HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

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HCP No.34/2013
IA No.21/2013, 31/2013

Date of Decision: 11/09/2013

Nissar Ahmad Bhat

Versus

State and others

Coram:

Hon'ble Mr. Justice Tashi Rabstan, Judge

Appearing counsel:
For petitioner(s) : Mr. M. A. Qayoom, Advocate
For respondent(s) : Mr. M. A. Chashoo, Addl. Adv. General

i) Whether approved for reporting in Press/Media : Yes/No/Optional

ii) Whether to be reported in Digest/Journal : Yes/No

1. Detenu – *Shri Nissar Ahmad Bhat son of Abdul Rahim Bhat resident of Nai Basti, Arwani, Anantnag*, through his father seeks quashment of detention order No.82/DMA/PSA/DET/2013 dated 14.03.2013, passed by District Magistrate, Anantnag (for brevity "*Detaining Authority*"), directing preventive detention of the detenu.

2. The detention order, through the medium of writ petition on hand, has been challenged on the grounds that the detenu was arrested on 01.12.2007 and detained under the provisions of J&K Public Safety Act by District Magistrate Srinagar vide Detention Order No.DMS/PSA/12/2008 dated 11.07.2008,

which was challenged in petition – HCPNo.185/2008. The said detention order is stated to have been quashed vide order dated 27.12.2008. The detenu was not released but was produced before Sessions Judge, Anantnag on 30./07.2009 in FIR No.131/2007 P/S Bijbehara. The detenu was directed to be released vide order dated 30.07.2009 passed by Sessions Judge, Anantnag. However, detenu thereafter was again vide Detention Order No.Det/PSA/DMA/09 dated 04.09.2009, detained, which was again challenged in HCP No.199/2009. It is contended that during consideration of said petition, learned counsel for respondents made a statement that detention order dated 04.09.2009 was revoked, as a result thereof, the said petition – HCP No.199/2009 was dismissed as having been rendered infructuous. It is averred that despite statement as regards revocation of detention order, the respondents did not release the detenu till another detention order No.Det/PSA/ DMA/10/03 dated 26.05.2010 was slapped on detenu. The said detention order dated 26.05.2010 came to be challenged in HCP No.225/2010, which was allowed by this Court and respondents directed to release detenu. However, according to petitioner, detenu was booked in FIR No.216/2006. It is contended that detenu vide order dated 13.08.2012 passed on the application by Sessions Judge, Anantnag, was directed to

be released but again Detention Order No.77/DMS/PSA/DET of 2012 dated 08.11.2012 was slapped on detenu. The said detention order dated 08.11.2012 came to be challenged through medium of petition – HCP No.170/2012. It is pleaded that while said petition – HCP No.170/2012, was pending consideration, the impugned detention order dated 14.03.2013 came to be passed by respondent no.2.

3. Respondents, despite opportunities granted, have not opted to file their Reply. However, learned Additional Advocate General has made available the record.

4. Heard learned counsel for the parties and perused the record.

5. The first ground urged in the instant petition to assail the detention order is that the grounds of detention pressed into service to place the detenu under preventive detention, are identical to the grounds of detention in support of earlier detention orders which either were quashed or revoked. A closer look at the grounds of detention in support of detention orders dated 11.07.2008, 04.09.2009, 26.05.2010, 08.11.2012 and 14.03.2013 reveal that the grounds of detention intriguingly are identical, without any change in the sequence of events and activities attributed to detenu and the reasons that prompted detaining authority to pass detention orders.

