

(2009) 08 J&K CK 0009
In the Jammu And Kashmir High Court

Syed Asiya Andrabi

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 26-08-2009

Acts Referred:

Constitution of India, 1950 — Article 22, 22(5)

Citation : (2010) 1 JKJ 493

Hon'ble Judges : Muzaffar Hussain Attar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Muzaffar Hussain Attar, J.—Faith in an Institution is not secured by waving a magic wand. Faith is earned and confidence secured by

untiringly & honestly working and by repulsing outward influences. Institutions of higher judiciary are assigned most delicate and highly sensitive

and important role to protect and preserve the Constitution of country, it's basic features and all other laws of which the Constitution is fountain

head. The Constitution of India, provisions whereof are jealously guarded by the Constitutional Courts is the longest constitution in democratic

countries of the world; and the Constitutional Courts of this country have been enforcing the same to secure the goals underlying the said

Constitution without any fair and favour or without noticing the person who appears as a party before the Court. The Constitutional courts and for

that matter all courts of law do not see who are the parties before them but see the case before them and decide the same in accordance with the

law of the land. The Constitution of our country has provided protections to its citizens in it's all forms and shades. The delicate balancing act has

been done by framers of the constitution as between individual rights and rights of the society at large. On the one hand, fundamental rights of the

citizen of the state have been formulated and on the other hand the protection of State to which the individual belongs to, has been ensured.

The individual rights are guaranteed under Article 14, 16, 19 and 21 of the Constitution. In these provisions the rights and guarantees flowing from

Article 19 are personal to an individual while as other provisions of the Constitution 14, 16 and 21 are relatable to the society at large. Article 21

provides that no person shall be deprived of his life and personal liberty except according to the procedure established by law. A person can be

deprived of life and personal liberty in accordance with procedure established by law. The State in order to protect its larger interest has thus

power to deprive an individual of his life and his personal liberty but same can be done in accordance with the procedure established by law.

Article 21 of the Constitution appears to be framed more in the interests of the State than that of an individual. The issue being not only delicate but

of great importance, can be dealt with only when raised in the appropriate proceedings and matter considered.

2. The preventive detention laws have been enacted to prevent danger to the community as whole. The State which is duty bound to protect the

life, liberty and property of an individual is also under high obligation to protect territorial integrity, to prevent danger to security of state and/or to

public order. The security of the State in other words would bring within its bosom in bold and larger context, to accord protection to life, liberty

and property of the citizens. The preventive detention laws are thus regulatory and not punitive in nature. The laws of preventive detention are

aimed at, preventing danger to society and are not exercised to inflict punishment on an individual. The preventive detention laws are preventive in

nature and purpose underlying enacting such laws is to prevent the Commission of Offence which would endanger the security of the State and

public order. In order to prevent the society from suffering damage at large at the hands of an individual the preventive detention acts as a measure

of prevention. It is better to prevent a person from endangering the security of the State and/or public order than to inflict punishment on such a

person after the act is accomplished and damage done.

3. The question of importance arises as the persons who challenge sovereignty and integrity of a State, can they seek protection of the laws of same State. This question however, cannot be answered in these proceedings as the issue requires a serious debate so as to enable the court to come to the proper and lawful conclusion. The issue is again left open but not without informing conscience of the person who seeks protection of these laws while breaking same laws simultaneously. Let such individuals address this issue at the bar of their conscience.

4. An individual, who is deprived of his personal liberty in accordance with procedure established by law has to be deprived of the same by reaching to reasonable belief on the basis of his past activities. For depriving a person from his personal liberty under preventive detention laws, there is no requirement that same shall be done by coming to the conclusion that the activities of the individual has the potential of jeopardizing the security of the State and/or public order beyond reasonable bound. Past is stable and future is always contingent. It is not fear but responsibilities that keeps the society polite. Question would arise in some cases to ascertain how far protections of laws can be afforded to a person who relentlessly keeps violating the same laws. The laws may lose their tenacity.

5. The present case however, is required to be answered on the basis of the constitutional protection afforded to a person under Article 22 of the Constitution of India, who has been deprived of his personal liberty in accordance with preventive detention laws.

