

(2020) 12 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : Writ Petition (Crl) No. 37 Of 2020

Nazir Ahmed

APPELLANT

Vs

Union Territory Of J&K &Ors

RESPONDENT

Date of Decision : 29-12-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161
Jammu And Kashmir Public Safety Act, 1978 — Section 3(2), 13(1), 19(1)
Maharashtra Prevention Of Dangerous Activities Of Slumlords, Boot-leggers, Drugs
Offenders And Dangerous Persons Act, 1981 — Section 3, 8(1), 14, 14(1)
Bombay General Clauses Act, 1904 — Section 21
Constitution Of India, 1950 — Article 21, 22(5)

Citation : (2020) 12 J&K CK 0002

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Suyansh Singh Chandail, Aijaz Lone

Judgement

1 Challenge in this petition is thrown to the order No.03/PSA of 2020 dated 07.08.2020 (hereinafter referred to as the impugned detention

order) issued by the District Magistrate, Samba (for brevity "Detaining Authority") whereby Nazir Ahmed son of late Ibrahim, resident of village

TandaSupwal, Tehsil and District Samba, at present Arnia Tehsil, District Jammu (for short "detenu") has been placed under preventive detention

directing his lodgement in Sub Jail, Hiranagar.

2 It has been 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, inasmuch as the whole material relied upon by the detaining authority has not been

supplied to the detenu and that the translated version of the documents/grounds of detention in Gojri language has not been provided to the detenu who is an illiterate person.

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 has been contended that all the documents relied upon by the Detaining Authority were, provided to the detenu as well as

to his wife and in token of having received the same, the detenu as well as his wife have signed the receipts. It is also urged that the contents of the

documents were read over and explained to the detenu in the language understood by him. 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 mere reproduction of dossier which shows non application of mind on the part of the Detaining Authority;

(ii) that the entire material relied upon by the detaining authority, while formulating the grounds of detention, has not been furnished to the detenu;

(iii) that the translated script in Gojri language of the material forming the basis of the grounds of detention has not been supplied to the detenu and

(iv) that the detenu has not been informed of his right to make a representation against the impugned order of detention before the detaining authority.

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 detenu

was a habitual criminal, inasmuch as seven FIRs were registered against him and on this basis, the Detaining Authority was well within its jurisdiction

to pass the impugned order of detention as there was every likelihood of the detenu indulging in similar activities. It has been further contended that all

the documents relied upon by the Detaining Authority were, provided to the detenu as well as to his wife and in token of having received the same, the

detenu as well as his wife have signed the receipts. It is also urged that the contents of the documents were read over and explained to the detenu in

the language understood by him.

7) 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 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.

8. 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 *the*. Thereafter follow various allegations against Jai Singh, paragraph by .) No.674/2019 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

nonapplication 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.â??

9) 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 nonapplication of mind on the part of the Detaining Authority.

10) So far as the other ground urged by learned counsel for the detenu is that the whole material, forming the basis of grounds of detention, was not supplied to the detenu is concerned, the same has been contradicted by respondent No.2 in his counter affidavit. According to respondent No.2, copies of detention warrant, grounds of detention and dossier (22) leaves have been served upon the detenu and besides this, warrant of detention (one leaf), grounds of detention (05 leaves), copies of dossier (05 leaves) and other documents of FIRs (16 leaves) have also been served upon the wife of the detenu.

11 The detention record produced before this Court contains a report of execution and a receipt executed by the detenu. According to this receipt, copies of detention warrant, grounds of detention and dossier (22 leaves) have been served upon him. Neither the execution report, nor the receipt executed by the detenu specifies as to, besides the detention warrant, grounds of detention and dossier, what other documents were furnished to the detenu. The grounds of detention bear reference to five FIRs and in all these FIRs, the challans are stated to have been presented before the Courts concerned. There is nothing either in the detention record or in the counter affidavit of respondent No.2 to show that the detenu has been provided copies of challans of these cases or that he has been provided the copies of statements of witnesses recorded under Section 161 Cr.P.C in these cases. Obviously, all these documents cannot comprise only 22 leaves including copies of detention warrant, grounds of detention and dossier.

Therefore, contention of the detenu that, whole material which formed the basis of grounds of detention was not supplied to the detenu, appears to be well founded. Apart from this, in the grounds of detention, it has been mentioned

that the detenu has formed a gang of criminals, but the identity of the persons forming the gang of criminals is not disclosed either in the grounds of detention or in any other material contained in the detention record.

12 It is next contended by learned counsel for the detenu that the detenu being an illiterate person has been disabled from making an effective representation because the detention order and the grounds of detention furnished to him are in English language and, thus, the detenu has lost a valuable right of making a representation against the detention order.

