

(2019) 09 J&K CK 0093

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 144 Of 2019

Rayees Ahmad Parray

APPELLANT

Vs

State Of Jammu & Kashmir And Ors

RESPONDENT

Date of Decision : 05-09-2019

Acts Referred:

Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 — Section 3(3)
Jammu And Kashmir Public Safety Act, 1978 — Section 8(a), 13
Constitution Of India, 1950 — Article 22, 22(5), 22(6)

Citation : (2019) 09 J&K CK 0093

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Hilal Ahmad Wani, Asif Maqbool

Final Decision : Disposed Of

Judgement

Rashid Ali Dar, J

1. By virtue of order bearing No. 137-DMB/PSA of 2019 dated 19.03.2019, (for short impugned order) passed by respondent no. 2 - District Magistrate, Baramulla, the detainee namely Rayees Ahmad Parray @ S P S/o Ali Mohammad Parray R/o Matipora Rohama Rafiabab, District Baramualla has been taken into preventive custody by invoking powers under Clause (a) of Section 8 of the J&K Public Safety Act 1978 (for short the Act), as his activities were found to be prejudicial to the 'peace and public order. Quashment of the said order is sought on the following grounds in terms of the petition: -

a) That the detainee submits that the cases mentioned in the grounds of detention have no nexus with the detainee and has been fabricated by the police in order to justify its illegal action of detaining the detainee.

b) That the allegations made in the grounds of detention are vague, non-existent and no prudent man can make a representation against such allegation and

passing of detention on such grounds is unjustified and unreasonable. Further, the detaining authority has mentioned several FIRs in the grounds of detention, however, these allegations are far from reality.

c) That the detaining authority has not given any reasonable justification to pass the detention order in the given circumstance of the case. The very basis of the satisfaction recorded by the detaining authority is vague, as such, impugned order suffers from complete non-application of mind on the part of detaining authority.

d) That the detention order has been passed for the object keeping in view the ensuing election, however, such an object is alien to Public Safety Act.

e) That the preventive detention is not alternative to defeat the right of a person to seek bail and the detaining authority has to record the compelling circumstances to justify the recourse to law, which in principle will block the right of the detainee to seek and get released on bail. In the present case, no such compelling reasons have been recorded which deserve the detainee not to be allowed the concession of bail which otherwise is due course of law.

f) That the detaining authority has not prepared the grounds of detention by itself, which is a pre-requisite for him before passing any detention order. He has relied only on the police dossier and has not perused any supporting material. The detaining authority seems to have worked on the dictates of police authorities and has not enquired about the existence of the facts by perusing the supporting material.

g) That the detainee is not an English literate person and admittedly understands only Kashmiri/Urdu language but the order of detention is in English and no translated script in Kashmiri or Urdu was furnished to the detainee nor the grounds read over and explained to him in the language he understands so that he can make effective representation. Non supply of the translated scripted as well as non explanations of the grounds of detention has prevented the detainee from making an effective representation.

h) That the detainee was not informed that he has a right to make a representation against his detention order to the detaining authority nor the respondents disclosed to him before whom authority of Government, the detainee can make the representation, and neither the respondents disclosed him to actual detention order, which is in total violation of the rights of the detainee as guaranteed under Article 22 of the Constitution and section 13 of Public Safety Act.

i) That the detainee is suffering from orthopedic disease as he had met with an accident in 2011 and thereafter he has been on continuous treatment by specialized doctors and by detaining him to far off place in terms of impugned order the detainee has been deprived of proper treatment which can prove detrimental to his health and can suffer irreparable loss to his body.