6. As already stated the courts do not see who is before it, the courts primary duty is to ensure that the constitutional provisions and other laws made by the State are enforced. It is interalia for this reason as well that Indian Judicial System is respected globally. The challenge in this petition is thrown to detention order which is reproduced as under:

Order No. DMS/PSA/17/2009 Dated 11.06.2009

Whereas, Senior Superintendent of Police, Srinagar vide his letter No. Legal/Det/09/2482/1731/1642-45 dated 10.06.2009 has produced material record, such as dossier and other connecting documents in respect of Syed Asiya Andrabi, w/o Ashaq Hussain Faktoo R/o Soura Srinagar. Whereas, I District Magistrate, Srinagar have perused the contents and recommendations carefully after it was produced before me in

respect of the said person.

Where as, the recommendation is to detain the said person under the Provisions of Jammu and Kashmir Public Safety Act. Whereas, after framing

the grounds of detention from the records submitted by the Senior Superintendent of Police, Srinagar and after applying my mind carefully and

having regard to the requirements of law, I am satisfied that with a view to prevent Syed Asiya Andrabi W/o Ashiq Hussain Faktoo R/o Soura

Sriangar from acting in any manner prejudicial to the security of the state, it is necessary to detain the said person under the Provisions of J & K

Public Safety Act.

Now, therefore in exercise of powers conferred u/s (8) of the J & K Public Safety Act, 1978, I, District Magistrate, Srinagar hereby direct that the

said Syed Asiya Andrabi be detained under PSA ;and is ordered to be lodged in District Jail Jammu.

Sd:

District Magistrate,

Srinagar.

7. The grounds of detention are also placed on record of this petition by the petitioner/detenu.

8. The petitioner/detenu has challenged the detention order on the grounds which are summarized as under;

a) The petitioner is not provided the record/material, dossier and other connected documents produced before detaining authority by respondent

No. 3.

b) The detenu has not been informed that she can make representation against the order of detention to the Government/Authority.

c) The detenu has not been furnished translated copy of the grounds of detention, so as to enable her to make the representation against the detention to the Government.

d) The grounds of detention are vague, uncertain, indefinite and ambiguous and for these reasons no effective representation could be made to the Government for setting the detenu at large.

9. On issuing notice in this petition, counter affidavit has been filed on behalf of respondents.

10. In the counter affidavit the grounds as summarized in the grounds of, detention have been referred to.

11. Para 2 and 3 under the ""brief resume of the facts"" is reproduced as under:

That the answering respondent received dossier from the SSP, Srinagar with the recommendations to detain the detenu for the reason of her

activities being prejudicial to the security of the State:

That the deponent on perusal of the record/material as well as dossier and after applying his own mind to the facts and circumstances of the case,

ordered preventive detention of the detenu under the provisions of J & K Public Safety Act, 1978 vide Order No. DMS/PSA/17/2009 dated

11.06.2009 on the grounds mentioned in the grounds of detention, which on the face of it warranted her preventive detention. The PSA warrant

was sent to the SSP, Srinagar for execution, where from same was forwarded to the concerned SHO for execution.

Heard learned Counsel for parties. Considered the matter.

12. Mr. M.A. Qayoom, Id. Counsel for petitioner/detenu has referred to judgment of this Court passed in HCP No. 198/08 dated 8.12.2008. The

Id. Counsel has submitted that the detenu was detained by District Magistrate Srinagar vide order No. DMS/PSA/16/08 dated 27th August 2008

which was challenged by the detenu in the above cited HCP No. 198/08. This Court has disposed of four H.C.Ps by one single judgment which

includes HCP of detenu also. The Id. Counsel has referred to said judgment in which this Court has considered plethora of judgments concerning

the preventive detention laws and more particularly Article 22(5) of the Constitution. This Court after referring to number of such judgments at

page 22 of the judgment applied the principles which emerge from the judgment referred to in the said judgment to the case of the detenu. This

Court reproduced all the grounds of detention in the said judgment and thereafter at page 27 of the judgment it was observed as under:

As would appear from these grounds of detention the detaining authority has laid down the allegations against the detenus but no details thereof are

given, to enable the detenus to make representation against such allegations. From these allegations it does not appear when and where the alleged

activities have been committed.