13 As per the record produced by the learned counsel for the respondents, the detenu is an illiterate person. Thus, he would not have been in a position to read the contents of the grounds of detention. As per the execution report which is attached to the detention record, the contents of detention

warrant and the grounds of detention are stated to have been read over and explained to the detenu in Urdu/Dogri language. The execution report

appears to bear the thumb impression of the detenu which means that he is an illiterate person. It is specifically pleaded by the detenu that he

understands Gojri language and that the translated version of the grounds of detention has not been furnished to him. Learned counsel for the

respondents has contended that in the case of a totally illiterate person, it hardly makes a difference whether the grounds of detention and the material

in support thereof furnished to the detenu is in English language or in any other language. In this regard, the learned counsel has referred to the

judgment of this Court in the case of Rustum Wani vs. State of J&K (LPA(HC) No. 57.2001, decided on 20.08.2001) .

14 It may be correct to state that in the case of a totally illiterate person, the language in which the grounds of detention and the material in support

thereof are furnished to the detenu may not be material, but at the same time, it is equally true that, the detenu at least should be explained the grounds

of detention and the material in support thereof in the language which he understands.

15 The service of the grounds of detention on the detenu is a very precious constitutional right and the object behind the same is to enable the detenu

to file an effective representation. It will be an empty formality to supply the grounds of detention to the detenu 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 WP(CrI) 21/2020 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 detenu to make a representation which right is frustrated by handing 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.

16 The execution report suggests that the grounds of detention and the contents of the impugned detention order were read over and explained to the detenu by the Executing Officer/SHO P/S Samba. It is the case of the respondents that the said executing official has read over and explained the grounds of detention to the detenu in Urdu/Dogri language. Thus, it is clear that the grounds of detention have not been explained to the detenu in the language which he understands i.e. Gojri language. Even the assertion of the respondents that the grounds of detention were explained to the detenu in Urdu/Dogri language is not supported by affidavit of the executing official. 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 detenu, to file an affidavit in order to attach a semblance of fairness to his actions. This requirement has not been followed in the instant case, at least the record suggests the same.

17 It has also been argued by learned counsel for the detenu that the detenu was not informed by the Detaining Authority with regard to his right to make representation before the Detaining Authority against the impugned detention order. According to the learned counsel, omission on the part of respondent No.2 in this regard renders the impugned order of detention

unsustainable in law.

18 A perusal of the impugned detention order reveals that the detenu has been informed by respondent No.2 with regard to his right to make an

effective representation before the Home Department and there is nothing on record to suggest that he was informed of his right to make a

representation to the Detaining Authority against the impugned detention order. The Supreme Court has, in the case of *State of Maharashtra vs.*

Santosh Shankar Acharya, (2000) 7 SCC 468, while interpreting the provisions of Section 8(1) and Section 14(1) of Maharashtra Prevention of

Dangerous Activities of Slumlords, Boot-leggers, Drugs Offenders and Dangerous Persons Act, 1981, which are in parimateria with the provisions of

Section 13(1) and Section 19(1) of J&K Public Safety Act respectively, observed as under:

The only logical and harmonious construction of the provisions would be that in a case where an order of detention is issued by an officer

under sub-section (2) of Section 3 of the Act, notwithstanding the fact that he is required to forthwith report the factum of detention together

with the grounds and materials to the State Government and notwithstanding the fact that the Act itself specifically provides for making a

representation to the State Government under Section 8(1), the said detaining authority continues to be the detaining authority until the

order of detention issued by him is approved by the State Government within a period of 12 days from the date of issuance of detention

order. Consequently, until the said detention order is approved by the State Government the detaining authority can entertain a

representation from a detenu and in exercise of his power under the provisions of Section 21 of Bombay General Clauses Act could amend,

vary or rescind the order, as is provided under Section 14 of the Maharashtra Act. Such a construction of powers would give a full play to

the provisions of Section 8 (1) as well as Section 14 and also Section 3 of the Maharashtra Act. This being the position, non-communication

of the fact to the detenu that he could make a representation to the detaining authority so long as the order of detention has not been

approved by the State Government in a case where an order of detention is issued by an officer other than the State Government under sub-

section (2) of Section 3 of the Maharashtra Act would constitute an infraction of a valuable right of the detenu under Article 22(5) of the

Constitution and the ratio of the Constitution Bench decision of this Court in KamleshKumars case (supra) would apply notwithstanding the

fact that in KamleshKumars case (supra) the Court was dealing with an order of detention issued under the provisions of COFEPOSA"".

19 From the aforesaid enunciation of law on the subject, it is clear that non-communication of the fact that the detenu has a right to make an effective

representation to the Detaining Authority against the detention order so long as the order of detention has not been approved by the Government

constitutes violation of valuable right of the detenu under Article 22(5) of the Constitution. That being the position in the instant case, the impugned

order of detention is not sustainable in law.

20 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 detenu. The impugned order of detention bearing

No.03/PSA/102 of 2020 dated 07.08.2020 issued by the District Magistrate,Samba is, therefore, unsustainable. Accordingly, the same is quashed. The

detenu is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case.

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