
(2018) 11 J&K CK 0099

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 256 Of 2018

Adil Hussain Dar @APPELLANT@Hash State Of Jammu & Kashmir And Ors

Date of Decision : 27-11-2018

Acts Referred:

Constitution Of India, 1950 — Article 22(5)

Citation : (2018) 11 J&K CK 0099

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Asif Maqbool

Judgement

1) In terms of order No.111/DMS/PSA/2017, Adil Hussain Dar was taken into preventive detention. The said order was challenged in HCP No.14/2018 which was allowed vide judgment dated 16.07.2018. The said detention order was quashed. The detainee, however, was not released but was again ordered to taken into preventive detention pursuant to detention order No.125/DMS/PSA/2018 dated 21.08.2018 and lodged in Central Jail, Kot Bhalwal Jammu. Validity of the said order is questioned by the medium of petition in hand on various grounds enumerated therein.

2) Contention of the learned counsel for the petitioner is that the grounds of detention which formed base of the earlier orders of detention could not be made base for the impugned order of detention. Once the detention orders are quashed, whatever grounds formed base, in law, cannot be used for passing fresh order of detention unless fresh facts, would emerge after release of the detainee from the custody warranting detention but when the detainee is never released, there could be no new facts so as to form base for the grounds of detention. In this connection, learned counsel placed reliance on the judgments reported in AIR 1974 SC 1155 and AIR 1974 SC 432. In the said judgments the principle, as has been laid down, is that fresh order of detention on same grounds on which earlier order was passed, is illegal. It has also been settled that fresh detention can be ordered only on fresh facts.

3) Para 12 of the judgment rendered by the Hon'ble Apex Court in "Chhagan

Bhagwan Kahar Vs. N. L. Kalna and others" (AIR 1989 SC 1234) is relevant to be quoted:

"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.

4) According to learned counsel for the respondents, the past conduct of the detinue has to be taken into consideration as has been done. In support thereof, learned counsel has relied on the judgment "Wasiuddin Ahmed Vs. District Magistrate, Aligarh UP and others" reported in (1981) 4 Supreme Court Cases 521. Para 25 is relevant to be quoted:

"25. The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed usually from prior events showing tendencies or inclination of a man that an inference is drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of public order. Of course, such prejudicial conduct or antecedent history should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary."

5) It is true that the past conduct and antecedents are to be taken note of but when the past conduct and antecedents have been taken note of in the order of detention which has been quashed, same position could not be taken note of for deriving satisfaction for passing the fresh order of detention as is the law laid down in the judgment AIR 1989 SC 1234 referred above.

6) In the judgment rendered in case "Jahangir Khan Fazal Khan Pathan Vs. The Police Commissioner, Ahmadabad and another" (AIR 1989 SC 1812), it has been held as under:

".....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."

7) Again same position has been dealt with in the case "Ramesh Vs. State of Gujarat" (AIR 1989 SC 1881). Para 10 is relevant to be quoted:

"10. On a careful scrutiny of grounds of detention, we unreservedly hold that the

detaining authority has taken into consideration the two criminal case 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 detainee."

8) Learned counsel for the petitioner further contended that the detainee has been deprived of making an effective representation in view of non-furnishing of the material forming base for his detention, which appears to have prevailing force. Nothing has been brought on record to show that the material which has been considered by the detaining authority while passing the detention order has been furnished to the detainee which would have enabled him to file an effective representation as against the detention, thus it negates the right guaranteed under Article 22(5) of the Constitution. In this view I am fortified by the judgment "Sophia Ghulam Mohd. Bham v. State of Maharashtra and others" (AIR 1999 SC 3051), wherein it has been held:

".....The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detainee to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detainee and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language."

9) Next learned counsel for the petitioner contended there has been non-application of mind on the part of detaining authority in passing the detention order. Further added, that the detaining authority has not derived subjective satisfaction while passing the impugned order.

10) One of the requirements for deriving subjective satisfaction is to formulate the grounds of detention which shall form basis for passing the order of detention. In the order impugned as passed by District Magistrate, it is recorded; "Whereas on the basis of dossier placed before me by the Sr. Superintendent of Police, Shopian,, vide his No.CS/D-1/2018-8042 dated 10.08.2018, I am satisfied...", which shows that Detaining Authority has not sifted the material for preparation of the grounds of detention. Copy of the grounds of detention is placed on file but not referred to in the order of detention. Non-application of mind is clear, therefore, an invasion to personal liberty was impermissible.

11) In the backdrop of the factual and legal position as noticed, only conclusion in-keeping therewith is that the impugned detention order bearing No. 125/DMS/PSA/2018 dated 21.08.2018 is unsustainable so is quashed. Detainee be released from the preventive custody forthwith provided he is not required in connection with any other case.

12) Detention records as produced be returned to the learned counsel for the

respondents.