13. This Court, accordingly, quashed the detention order of the detenu. The Id.

Counsel for the detenu has further submitted that the material referred to in the detention order and grounds of detention has not been made available to the detenu which seriously prejudiced the detenu in making an effective representation against the detention order. The Ld. Counsel further submitted that a translated copy of grounds of detention has not been made available to the detenu which has also prejudiced her in filing the representation. The Ld. Counsel has referred to case titled *Thahira Haris etc. Vs. Government of Karnataka and Others*, ; case titled *Powanammal Vs. State of Tamil Nadu and Another*, ; case titled *Taramati Chandulal v. State of Maharashtra*, 1981 CriLJ 445 ; case titled *State of Maharashtra and Others Vs. Santosh Shankar Acharya*, ; case titled *Union of India (UOI) Vs. Ranu Bhandari*, ; case titled ""*Fayaz Ahmad Bhat v. State and Anr.*"" reported in 2003 (1) SLJ 241; case titled *Bashir Ahmad Sofi v. State and Ors.*"" reported in 2005 (1) SLJ 46; case titled *Smt. Raziya Umar Bakshi Vs. Union of India and Others*, .

14. The Id. Counsel, accordingly, submitted that there is grave violation of the constitutional safe guards available to the detenu under Article 22(5) of the Constitution and the detention order deserves to be quashed.

15. Ld. Counsel for respondents Mr. N.H. Shah, while arguing, submitted that the detention order called in question in this petition is legal and valid and in the facts of this case cannot be quashed. The Ld. Counsel referred to judgment to show that there has been total compliance with the provisions of J & K Public Safety Act of 1978 under which the detenu has been ordered to be detained. The Ld. Counsel has also produced the record to show that there has been total compliance with the provisions of J & K P.S. Act of 1978. The Ld. Counsel also referred to case titled *State of Tamil Nadu and Anr. v. Abdullah Kadher Batcha and Anr.*"" reported in 2009 SC 507, to state that the documents referred to in the grounds of detention need not to be provided to the detenu, and non supply of these documents to the detenu does not in any manner affect the validity of the detention order. The Ld. Counsel further referred to, two judgments of this Court reported in 2003(1) SLJ 241 and 2003 2 SLJ 511, to canvass the point that sufficiency and insufficiency as also the credibility of the material available with the detaining authority cannot be examined by the Court. The Ld. Counsel has also referred to and relied upon

judgment reported in 2002 (2) SLJ 584 to canvass the point that in case the detenu is illiterate there is no need to give translated copies to the detenu. The Id counsel has referred to D.B Judgment of this Court passed in LPA No. 162/07 to state that in view of the law laid down the petition deserves to be dismissed.

16. The record produced by Mr. N.H. Shah, Ld. AAG reveals that the detention order has been passed by detaining authority u/s 8 of J & K P.S. Act of 1978, on 11th June 2009. The record also reveals that detention order was executed on 12th June 2009 by one ASI. The grounds of detention were also served upon the detenu which were explained to the detenu in urdu/Kashmiri languages. The report evidencing this fact is signed by the detenu, the executing officer and Dy. Superintendent District Jail Jammu to whom the detenu was handed over. A separate receipt has also been executed by the detenu under her signature evidencing the fact that the grounds of detention (three leaves) have been handed over to the detenu on 12th June 2009 and same were read over and explained to the detenu in Urdu/Kashmiri languages which the detenu fully understood. The detenu has signed the said receipt also. The record further reveals that Govt. vide order No. Home/PB-V/2009 dated 17.06.2009 approved the detention order and it was provided in the said order that the period of detention shall be determined on the opinion of the report of Advisory Board. The State Advisory Board on 2nd of July 2009 considered the matter, heard the detenu and approved the action of District Magistrate Srinagar, whereunder the detenu was ordered to be detained under the provisions of J & K Public Safety Act, 1978. Vide Govt. order No. Home/PB-V/1374/2009 dated 20th July 2009 the Government confirmed the detention order and the detenu was ordered to be detained for a period of 12 months. This confirmation order was passed in exercise of powers conferred by Section 17(1) of J & K P.S Act, 1978. Thus facts show that the Government has complied with the procedural part of the provisions of J & K P.S. Act, 1978, and there has been no infraction of any of the protections available to the detenu.

17. The matter thus requires to be considered only on the ground as to whether the documents referred to in the detention order and grounds of detention are documents which were relied upon by the detaining authority while

passing the detention order and thus would become imperative on the authority to provide the copy of material to the detenu.

