

(1991) 12 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition No. 736/90 & C.M.P.No. 143/91

Pervez Ahmad Bhat

APPELLANT

Vs

State and others

RESPONDENT

Date of Decision : 27-12-1991

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Public Safety Act, 1978 — Section 13(2), 8

Citation : (1993) 1 Crimes 779 : (1992) 2 Crimes 216 : (1992) KashLJ 186

Hon'ble Judges : S.M.Rizvi, J

Bench : Single Bench

Advocate : S.T.Hussain, Rahul Pant, Advocates appearing for the Parties

Judgement

By medium of this petition for a writ of Habeas corpus, the detention of Pervez Amhad u/s 8 of the J&K Public Safety Act, hereinafter referred to

as Act, has been challenged on various grounds.

Despite many opportunities granted to the respondents they have failed to file the counter. I have heard the learned counsel for the parties. Mr.

Panth the learned Govt. Advocate appearing for the respondents had undertaken to produce the record pertaining to the detention of the detenu.

He too has failed to do so the same.

Mr. Hussain at the very outset, during the course of arguments referred me to a judgment of this court dated 31/10/1991 given in H C. Petition No.

772 of 1991, and submitted that the same is on all four's to the instant case, and will govern its fate also. He produced a copy of the said

Judgement for my perusal.

In that case the order of detention was quashed on the solid ground that the detaining authority while purporting to act under Sec. 13(2) of the Act,

had withheld the grounds of detention from the detenue, and it was held that the same deprived him of his right to make a representation against the order of his detention violating the mandate of Art. 22(5) of the constitution of India.

In the present case the learned counsel for the petitioner challenges the order of detention on the same point of law. He referred me to the grounds of detention particularly the following sentence therein which is reproduced below:

Specific grounds of detention are not being disclosed to you under section 13 (2) of P.S. Act 1978.

According to him the nondisclosure of grounds of detention the detenue is a flagrant violation of Art. 22 (5) of the constitution of India vitiating the order of detention.

In order to appreciate his argument, it would be worthwhile to reproduce Art, 22 (5) and Act 22 (6) of the constitution of India. Art 22 (5) reads as under:

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making representation against the order.

Art. 22 (6) reads as under:

Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority, considers to be against the public interest to disclose.

Under Art. 22(5), the detaining authority has no option to withhold the grounds of detention from the detenue. He is bound to communicate the grounds of detention to him, as soon as may be and afford him the earliest opportunity of making a representation against the order. It is mandatory under this clause to communicate the grounds of detention to the detenue for enabling him to make a representation against the order of detention.

The detaining authority has no power to withhold the grounds of detention from the detenue, and if he makes any sort of deviation in it, it would invalidate the order of detention.

However, under order Art. 22(6) the detaining authority has the power to withhold the 'facts' from the detainee if such authority consider its disclosure against the public interest.

The constitution makes clear distinction between grounds for detention and facts of detention. The 'grounds' cannot be withheld in any circumstances, though the 'facts' can be, in the public interests.

In the present case, the detaining authority has in the grounds of detention itself mentioned that the 'Specific' grounds of detention cannot be disclosed to the detainee. This is clearly a iflagrant violation of Art. 22(5) of the constitution of India, without any power given to the detaining authority, he appears to have withheld the specific grounds of detention from the detainee. By doing so, the detaining authority has deprived the detainee of his legal right given to him under Art 22 (5) to make a representation against the order of detention

The respondents have failed to produce the record before the court and therefore it could not be ascertained as to what specific grounds were

withheld from the detainee. They have failed to file the counter also. In these circumstances the court has no option but to presume that some

specific grounds of detention have been withheld from the detainee, depriving him of his constitutional right to make a representation against the

order of his detention. Art 22 (5) postulates two rights: The first part gives a right to the detainee to be furnished with grounds on which order has

been made. The second right given to such person is of being afforded the earlier opportunity of making a representation against the order of

detention. The confinement of a right to make a representation carries with it the obligation on the part of the detaining authority to furnish grounds,

i.e. the material on which detention order was made. Therefore, in a case where grounds are not communicated to the detainee and are withheld

even in public interest, the right conferred on a detainee under Art 22 (5) is rendered infructuous. In such a case the question of sustaining the

detention order does not arise.

In these circumstances of the case the court has no option but to hold that the detaining authority has withheld some specific grounds of detention

from the detainee, which has deprived him of his legal right to make a representation against the order of his detention.

The result is that the petition is allowed and the order of detention impugned in this petition held as unconstitutional, illegal and bad in law. The

detenue is therefore ordered to be set at liberty forthwith. The respondents as also the superintendent Jail concerned Udhampur are hereby

directed to release him at once.

Let the file be consigned to records.