6. The content and composition of the grounds of detention in successive detention orders remains same with only minor additions attributed to the developments subsequent to the detention orders, unmindful of the fact that the detenu all along remained in detention. Once we find the grounds of detention in support of quashed/revoked detention order(s) and one under challenge to be, in substance, identical, it is next to be seen what is its fall out on the detention order. The question surfaced in ***Chhagan Bhagwan Kahar v. N. L. Kalna and others [AIR 1989 SC 1234].*** The Supreme Court held:

> *"12. It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention, there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari, the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing rule, it nullifies the entire order.*

7. In ***Jahangir Khan Fazal Khan Pathan v. The Police Commissioner, Ahmedabad and another [AIR 1989 SC 1812]***, the Supreme Court held:

> *"……It is, therefore, clear that an order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the Court, and if such previous grounds of detention are taken*

> *into consideration while forming the subjective satisfaction by the detaining authority in making a detention order, the order of detention will be vitiated. It is of no consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered."*

8. Again in ***Ramesh v. State of Gujarat [AIR 1989 SC 1881]***, it is held:

> *"10. On a careful scrutiny of grounds of detention, we unreservedly hold that the detaining authority has taken into consideration the two criminal cases mentioned under Sr. Nos.1 and 2 of the table which where the materials in the earlier order of detention that had been quashed and that it cannot be said that those two cases are mentioned only for a limited purpose of showing the antecedents of the detenue."*

9. It is well settled law that when the detention order is quashed by the Court, grounds of the order so quashed should not be taken into consideration, either as whole or in part, even along with fresh grounds of detention for drawing subjective satisfaction to pass fresh detention order. It is to be appreciated that once the Court sets-aside the detention order, it nullifies the entire order. The Detaining Authority, therefore, cannot make use of the grounds that were relied upon to pass the earlier detention order(s) or activities that were detailed in such grounds. No such recourse is available where the earlier detention order is struck down by the Court as it sets at

naught not only detention order but the grounds on which the detention order is based. A reference in this regard may as well be made to law laid down in ***Masrat Alam Bhat v. State & Others [2003 (II) SLJ 570]; Mst. Zahida v. State & Others [2008 (1) SLJ 245]; Masrat Alam Bhat [2008 (II) SLJ 689] and Fayaz Ahmad Wani v. State of J&K [SLJ 2003(I) 272]***.

10. In ***Dr. Ram Krishan Bhardwaj v. The State of Delhi and Ors.*** **[1953 SCR 708]**, the Supreme Court, while interpreting Article 22(5) of the Constitution, observed as under:

> *".....Preventive detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In this case, the petitioner has the right, under article 22(5), as interpreted by this Court by majority, to be furnished with particulars of the grounds of his detention "sufficient to enable him to make a representation which on being considered may give relief to him." We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of article 22. That not having been done in regard to the ground mentioned in sub-paragraph (e) of paragraph 2 of the statement of grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of article 21. The petitioner is therefore entitled to be released and we accordingly direct him to be set at liberty forthwith."*

11. The right which the detenu enjoys under Article 22(5) is of immense importance. In order to properly comprehend the

submissions of the detenu, Article 22(5) is reproduced as under:

> *"22(5). 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 a representation against the order."*

12. This Article of the Constitution can be broadly classified into two categories: (i) the grounds on which the detention order is passed must be communicated to the detenu as expeditiously as possible and (ii) proper opportunity of making representation against the detention order be provided.

13. The preventive detention law makes room for detention of a person without a formal charge and without trial. The person detained is not required to be produced before the Magistrate within 24 hours, so as to give an opportunity to the Magistrate to peruse the record and decide whether the detenu is to be remanded to police or judicial custody or allowed to go with or without bail. The detenu cannot engage a lawyer to represent him before the detaining authority. In the said background it is of utmost importance that whatever procedural safeguards are guaranteed to the detenu by the Constitution and the preventive detention law, should be strictly followed. The Supreme Court in

Rekha v. State of Tamil Nadu Through Secretary to Government and Anr. [(2011) 5 SCC 244], while emphasizing need to adhere to the procedural safeguards, observed:-

> *"It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as "jurisdiction of suspicion", The Detaining Authority passes the order of detention on subjective satisfaction. Since Clause (3) of Article 22 specifically excludes the applicability of Clauses (1) and (2), the detenue is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital.*