18. But before advertent to this aspect of the case, it becomes necessary to bring it on record that the grounds of detention which have been

provided to the detenu excepting the allegations in respect of May/June 2009 activities is replica of the grounds of detention though in re-arranged

form of the grounds of detention on the basis of which the detenu was earlier ordered to be detained. This Court while considering the grounds of

detention has already ruled that they do not provide any details so as to enable the detenu to make an effective representation against such

allegations. The judgment of this Court having not been challenged by the respondents has attained finality and binds the parties. In this petition the

ground of detention excepting those related May/June 2009 allegations are thus rendered in consequential and cannot be looked into.

19. The Hon'ble Supreme Court in case Vallapally Plantations Pvt. Ltd. Vs. State of Kerala, and case titled Authorised Officer (Land Reforms)

Vs. M.M. Krishnamurthy Chetty[OVERRULED], , held that any order though, not legal but having attained the finality binds the parties. The

relevant paras 23, 24 from Vallapally plantation's case and para 2 from Authorised Officer (land Reform's) are reproduced as under:

23. Considering the question regarding applicability of Section 85(9) to the case in hand in the conspectus of statutory provisions we are of the

view that answer to the question is in the negative. The provision in Section 85(9), as we see it, is intended to enable the Board to set aside its

order under Sub-section (5) or Sub-section (7), as the case may be. The power vested in the Board under the provision is in wide terms, and

therefore, the necessity for circumspection in exercise of the power. The provision is intended to empower the Board to correct errors in its orders

and not to upset judgment/order/decreed of competent courts which are binding on the parties. To hold otherwise will amount to vesting powers to

reopen any proceeding disposed of by a competent Court at any point of time (there is no period of limitation provided in the section) which may

result in unsettling positions settled between the parties. On a fair reading of the provision it is to be held that the power to set aside its order and

reopen a proceeding should be exercised by the Board in a fair and reasonable

manner. In a case where the dispute on being determined by the Taluk Land Board was carried in revision to the High Court by the person affected or by the Government and the revisional order passed by the High Court was not challenged before superior Court and thus attained finality, to vest the power in the Taluk Land Board to ignore such an order and reopening the proceeding will not only result in unsettling settled positions between the parties but also go against judicial discipline.

24. No doubt in the present case the order that was sought to be set aside was of the Board. But the said order was passed in pursuance to the directions of the High Court in the revision petition. In other words in substance and in effect, in passing the order the Board was only complying with the direction of the High Court. To vest jurisdiction in the Board to set aside such an order will be permitting the Board to interfere with the decision of the High Court which has attained finality inter-parties.

2. According to the appellant once the judgment on the basis of which the High Court had directed to dispose of the dispute relating to the excess land had been reversed by this Court, the Authorised Officer was justified in following the judgment of this Court instead of the judgment of the High Court. It need not be pointed out that the order passed by the High Court attained finality as it was not challenged before the Supreme Court.

The order passed by the high Court directing the Authorised Officer to examine the dispute in the light of the judgment of the High Court in the case of Naganatha Ayyar v. Authorised officer became final although the judgment on which the grievance had to be examined itself was reversed later by this Court. We find no fault with the reasoning of the High Court. It is well settled that even orders which may not be strictly legal became final and are binding between the parties if they are not challenged before the superior courts. In the result the appeal fails and it is dismissed.

20. The allegations referred to May/June 2009 activities in the grounds of detention are bald, general in nature and vagueness thereof is writ large.

The reference made to ""Idd Gah Chaloo Call"" for 17.06.2009 and Call for observing complete shut down on 11.06.2009, purportedly reported in Greater Kashmir"" dated 10.06.2009, has thus, become basis of passing the detention order impugned in this petition. The detaining authdrity obviously relied upon ""Idd Gah Chaloo Call and Shut down Call"" reported in

Greater Kashmir. The Ld. Counsel for the respondents when asked as to which material has been provided to the detenu, the Ld. Counsel after referring to the record very fairly submitted that it is three leaves comprising of grounds of detention which have been provided to the detenu and no other material has been provided to the detenu.

