, which were served on the detenu, have been drawn up in English. It is true that Shri C. L. Antali, Police Inspector, who served the grounds of detention on the detenu, has filed an affidavit stating that he had fully explained the grounds of detention in Gujarati to the detenu. But, that is not a sufficient compliance with the mandate of Article 22(5) of the Constitution, which requires that the grounds of detention must be "communicated" to the detenu. "Communicate" is a strong word. It means that sufficient knowledge of the basic facts constituting the 'grounds' should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the 'ground' to the detenu is to enable him to make a purposeful and effective representation. If the 'grounds' are only verbally explained to the detenu and nothing in writing is left with him, in a language which he

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understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed. If any authority is needed on this point, which is so obvious from Article 22(5), reference may be made to the decisions of this Court in Harikishan v. State of Maharashtra: and HaribandhuDass. v. District Magistrate (AIR 1969 SC 43) (ibid)."

26) From the afore quoted observations of the Supreme Court, it is clear that a detenue has not only to be furnished the translated versions of the grounds of detention, particularly when a detenue is semi literate, as is the case at hand, but even the executing officer has to file an affidavit to show that he has fully explained the grounds of detention to the detenue in the languages which he understands. None of these requirements have been followed in the instant case, at least the records suggests the same. In fact, the receipt of detention papers bearing the signature of the detenue, which is part of the detention record, bears the following expression. It contains the following expression:

"...The contents of the detention warrant/ grounds of detention have been read over and explained to the detenue in Kashmir/Urdu/ English language which he understood fully..."

27) From the perusal of aforesaid expression, it is not clear as to in which language the grounds of detention have been read over and explained to the detenue, whether it is Kashmiri, Urdu or English language. It should have been discernible from the record as to in which language the grounds of detention were read over and explained to the detenue, which is not the case. Therefore, the contention of the petitioner that the grounds of detention were not explained to him in the language which he understands gets strengthened from the detention record.

28) The cumulative effect of the aforesaid discussion leads to the only conclusion that in the instant case, the respondents have not adhered to the legal and Constitutional safeguards while passing the impugned detention order against the petitioner. The impugned order of detention bearing No. DMS/PSA/144 dated 30.11.2019, passed by respondent No.2-District Magistrate, Srinagar, is, therefore, unsustainable. Accordingly, the same is quashed. The detenue is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

29) The record, as produced, be returned to the learned counsel for the respondents.

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