2. Respondents have filed the counter affidavit wherein it is submitted that the detainee is an anti-social element and one of the main instigators of stone palters in Rohama Rafiabab area. The detainee was already registered under three FIRs bearing Nos. 52/2016, 54/2016 & 55/2016. On 23.02.2019, after a rumor about the death of a militant namely Wasim Ahmad spread in the areas, and huge unlawful gathering assembled at Shutloo pronouncing /chanting international slogans. During the protest, the detainee with associates attacked the vehicle of Peoples Conference Worker which was heavily damaged and others after damaging the vehicle set ablaze and the worker who luckily survive the attack run away from the spot. In this regard, case FIR No. 10/2019 U/S 147, 148, 149 336, 427, 436, 307 RPC stands registered in P/S Panzlla. Accordingly, the police concerned prepared a dossier and while finding the activities of the detainee are highly prejudicial to the maintenance of security of state/nation and normal law of land is not sufficient to deter the detainee from his unlawful activities. It is further stated that the detention order, grounds of detention and other relevant material was supplied to the detainee. The respondents have also followed the provision of Public Safety Act and the detainee has been detained only after following due procedure in terms of Public Safety Act. The material on the basis of which the grounds of detention were framed by respondent no. 2 were supplied to the detainee and there is proper application of mind and the respondent no. 2 was fully satisfied for detaining the detainee on the grounds explained to him.

3. Heard learned counsel for the petitioner and learned GA.

4. The learned counsel for the petitioner reiterated the pleas referred in the petition and also contended that the detainee was arrested in the month of February 2019 and was under illegal police custody in view of his alleged involvement in FIR No. 10/2019 U/S 147, 148, 336, 427, 436, 307 RPC in P/S Panzlla and thereafter taken into preventive custody pursuant to impugned detention order No. 137- DMB/PSA of 2019 dated 19.03.2019 and lodged in Central Jail, Kotbhalwal, Jammu. Learned counsel for the petitioner further contended that there is non-application of mind on the part of detaining authority while passing the impugned detention order as the detaining authority has not scanned the relevant material and has not formulated the grounds of detention itself. Other points raised in the petition are also reiterated.

5. Next learned counsel for the petitioner would contend that the material forming base for the grounds of detention, such as dossier and other connecting documents as reflected in the order of detention, have not been supplied to the detainee, therefore, has been deprived of making an effective representation against the order of detention. The right guaranteed under Article 22(5) of the Constitution of India, as such, is infringed. It is further stated that the detainee is not much qualified and has read up to 9th Class and further added that the detainee has also been disabled from making an effective representation by not supplying him the translated copies of the ground of detention which are in

English language besides being in a hyper technical language which the detainee is not in a position to understand. Other points raised in the petition are also reiterated.

6. Per contra, learned counsel for the respondents herein submits that the detaining authority was right in passing the detention order against the detainee as his aim and objective is to disturb the maintenance of public order and to create an atmosphere conducive to propagation of secessionist ideology. Finding the activities of the detainee prejudicial to the maintenance of public order. District Magistrate Baramulla ordered for his preventive detention under J&K Public Safety Act, 1978. The material forming base of the detention has been supplied to the detainee. The grounds of detention have been read over and explained to the detainee in the language which he is conversant to. The order of detention does not suffer from any illegality and it has been passed with due diligence and in accordance with provisions of applicable law and rules.

7. Considered the rival submissions.

8. It has been noticed hereinabove that one of the contentions raised by the detainee is that he has not been furnished requisite material on which the detaining authority has arrived at subjective satisfaction. Photostat copy of the acknowledgement of the detainee regarding receipt of documents bearing correction vis-a-vis number of leaves, has been furnished. It is being represented in terms of unattested 33 leaves, were furnished to the detainee through ASI Gh. Ahmad Jan, Belt No. 118/Sgr. DPL Sopore and he also read over the same in English and explained in Kashmiri /Urdu. The affidavit of the said officer has not been brought on record. Omission on the part of the detaining authority to do so impels the court believes the stand taken on behalf of the detainee was not furnished. Non-supply of the material would amount to violation of Article 22(5) of the Constitution of India, so deprivation of a valuable right. The Hon'ble Apex Court in its judgment captioned

Thahira Haris etc. etc. Vs. Government of Karnataka & Ors, reported in AIR 2009 Supreme Court 2184, has held as under :

"27. There were several grounds on which the detention of the detainee was challenged in these appeals but it is not necessary to refer to all the grounds since on the ground of not supplying the relied upon document, continued detention of the detainee becomes illegal and detention order has to be quashed on that ground alone.

