

Ghulam Fatima Vs. State and ors.

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Court : Jammu and Kashmir

Decided On : Feb-17-1992

Reported in : 1993CriLJ2719

Judge : S.M. Rizvi, J.

Acts : Jammu and Kashmir Public Safety Act, 1978 - Sections 8 and 13; ;Terrorist and Disruptive Activities Act - Sections 3 and 4; ;Jammu and Kashmir Business Rules - Rules 11 and 12; ;Constitution of Jammu and Kashmir - Section 45; ;
[Constitution of India](#) - Article 22 and 22(5)

Appeal No. : Habeas Corpus Petn. No. 903/91

Appellant : Ghulam Fatima

Respondent : State and ors.

Advocate for Def. : U.K. Jalali, Sr. AAG

Advocate for Pet/Ap. : Z.A. Qureshi, Adv.

Disposition : Petition allowed

Judgement :

ORDER

S.M. Rizvi, J.

1. By medium of this petition for a writ of habeas corpus, the detention of Manzoor Ahmad Kha, alias Bitto, Under Section 8 of the J. and K. Public Safety Act, (hereinafter referred to as Act), has been challenged on various grounds as enumerated herein.

2. The counter has been filed by the Addl. Chief Secretary (Home) denying the allegations made in the petition.

3. I have heard the learned counsel for the parties. I have examined the record produced by Mr. Jalali. I have gone through the file also.

4. The first argument of Mr. Qureshi was that the order impugned has been passed by the Addl. Chief Secretary (Home), who has no power under the Act, to do so, and therefore, it was invalid.

5. In the counter it is stated that the order has been passed by the Govt, and the Addl. Chief Secretary has only authenticated the same.

6. From the perusal of original record produced by Mr. Jalali (File No. Home-I SD-355/90), I have not been able to find the original order which was supposed to be signed and/or approved by the Governor himself. The grounds of detention on the file also have not been signed and/or approved by any authority, which in the present case were required to be considered by the Governor himself for his subjective satisfaction, as the order of detention has been allegedly passed by the Government, the respondents were directed by the court to produce the record pertaining to the detention of the detenu. They were required to produce the record in original and as a which (sic) about the said matter. According to Mr. Jalali, he has produced the required record, which is the file as mentioned above. The said file which is said to be the original record, does not contain any order of detention signed and/or approved by the Governor. The grounds of detention on the said file too are not signed and/or approved by the Governor.

7. No doubt under Rules 11 and 12 of the J & K Business Rules, read with Section 45 of the Constitution of the J & K, if any order is authenticated by any competent authority, it is to be presumed to be a valid order. However, where a specific

allegation has been made about the incompetence of the authority, it is for the State to rebut such allegations by producing the original record or by filing an affidavit by the competent authority in this behalf.

8. In the present case the record has been produced which instead of rebutting the allegation of the petitioner has supported the same. There is no original order on the file signed by the Governor. The grounds of detention too have not been signed by him.

9. In this view of the matter, how can the court presume that the order has been passed by the Governor. Even the authentication of the order in original is not on the file.

10. It may be pertinent to mention here that presently the State of J & K is under President's rule and, therefore, the Govt. of J & K would mean the Governor of J & K. Therefore if any order is required to be passed by the Government, it is to be signed by the Governor. The grounds of detention furnished to the detenu is a xerox copy, and in that form bears the signatures of the Addl. Chief Secretary (Home). It is not mentioned anywhere in the said copy that it is by order of the Governor. Even on the office copy of the original file, it is not stated anywhere that it is by order of the Governor. The court is, therefore, justified to hold that the order of detention has not been passed by the Governor. The grounds of detention too are not under the orders of the Governor.

11. The order of detention as also the grounds of detention are signed by the Addl. Chief Secretary (Home), and there is no approval of the Governor on the file. The Addl. Chief Secretary (Home) is no entity under the Act to pass any order Under Section 8.

12. In these circumstances of the case, 1 hold that the order of detention impugned in this petition has been passed by an incompetent authority and therefore not sustainable in the eye of law. It is a fraud played not only on the Act but also on the constitution as well, that orders of detention are passed by incompetent authority detaining a citizen unlawfully.

13. The second argument of Mr. Qureshi, was that the grounds of detention have been furnished to the detainee beyond time as specified in the Act, which also vitiates the order of detention.