14. The Court making reference to law laid down in ***Kamleshwar Ishwar Prasad Patel Vs. Union of India and Others (1995) 2 SCC 51 (para 49)*** observed:

> *"the history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of the nature of alleged activities of the detenue".*

15. The Court also quoted with approval following observation made in ***Ratan Singh Vs. State of Punjab and others (1981 (4) SCC 1981) :-***

> *But the laws of preventive detention afford only a*

> *modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at- least those safeguards are not denied to the detenu's"*

16. Law on the subject was succinctly laid down by the Apex Court in ***Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and another (1987 2 SCC 22)*** in following words:

> *"The procedural requirements are the only safeguards available to a detenue since the court is not expected to go behind the subjective satisfaction of the Detaining Authority. The procedural requirements are, therefore to be strictly complied with if any value is to be attached to the liberty of the subject and the Constitutional rights guaranteed to him in that regard".*

17. The Constitution of India – Article 22(5) and Section 13, J&K Public Safety Act 1978, guarantee two important safeguards to the detenu – first that the detenu is informed of grounds of detention that prompted the detaining authority to pass the detention order and second that the detenu is allowed to represent against his/her detention immediately after the detention order is made or executed. The Constitutional and Statutory safeguards guaranteed to the detenu are to be meaningful only if the detenu is handed over the material referred to in the grounds of detention that lead to subjective satisfaction that the preventive detention of detenu is necessary to prevent him from acting in any manner prejudicial to the

security of the State of public order and further it is ensured that the grounds of detention are not vague, sketchy and ambiguous so as to keep the detenu guessing about what really weighed with the detaining authority to make the order.

18. The detention order makes mention of material record such as dossier and other connecting documents relied upon by the detaining authority while making the detention order. The detention order also makes reference to a communication received from Senior Superintendent of Police, Anantnag. The detention record does not convincingly establish that all the documents referred to in the detention order were actually supplied to the detenu. The endorsement on the overleaf of detention order made by the Executing Officer – Mohd Ashraf (SI) DPL Anantnag No.6631/NGO, at the time of execution of detention order, does not make a reference to the documents in question and does not record that such documents were supplied to detenu at the time of execution of detention order or immediately thereafter. The grounds of detention make reference to case - FIR No.33/2008 under Section 7/25 A.Act, 17, 18 & 20 ULA(P) Act P/S Batamaloo; FIR No.40/2007 P/S Rajbagh; FIR No.131/2007 under Section ¾ Exp. Sub Act P/S Bijbehara; and FIR No.216/2006 under Section ¾ Exp. Sub. Act, 307 RPC P/S Anantnag, to have been registered against

the detenu. The involvement of the detenu in the aforementioned cases appears to have weighed with the detaining authority while making detention order. The record does not indicate that copies of aforementioned First Information Reports, statements recorded under section 161 Cr.P.C. and other material collected in connection with investigation of aforesaid case(s), were ever supplied to the detenu. The material, mentioned above, thus assumes significance in the facts and circumstances of the case. It needs no emphasis that the detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22 (5) of Constitution of India and Section 13 of Jammu and Kashmir Public Safety Act, 1978, unless and until the material on which the detention order is based, is supplied to him. It is only after the detenu has all said material available, that he can make an effort to convince the Detaining Authority and thereafter Government that their apprehension as regards his activities are baseless and misplaced. If the detenu is not supplied material, on which detention order is based, he cannot be in a position to make an effective representation against his detention order. The failure on the part of Detaining Authority to supply material relied at the time of making detention order to detenu, renders detention

order illegal and unsustainable. While holding so, support is drawn from law laid down in ***Thahira Haris Etc. Etc. v. Government of Karnataka [AIR 2009 SC 2184]; Union of India v. Ranu Bhandari [2008, Cr. L. J. 4567]; Dhannajoy Dass v. District Magistrate [AIR, 1982 SC 1315]; Sofia Ghulam Mohammad Bam v. State of Maharashtra & ors [AIR, 1999, SC 3051]; and Syed Aasiya Indrabi v. State of J&K & ors [2009 (I) S.L.J 219]; and Union of India v. Ranu Bhandari (2008 Cr. L. J. 4567);***

