

(2001) 03 J&K CK 0023
In the Jammu And Kashmir High Court
Case No : Habeas Corpus Petition No. 240 Of 2000

Nisar Ahmad Najar

APPELLANT

Vs

State of J&K and Others

RESPONDENT

Date of Decision : 13-03-2001

Acts Referred:

Public Safety Act, 1978 — Section 11

Citation : (2001) KashLJ 300

Hon'ble Judges : Syed Bashir-Ud-Din, J

Bench : Single Bench

Advocate : T.Khawaja, R.A.Khan, Advocates appearing for the Parties

Judgement

1. Nisar Ahmad Najar on whose behalf this HC petition is filed by his father was arrested in March 2000 in FIR 37/2000 under Section 7/25 I.A.

Act Registered at Police Station Soura. While under punitive custody, District Magistrate Srinagar under his order no. DMS/ PSA/18 dated

2052000 ordered preventive detention of said Nisar Ahmad Najar under Section 8 of the Jammu and Kashmir Public Safety Act, 1978 with a

view to prevent him from acting in any manner prejudicial to the security of the State. This order and consequent detention of the said detainee is

under challenge in this petition. Though possibly all available grounds within the parameters of Article 22(5) of Constitution of India and provisions

of Jammu and Kashmir Public Safety Act have been taken to challenge the legality of the detention, but petitioner's counsel submits that the two

main grounds on which he is relying to question the legality of the detention are.

2. First that the grounds of detention as also the material on which the alleged grounds of detention are based have not been at all supplied to the

petitioner. Even, the grounds of detention have not been read over and explained to the petitioner in the language which he understood, i.e.

Kashmiri. Being illiterate,' he understands no language other than Kashmiri. He has been prejudiced. In absence of communication of grounds

petitioner is prejudiced to make representation to the Government against the detention.

3. Second, notwithstanding that the State and its police department were having physical custody of the petitioner from March 2000, the detention

order was passed about two months thereafter and yet the order of detention was executed on 772000. In any case 11/2 month was taken to

execute the order of detention, even though the detainee was in the custody of the Police and the State in a regular case FIR 37/2000 of Police

Station Soura (ibid). The other grounds pleaded and taken the counsel concedes are more ornamental rather than of substance to sustain any

challenge to impugned detention order.

4. Mr. R.A. Khan, Government Advocate, submits in answer that in terms of the counter filed by the District Magistrate Srinagar the detaining

authority, it should be seen that the detainee has been served the detention order and copy of the grounds. Warrant was read over and explained to

the detainee in Urdu/ Kashmiri language which he understood for which receipt has been obtained from him. The detainee has been given full

opportunity to make representation to the government against the order. The detainee is not prejudiced. It is conceded that despite the detention

order having passed on 2052000, it was executed on 772000. But the counsel submits that merely, because the detention order was executed

after 48 days it cannot be in the facts and circumstances of this case, said to have been executed belatedly so as to vitiate the detention itself. The

counsel has also produced the detention record of the Government.

5. Now, having taken note of the respective contentions of the petitioners counsel and learned Government Advocate for respondents, it would be

useful first to refer to the relevant pleas of the petition and counter.

6. Para 4(j) & (m) of the writ petition reads as under:

4(i) For that not even an iota of material on which the alleged grounds of detention are supposed to be founded, including copy of FIR referred to

the grounds of detention has been furnished or made available to the detainee by

the respondents in compliance with the mandate of Article 22

Clause 5 of the Constitution of India as applicable to the State of Jammu and Kashmir entailing irretireable prejudice to the detenue in the matter of

making effective representation to the Advisory Board against the detention order in exercise of fundamental rights guaranteed to the detenue by

Article 22 of the Constitution of India.

(m) For that grounds of detention have not been read over or either explained to the petitioner in the language understood by the petitioner and

thereby petitioner has been deprived the right to make effective representation against the detention. It will be appropriate to mention here that the

petitioner is totally illiterate and does not understand any language except his mother tongue i.e. Kashmiri. The detention on this ground alone is

liable to be declared illegal and petitioner ordered to be released forthwith".

7. In counter affidavit in answer to the above allegations, it is averred :

(j) Ground (j) is repetition, hence denied. The detenue although stands informed of his right to make a representation has failed to make a

representation to the government against his detention.

(m) Ground (m) is also denied in view of submissions made in clause (ii) of factual backdrop herein above".

8. The factual backdrop given in clause (2) of the counter affidavit states that on execution of the detention order on 07072000 contents of warrant

were read over and explained to the detenue in Urdu and Kashmiri language which he fully understood and in token where of he has put his

signature on the executed copy of the detention order.