14. Admittedly the detainee was in custody of the police when the order of detention was passed against him on 27-8-1990. He stood arrested in FIR No. 3 of 1990 for the offence Under Section 3/4 TADA Act, long before the said order was passed. The order of 'detention' has been passed on 27-8-1990. In the grounds of detention it is stated that he has been 'detained' Under Section 8 of the Act. The word 'detailed' means his detention in past, and in the least, it is to be presumed that when the grounds were signed he stood detained either on that day or before that. Even if we stretch it too far, it can be said that the grounds of detention were signed when the order of detention was passed. The said order was passed on 27-8-1990, as stated above. As in the grounds of detention it is said that he has been 'detained' it would mean that he has been detained on 27-8-1990. In terms of Section 13 of the Act, the grounds were required to be furnished to the detainee, within five days from the day of his detention. The grounds however can be furnished within ten days in each case, where, for the reasons to be recorded by the detaining authority, if could not be done within five days.

15. In the counter it is stated that the grounds of detention were provided to the detainee on 4-9-1991 along with the order of detention. There is a serious contradiction between the statement made in the counter and the grounds of detention in this regard. The order of detention having been passed on 27-8-1990, the grounds of detention were supposed to be signed on that day or earlier, and in no case, later. In the grounds of detention it is stated that 'he is hereby ' detained' on 27-8-1990 itself, or even earlier as he was already under arrest, Under Section 8 of the Act. The grounds of detention were to be furnished to him within five days from 27-8-1990. This has not been done. Admittedly they were furnished to him on 4-9-1990. i.e. after seven days of his detention in any case. No reasons have been recorded anywhere for not furnishing him the same within five days. As already stated it could be done within ten days also provided reasons are recorded by the detaining authority for not furnishing the same within five days.

16. The third argument of Mr. Qureshi, was that in the grounds of detention it is stated that specific grounds of detention were not furnished to the detainee. According to him non-supply of grounds of detention was violative of Article 22(5) of the [Constitution of India](#), vitiating the order of detention.

17. From the perusal of grounds of detention, it transpires that it is stated therein that specific grounds of detention were not disclosed to him. This is flagrant violation of the constitutional guarantee as enshrined in Article 22 of the [Constitution of India](#) and vitiates the order of detention. After all how can a detainee make an effective representation against his detention unless the grounds of detention are furnished to him. Under Article 22(5) of the Constitution, it is the constitutional right of a detainee to make a representation against his detention. He is not in a position to make such representation effectively unless grounds of detention are furnished to him.

For this reason also the order of detention is bad under law and not sustainable. For this reason also the order of detention is unconstitutional.

18. The fourth argument of Mr. Qureshi, was that no material was furnished to the detainee to enable him to make a representation against the order of his detention, which also invalidates the same.

19. From the perusal of the file, it appears that the order of detention has not been given to the detainee however, from the perusal of the record produced by Mr. Jalali, the order of detention was traced out. In that order there is no mention of any material having been furnished to the detainee. The question is that on what material has the order been passed by the detaining authority. The detaining authority has to base its subjective satisfaction on some material produced before him that the activities of the detainee are prejudicial to the security of the State and for preventing him to do so it was necessary to detain him. In absence of any such material, where from would the authority assume its subjective satisfaction.

20. On the record, copy of the FIR No. 3 of 1990, in which the detainee was arrested, as also the dossier of the S.P. (CID), have been found. Presumably the detaining authority has considered the said documents for his subjective

satisfaction, as there is no other material on the record. If it is so, the copies of the FIR and the dossier were required to be supplied to the detenu, alongwith grounds of detention, to enable him to make a representation against his detention. There is nothing on the record to show that the said documents were furnished to him. Non-supply of the same has deprived the detenu of his right to make a representation, which is violative of Article 22(5) of the [Constitution of India](#). For this reason also the order of detention is bad in law.

21. On the record produced by Mr. Jalali, I have also found the order of the Advisory Board. From its perusal it transpires that the detenu was not produced before the said Advisory Board. It has been stated by the Advisory Board that the Government declined to produce the detenu before it.

22. On the record, there is nothing to show that any query was made from the detenu as to whether he wanted to be heard by the said Board. The query was necessarily to be made from him as to whether he wanted to be heard by the said Board. If he wanted to avail of such opportunity, the Government was bound to produce him before the said Board. In absence of any such query, it is manifest that the Government has deprived; him of this opportunity, which also vitiates the order of detention.

23. For the above mentioned reasons, I accept the petition and hold the order of detention unconstitutional, illegal and bad in law. The said order is hereby quashed and by a writ of habeas corpus the detenu ordered to be set at liberty forthwith. The Superintendent Sub-Jail Hiranagar, or the officer in-charge of the Jail, wherever the detenu is presently lodged, is directed to implement this order at once.

The file be consigned to records after due completion. The record produced by Mr. Jalai, shall be returned to him against a proper receipt.