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detainee who has been detained in pursuance of the order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detainee at the earliest opportunity to make effective and meaningful representation against his

detention.

9. It is quite apposite to quote para 10 of the judgment of the Hon'ble Apex Court in "Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others", (1982) 3 SCC 440:

"10. Two propositions having a bearing on the points at issue in the case before us, clearly merge from the aforesaid resume of decided cases : (a) all documents, statements and other materials incorporated in the grounds by reference and which have influenced the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detenu along with the grounds or in any event not later than five days ordinarily and in the exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of his detention and (b) all such material must be furnished to him in a script or language which he understands and failure to do either of the two things would amount to a breach of the two duties cast on the detaining authority under Article 22 (5) of the Constitution. Relying upon this legal position counsel for the petitioner urged before us that in the instant case a breach of the mandate contained in Article 22 (5) read with Section 3 (3) of the COFEPOSA is clearly involved because of three things that have happened, namely, (i) supply of Urdu translations of the bulk of documents and statements incorporated in the grounds and relied upon by the detaining authority was delayed beyond the normal period of 5 days without any exceptional circumstances obtaining in the matter, (ii) the alleged exceptional circumstances purporting to justify the delay and the fact that the reasons had been recorded in writing were not communicated to the detenu which has prevented him from making effective representation against his continued detention and (iii) Urdu translations of quite a few documents and statements incorporated in the grounds and relied upon by the detaining authority have not been supplied to him at all. As regards the first two aspects counsel relied upon two decisions of the Patna High Court, namely, Bishwa Mohan Kumar Sinha v. State of Bihar and Ors.(1) and Bishwanath Prasad Keshari v. State of Bihar & Ors.(2) where the Patna High Court has taken the view that not merely should the exceptional circumstances exist justifying the delayed supply of the grounds of detention but these should be communicated to the detenu to enable him to make an effective representation. Counsel urged that because of the aforesaid failure the continued detention of the petitioner must be held to be illegal. We find considerable force in these submissions made by the counsel for the petitioner."

10. The detenu is shown to have been arrested during investigation of the said case in view of his involvement and there being likelihood of grant of bail in his favour as bail application has been moved before the competent Court. It is not, however, stated therein that any of the co-accused in the said case was admitted to bail.

11. In case "State Legal Aid Committee, J&K Vs. State of J&K and Ors." (AIR

2005 SC 1270) the Hon'ble Apex Court has observed that the detaining authority desirous to make the court believe that the relevant material was furnished to the detenu through some reasonable officer. The said effect ought to be incorporated by placing on record affidavit of the said officer. It be pertinent to quote herein:

"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 assessee and he was informed about his right to make a representation 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 detenu 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 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."

12. It is important to note that the translated copies of the grounds of detention have not been supplied to the detenu as can be gathered from the record, besides, the detenu is not much qualified and has read up to 9th Class. Hyper technical grounds of detention cannot be assumed to have been understood by the detenu. This vividly can be inferred to have prejudiced the detenu in the exercise of his right to make an effective representation against his detention. For this, Para 13 of the judgment of Hon'ble Apex Court in Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam vs. State of Gujarat and others', (1982) 3 SCC 440, shall be quite apposite to be reproduced herein:

"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 detainee 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 detainee, 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."

13. It shall be quite advantageous to quote following para from the judgment rendered in case captioned Powanammal vs. State of T. N. and another reported in 1999 (2) SCC 413:

"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 detainee but also to supplying their translation in script or language which is understandable to the detainee. Failure to do so would amount to denial of the rights of being communicated the grounds and of being afforded the opportunity of making a representation against the order."

14. For what has been stated above, the order of detention impugned bearing No. 137-DMB/PSA of 2019 dated 19.03.2019, passed by District Magistrate, Kupwara, is not found valid, as such, is quashed. The detenu namely Rayees Ahmad Parray @ S P S/o Ali Mohammad Parray R/o Matipora Rohama Rafiabab,

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

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

Disposed of