9. Contextually the detention order on record and the detention file presented by the learned Government Advocate reads with opening words as

Whereas I, Bipul Pathak IAS District Magistrate Srinagar am satisfied on the basis of records received from SSP Srinagar that with a view to

prevent Shri Nisar Ahmad Najar...". The grounds of detention Annexure A shows that the antecedents and previous history of the detenue of his

being member of JKLF and HUM outfits, his association with terrorists and throwing of grenades and attacking security forces in town areas of

Srinagar city, besides his involvement in recovery of arms and ammunition and registration of case thereto are the reasons which have gone into

consideration of the detaining authority culminating in passing of the impugned detention order. These grounds when read conjointly with the petition pleas and reply/ counter pleas in just position with the order of detention of the District Magistrate, leaves no doubt that the grounds are obviously based on material and record supplied to the District Magistrate by SSP Srinagar. The record made available by the Govt. Advocate also shows that report/ dossier has been made available to the detaining authority by SSP District Srinagar. The grounds as also the detention order is rooted to the report and record. The report as also the record and other material has entered consideration of the detaining authority resulting in passing of the impugned detention order. The specific allegation that the detainee not being provided even iota of material to the basis of the grounds of detention and the consequential prejudice to the detainee (as taken up in para 4(j) of the petition) is not at all controverted. The detaining authority in answer to the allegation simply says that same is denied. 10. In counter, it is nowhere stated that the dossier, material, record has been at all supplied to the petitioner. It is relevant to note that what is spoken to be delivered to detainee is simply a copy of detention order which has been explained in Urdu/ Kashmiri language to him. In the endorsement the words towards end and grounds of detention appears to have been rewritten. This record in absence of affidavit of the executing officer and in absence of being attested by Superintendent Jail where the detainee is lodged appears doubtful. The grounds seem not to have been supplied to the detainee and in any case supply of grounds in the facts and circumstances of the case is highly doubtful. The other limb of the argument that the detainee has not been explained the grounds in the language (Kashmiri) which he understood is also covered by the above conclusion of the court in so far as the very supply of grounds to the detainee is doubtful, therefore, the translation thereof in the language also appears not true. Infact even if one goes through this unsatisfactory endorsement, one finds that only the order of detention referred as warrant by the executing officer of the Police Department has been explained to the detainee (if at all so), Urdu/ Kashmiri language which petitioner is alleged to have understood. There is no mention of explaining the grounds to the detainee in the language which he understood. Merely because the detainee has signed this endorsement in broken urdu words same cannot lead the court in

the overall facts and circumstances of the case, to conclude that the petitioner is literate or that the grounds were explained to him in the language

which he understood. It is equally doubtful if the petitioner has been served communication and order no. DMS/PSA/18 dated 2052000 informing

him that he is free to make representation to the Government against the detention. This is so as there is nothing on record to show that this

communication was at all served on the detainee on any date till he was detained on 772000. Merely making a mention that the detainee has been

informed by a letter of his right to make a representation when there is nothing on record to show that the letter was infact delivered or given to the

detainee would not perse make the court to conclude that the detainee was informed of his right to make a representation against his detention.

11. In the facts and above tell tale circumstances of the case, the detainee cannot be said to have been communicated the grounds of detention. The

constitutional imperative as laid in Article 22(5) regarding communication of the grounds, the basis of detention order and affording opportunity to

detainee of making representation is violated and a fortiori, that detention is vitiated.

(See Mangalbai Motiram Patel vs. State of Maharashtra and others (AIR 1981 SC510)

Smt. Ichhu Devi Choraria vs. Union of India and Ors. (AIR 1980 SC 1983) and Naser Ahmad Sheikh vs. Addl. Chief Secretary Home and Anr.

(1999 SLJ, 241).

12. In Sophia Gulam Mohd Bham Vs. State of Maharashtra and Ors. (AIR 1999 SC: 3051), the Apex Court in the context of ""communication of

grounds"" held :

...The right to be communicated the grounds of detention flow 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 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...

13. In Ghulam Mohd. Mir Vs. State of Jammu and Kashmir and Another (HC. P.

No. 93/99) decided on 30121999, it is recorded :

...In the circumstances, the detainee cannot be said to have been provided an opportunity and the means to make meaningful and effective

representation against the detention as guaranteed apart from provisions of Public Safety Act, by Article 22 of the Constitution. So long the

material, on which the facts or conclusions constituting the grounds and basis of subjective satisfaction of the detaining authority, is withheld from or

denied to the detainee, the detainee cannot be said to be communicated the grounds with material. If so, detainee is denied opportunity to make

representation.

14. The basic facts and material having bearing on the satisfaction of the detaining authority in absence of proof that the grounds and material,

thereto has been provided to the detainee, the detainee cannot be said to have been communicated the grounds for making an effective and

meaningful representation within conspectus of law laid down in Article 22(5) of the Constitution.

15. In view of the conclusion arrived at as above the other alleged ground of delayed execution as snapping live and proximate link between the

grounds of detention and purpose of detention, is no more required in the over all facts and circumstances of the case, to be gone into and

determined. This aspect of the matter is left here.

16. For the aforesaid reasons, the detainee as also the impugned order of detention is held vitiated and illegal. As a consequence, the detention

order is quashed. Respondents/ detaining authority or official having corpus of the detainee is directed to release him from custody and set him at

liberty forthwith provided the detainee is not required in any case or substantive offence including FIR 37/2000 under Section 7/27 I.A. Act

registered at Police Station Soura.

17. Communicate this order to the concerned authority having physical custody of the detainee Nisar Ahmad Najar S/o Abdul Kabir Najar R/o

Ompora Budgam. Give copy free of cost to the petitioner. Detention record has been handed over to Mr. R.A. Khan in open court.

18. Disposed of. Srinagar