19. Article 22(5) of Constitution provides a precious and valuable right to a person detained under preventive detention law - J&K Public Safety Act 1978, to make a representation against his detention. It needs no emphasis that a detenu, on whom preventive detention order is slapped, is held in custody without a formal charge and trial. The detenu is held in custody on a mere suspicion that his apprehended activities may be prejudicial to the maintenance of public order or security of the State. Article 22(5), Constitution of India and Section 13 of the Act, thus make it obligatory for Detaining Authority to provide detenu an earliest opportunity of making an effective and meaningful representation against his detention. The object is to enable the detenu to convince the Detaining Authority and Government, as the case may be, that all apprehensions

regarding his activities are grossly misplaced and his detention is unwarranted. To make the Constitutional and Statutory right available to detenu meaningful, it is necessary that detenu be informed with all possible clarity what is/are apprehended activity/ies that persuaded Detaining Authority to make detention order. In case grounds of detention are vague, ambiguous and confusing, the detenu cannot be expected to make a representation against his detention.

20. In the instant case the detenu, while lodged in jail, is alleged to have provoked/instigated youth against government establishment and create law and order problem. The detenu is also alleged to have been in contact with his associates through the persons who were meeting him during detention in jail. The detenu was not provided the particulars of youth, who are alleged to have been instigated/provoked by detenu or that of the persons who are alleged to have met him to remain in contact with his associates. The detenu, in absence of such details, could not be expected to have been in a position to give his side of story and persuade the detaining authority and other respondents that the allegations against him were bereft of any basis. To sum up, the grounds of detention that constitute basis for the detention order in question are ambiguous, vague, uncertain and hazy. A person of ordinary prudence would not

be in a position to explain his stand in reply to the grounds of detention detailed by the detaining authority. The detenu has been kept guessing about the facts and events that weighed with the detaining authority and prompted detaining authority to record subjective satisfaction regarding sufficiency of the material to warrant preventive detention of the detenu. These are only few instances to illustrate that the grounds of detention are vague and ambiguous and bound to keep the detenu guessing about what really was intended to be conveyed by the detaining authority. It is well settled law that even where one of the grounds relied upon by the Detaining Authority to order detention is vague and ambiguous, Constitutional and Statutory right of the detenu to make a representation against his detention are taken to have been violated. Reference in this regard may be made to law laid down in ***State of Maharashtra and others v. Santosh Shankar Acharya [AIR 2000 SC 2504]; Chaju Ram v. State of J&K [AIR 1971 SC 263]; Dr.Ram Krishan v. The State of Delhi & ors. [AIR 1953 SC 318]; Mohd Yousuf Rather Versus State of J&K [AIR 1979 SC 1925]; and Ghulam Nabi Shah v. State of J&K & others [2005(I) SLJ 251]***.

21. For the reasons discussed above, the petition is allowed and detention order No.82/DMA/PSA/DET/2013 dated

14.03.2013, passed by the District Magistrate, Anantnag – respondent No. 2, directing detention of *Shri Nissar Ahmad Bhat son of Abdul Rahim Bhat resident of Nai Basti, Arwani, Anantnag*, is quashed. The respondents, in view of quashment of detention order, are stripped of any authority to continue to detain the detenu under order No. 82/DMA/PSA/DET/2013 dated 14.03.2013. Resultantly, the respondents are directed to release the detenu from preventive detention, ordered vide order No. 82/DMA/PSA/DET/2013 dated 14.03.2013, provided he is not required in connection with any other case, provided he is not required in connection with any other case.

22. Disposed of.

23. Detention record be returned to counsel for respondents.

(Tashi Rabstan)
Judge

Srinagar
11/09/2013
Ajaz Ahmad