21. A perusal of the order of detention reproduced in this judgment would show that the detaining authority has received ""dossier and other connected documents"" in respect of the detenu. The perusal of the detention order further reveals that the detaining authority has perused the contents and recommendations carefully which were produced before him. The detention order further reveals that recommendations have been made to detain the detenu. The detaining authority thereafter has stated in the detention order that after framing the grounds of detention from the records submitted by Sr. Superintendent of Police and after applying his mind carefully and having regard to the requirements of law being satisfied preventing the detenu from acting in any manner prejudicial to the security of the State passed the impugned detention order. The submission so made in the detention order coupled with the averments made by respondents 2 and 3 in the counter affidavit what emerges is that the detaining authority while entering into the subjective satisfaction has considered the ""dossier, other connected documents"" and the recommendations made to him. Neither the detention order nor counter affidavit and not even the record discloses as to which were other connected documents and recommendations which became basis for entering into satisfaction to order for detaining the detenu u/s 8 of the J & K P.S. Act, 1978. This very fact demonstratively shows that the order of detention is not based on subjective satisfaction of the detaining authority but is based on the recommendations. The detaining authority has thus in the facts and circumstances of this case abdicated his statutory function and has passed the detention order on some recommendations. The detention order is rendered illegal on this score alone.

22. However, it becomes necessary to state that detention order is rendered illegal as the copies of the documents which are referred to in the detention order and the copy of the News paper as also the material about ""Idd Gah Chaloo Call"" on which circumstances the detaining authority

has relied upon, in passing the detention order have admittedly not been made available to the detenu. The detenu is thus deprived of making

effective representation to the competent authority which in turn has violated the constitutional guarantee available to the detenu under Article 22(5)

of the Constitution of India. For non compliance of this provision of Constitution of India the detention order of the detenu is rendered illegal.

23. The argument of the Ld. Counsel for the detenu that a translated copy of the grounds of detention has not been made available to the detenu is

rendered in-consequential. It is nowhere pleaded in the petition that detenu does not understand English language. In absence of such claim it was

not required for the detaining authority to provide translated copy of the grounds of detention as also detention order to the detenu. The other

grounds taken by the Ld. Counsel for the petitioner/detenu in view of the findings recorded above need not to be considered and dealt with.

24. The Ld. Counsel for the respondents has referred to judgment reported in AIR 2009 SC 507, but has failed to show that the document

mention whereof is made in the detention order and grounds of detention were only referred to and not relied upon by the detaining authority. In

the facts of this case that the detaining authority has relied upon this document for passing of detention order. The judgment cited at bar thus does

not help the respondents. The other two judgments reported in 2003 SLJ were cited without any purpose as no argument was raised by the Ld.

Counsel for the petitioner/detenu to adjudge the sufficiency and insufficiency of the material and/or to evaluate the ground of detention. The Ld.

Counsel for the petitioner/detenu based his argument on infringement of constitutional guaranteed as provided under 22 (5) of Constitution of India

available to the detenu. The Ld. Counsel for the respondents has referred to SLJ 2002 on the pleas that when detenu is illiterate then he/she not to

be provided translated copies of grounds of detention/detention order. The judgment cited at bar is also misplaced for the reasons that it is not the

case of the detenu that she is illiterate.

25. The Ld. Counsel for the respondents also referred to AIR 2009 SC 507. This case is also based on the legal proposition that the documents

which are referred to and not relied upon for passing of detention order need not to be provided to the detenu. Para 8 of the judgment is

reproduced as under:

While examining whether non supply of a document would prejudice a detenu the Court has to examine whether the detenu would be deprived of

making an effective representation in the absence of a document. Primarily, the copies which form the ground for detention are to be supplied and

non supply thereof would prejudice to the detenu. But documents which are merely referred to for the purpose of narration of facts in that sense

cannot be termed to be documents without the supply of which the detenu is prejudice.

26. In view of the facts of this case, the judgment supports case of the detenu than that of the respondents. The decision of the case in LPA162/07

proceeds entirely on different facts. This judgment also does not support the respondents.

27. For the reasons stated above, this petition is allowed. The detention order No. DMS/PSA/17/2009 dated 11.06.2009 is quashed. The detenu

is ordered to be released from custody unless required in any other case.

Record of the case be returned to Ld. Dy. Advocate General.

28. Before parting with this judgment I am reminded of one important historical event. The ""Socrate's"" was convicted and sentenced to death.

During his imprisonment he was to die by drinking cup of hemlock. While in jail ""Socrates"" friends afforded him the chance to escape, but he did

not accept the offer. The ""Socrates"" very honestly stated that the laws of ""Athens"" have protected him all his life, and that he could not disobey

them and give them slip even if it costs his life.