
(2017) 03 J&K CK 0024
In the Jammu And Kashmir High Court
Case No : 67 of 2016

Nazir Ahmad Lone

APPELLANT

Vs

State of J&K & ors.

RESPONDENT

Date of Decision : 10-03-2017

Acts Referred:

Constitution of India, Article 22(5) -
Protection against arrest and detention in certain cases
Narcotic Drugs and Psychotropic Substances Act, 1985, Section 20, <a href=

Citation : 2017 0 CriLJ 2752

Hon'ble Judges : Mohammad Yaqoob Mir

Bench : SINGLE BENCH

Advocate : Malik Mushtaq, B. A. Dar

Judgement

1. Pursuant to order No.DIVCOM-""K""/33/2016 dated 18.04.2016, Nazir Ahmad Lone S/o Ab. Gani Lone R/O Khankah Midoora District

Pulwama (hereinafter referred to as the detainee), has been detained on 23.04.2016. The order has been confirmed vide Govt. order

No.Home/PB-V/411/2016 dated 17.06.2016, the period of detention in the first instance has been fixed as six months. On its expiry, period has

been extended for six months vide Govt. order No.Home/PB-V/1672/2016 dated 21.10.2016 which period has to expire on 21.4.2017.

2. Detenue by now has been in custody for more than ten months. The maximum period of detention in such a case is one year.

3. First it is contented that the order of detention is bad for lack of application of mind. The contention carries weight to prevail because the

detaining authority while exercising power under Section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and

Psychotropic Substances Act, 1988 (for short hereinafter referred to as "Act of 1988"), can detain a person so as to prevent him from committing the acts which fall within the meaning of "illicit traffic". The order impugned reveals that the same has been passed to prevent the detainee from committing the acts within the meaning of "illicit traffic" and "maintenance of public order". The words "maintenance of public order" as incorporated is beyond the scope of Section 3 of the "Act of 1988" which in turn would mean that the detaining authority has not been alive to the basic provision.

4. The detaining authority while passing the order dated 18.04.2016 has also recorded that the Senior Superintendent of Police, Awnatipora, has submitted the papers on 01.3.2016 and a letter dated 19.3.2016, on examination of the same has derived satisfaction for ordering detention. In the grounds of detention, as placed on record, it has been alleged that the detainee after attaining the age of majority came into contact with various anti-social elements which include notorious drug traffickers, therefore, developed a tendency to accumulate wealth through illegal dealings in narcotic drugs and psychotropic substances. The detainee has turned into a hardened drug trafficker and used to operate clandestinely in various areas of Valley particularly District Pulwama. In support of the said allegations, as recorded in the grounds of detention, no material is placed on record neither it is known as to who were the anti-social elements and notorious drug traffickers with whom the detainee had come into contact. There shall be certainty in the allegations only then precious right of liberty can be interfered with. It means that deriving of subjective satisfaction for ordering detention has been a casualty.

5. Again in the grounds of detention it is mentioned that the detainee was apprehended on 30th January, 2016, during a routine patrolling when a huge quantity of charas (Cannabis) weighing 3 1/2 Kgs was recovered from his possession and a case FIR No.09/2016 P/S Awantipora was registered for commission of offences punishable under Section 20 NDPS Act read with Section 8 of NDPS Act. This position also appears not to have been carefully looked into because of the fact that the detainee when arrested in connection with case FIR No.09/2016 had applied for grant of bail before the Court of Sessions Judge, Pulwama. He has been admitted to

bail vide detailed order dated 22nd February, 2016. Copy of the order has been produced which is taken on record. Learned Sessions Judge, Pulwama, has observed as under:

In the present case admittedly the alleged narcotic substance is weighing three kg and 500 grams of charas which is called "bhang"

i.e. dried leaves of cannabis plant. As per law relied upon by learned counsel for the accused/applicant, reported in 2010 (3) CCC

605 (HP) (DB), possession of dried leaves of cannabis plant, i.e. bhang is no offence, as such, rigor of section 37 of NDPS Act is

not applicable.

This position of the order dated 22.02.2016 passed by learned Sessions Judge, Pulwama, has not been perhaps brought to the notice of the

detaining authority nor has been considered. The order of detention has been executed on 23.04.2016. Either order of the learned Sessions Judge

has not been brought to the notice of the detaining authority or it has been withheld which again shows non-application of mind.

6. In terms of Section 11 of the "Act of 1988", maximum period of detention which could be ordered, to which Section 10 of the "Act of 1988"

does not apply, shall be one year from the date of detention whereas a person who has been detained under clause (f) of Section 9 read with sub-

section (2) of Section 10 of the "Act of 1988", maximum period shall be two years. The detaining authority has discretion to order detention for a

period which shall not exceed the period of one year. Once the discretion is exercised and the detainee is detained for a period of six months, then

there is no scope for ordering extension of the detention.

7. Section 18 of the J&K Public Safety Act, which is not applicable to the present case, provides for maximum period of detention in the case

where a person has been detained under Section 8 of the J&K Public Safety Act. Earlier language of Section 18 of the P.S. Act was similar to

Section 11 of the "Act of 1988". Section 18 of the P.S. Act has been amended to the effect that in case of threat to maintenance of public order,

detention can be ordered for a period of three months in the first instance which can be extended up to 12 months, whereas in case of threat to the

security of the State, period can be six months at the 1st instance. Section 11 of the "Act of 1988" has not been amended. This also shows that

perhaps detaining authority has fixed the period of detention under Section 18 of the J&K Public Safety Act, again lack of application of mind.

8. The next ground as projected is that the material forming base for the grounds of detention and the consequent order of detention has not been

furnished to the detainee. What has been furnished to the detainee, which he has allegedly acknowledged, are the copies of detention order,

grounds of detention along with notice. No other material, such as copy of FIR No.09/2016 and the material collected during investigation of the

case, has been supplied to the detainee, therefore, he has been deprived of making an effective representation against his detention. Nonsupply of

material forming base for the order of detention, in effect is a violation to the right guaranteed under Article 22(5) of the Constitution of India. It

shall be quite apposite to quote the judgment rendered by the Hon''ble Apex Court in the case Sophia Gulam Mohd. Bham v. State of

Maharashtra (AIR 1999 SC 3051), wherein it has been held:

The right to be communicated the grounds of detention flows 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 detainee to make a representation against the order of detention. 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 detainee 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

9. The detainee has been in preventive custody for last more than ten months excluding the period of 23 days in custody till release on bail in case

FIR No.09/2016 P/S Awanitpora i.e. from 30.01.2016 to 22.02.2016. That apart, for the stated reasons, circumstances and the position of law,

the order of detention is unsustainable, as such, quashed. The detainee is directed to be released forthwith if not required in connection with any

other case.

10. Detention records as produced by learned AAG is returned to him.