

(1988) 04 J&K CK 0003
In the Jammu And Kashmir High Court

Ali Mohd. Wazir and etc.

APPELLANT

Vs

State of J. and K.

RESPONDENT

Date of Decision : 14-04-1988

Acts Referred:

Constitution of India, 1950 — Article 143, 226

Citation : (1989) CriLJ 493

Hon'ble Judges : M.L. Bhat, J;B.A. Kuchhai, J

Bench : Division Bench

Judgement

M.L. Bhat, J.—A learned single Judge of this Court by his order dated 13-2-1988 was of the opinion that a very important question of law

was raised by Mr. S. T. Hussain. therefore the matter be considered by the Division Bench. The important question of law which is to be

considered in these petitions is as to whether a detenu detained under the Public Safety Act can be granted bail at an interim stage by this Court.

This question was raised in Ali Mohd. Wazir's case first and then in Mohd. Ahsan Mir's case also the same question was referred by another single

Judge of this Court to the Division Bench. The two cases were considered together by the Division Bench.

2. In both the cases the detenus are to be detained under the provisions of Public Safety Act and they seek bail in anticipation of their detention.

As to whether the detention is valid or not cannot be considered in these references. The only question which falls for our consideration is whether

bail in anticipation of detention to a detenu who is detained under the provisions of Public Safety Act with a view to prevent him from indulging in

activities specified in Section 8 of the Public Safety Act can be granted in a writ jurisdiction.

3. Mr. S. T. Hussain has drawn our attention to the provisions of Article 226 of the Constitution of India read with S. KM of the Constitution of

J&K and has on the terms of the said provisions of Constitution, submitted that the High Court has the power to stay execution of the detention

order pending determination of the writ petition which would amount to grant of bail in anticipation and the powers are implicit because the

Constitution enjoins upon this Court to protect the rights of the citizens who approach this Court with complaint that the State or its agency have

infringed their fundamental rights.

4. Mr. S. T. Hussain placed reliance on *The State of Bihar Vs. Rambalak Singh and Others*, , in support of his submissions. The Supreme Court

was dealing with a case which was decided by the Patna High Court. The Patna High Court had ordered that the detenu who was detained under

Rule 30 of the Defence of India Rules be released on bail of Rs. 500/- with two sureties 250/- each to the satisfaction of the Registrar of the High

Court. The State of Bihar filed a criminal appeal in the Supreme Court to get the point of law decided as to whether in Habeas Corpus Petitions,

bail can be granted though it was not interested in the reversal of the order of bail. It was argued before the Supreme Court by the State of Bihar

that the policy underlying the enactment of the Defence of India Act and the Rules framed thereunder was to achieve the object, on valid

consideration, of paramount importance which distinguishes the detention made under Rule 30 of the Defence of India Rules and that alters the

character of proceedings initiated by or on behalf of the detenu under Article 226. The High Court in its writ jurisdiction may have the power to

annul the detention order if it is bad or mala fide but this would not empower the High Court to enlarge a detenu on interim bail when his detention

is made in order to safeguard the defence of India. Civil defence, public safety, maintenance of public order. India's relationship with foreign

powers, maintenance of peaceful conditions in any part of India maintenance of efficient conduct of military operations or the maintenance of

supplies and services essential to the life of the community. The very object of making an order of detention is to put an end to his prejudicial

activities which are likely to affect one or the other matters of grave public importance specified by Rule 30 and so it was illogical to release a

detenu on interim bail before the Court comes to a decision as to merits of the grounds on which the order of detention is challenged. This

argument was not accepted by the Supreme Court, The Court observed that if High Court has the power to release a detenu in its writ jurisdiction

by quashing his detention made under Rule 30, it would equally have the power to grant an interim bail. But the exercise of such power is inevitably

circumscribed by the considerations which are subject to such proceedings and which have relevance to the object which is intended to be served

by orders of detention properly and validly passed under the said rules.

5. Another principle which the Supreme Court laid was that if the Court has jurisdiction to give the main relief to the detenu at the end of

proceedings, on principle and in theory, it was not easy to understand why the Court could not give interim relief to the detenu pending final

disposal of the writ petition. The interim relief must be in aid of and auxiliary to the main relief. It cannot be said that releasing a detenu on bail is not

in aid of or auxiliary to the main relief for which a claim is made on his behalf in the writ petition. At the same time Court could take into

consideration the objects which are intended to be achieved by orders of detention passed under Rule 30. Supreme Court was dealing with the

basic question of jurisdiction of High Court in writ proceedings and it was considering the propriety or reasonableness of the order which was

impugned before it.

6. Under Rule 30 of the Defence of India Rules as also under the Public Safety Act a person could be detained for preventing him from acting in a

manner which are specified in Rule 30 of the Defence of India Rules and the provision of Section 8 of the Public Safety Act, The detention under

both the provisions of law is preventive in nature and is not punitive. Bail is a concept which is generally invoked in matters which are punitive in

nature and where a person is sought to be tried in accordance with the procedure established by law. The law presumes an accused person

innocent and with some exceptions grant of bail at interim stage is rule and refusal is exception. The provisions relating to the grant of bail are

embodied in the Criminal P.C. and an accused person at any stage can make out a case for grant of bail. Grant of bail is always discretionary and

it is guided by certain considerations which the Courts have recognized as

enabling them to exercise the discretion in favour of grant of bail. These considerations have evolved with the growth and development of law. The grant of bail in a criminal case at interim stage is liberally construed because of the concept of liberty which has been introduced by the Courts in the realm of discretionary powers as regards grant of bail. It is only in cases where punishment is life imprisonment or death. Courts generally refuse to grant bail because the provisions of Criminal P.C. contain a prohibition in that regard and restrict the discretion of the Court in the matter of grant of bail in the cases referred to above. The bail at interim stage of the proceedings is therefore a matter, grant or refusal of which can be considered only for those offences which are punitive and for which trial is provided. Grant of interim bail ordinarily would not be invoked in cases of preventive detention. Preventive detention is ordered to prevent a person from acting in a manner which are specified in the provisions of Preventive Detention laws. Detention is not ordered for any offence or for facing a trial by a person. It is to prevent a person in future from acting in a particular manner about which detaining authority has to assume satisfaction based on certain valid grounds. This is not true about a criminal case.

7. Reverting back to *The State of Bihar Vs. Rambalak Singh and Others*, the State of Bihar had contended that interim bail in proceedings initiated under Rule 30 of Defence Rules would be final even if the High Court was exercising powers under Article 226. Same may not be true when legality of conviction is challenged under Article 226 and the order granting bail would enure only till the disposal of the proceedings because if the proceedings fail, the convict shall have to return to Jail and run out the sentence imposed on him. In detention matters or under R, 30 of the Defence of India Rules, question of running out the remaining period of detention would not arise because no period of detention was fixed under Rule 30. The detention under Rule 30 could be renewed from time to time as was authorised under the relevant rules and object was to prevent the commission of prejudicial acts of the detenu. This argument was not accepted by the Supreme Court on the ground that High Court in Habeas Corpus petitions would grant bail only if it is satisfied that prima facie there is something patently illegal in the order of detention. The jurisdiction of the High Court to pass an interim order in such cases would not depend upon the

nature of the order but upon its authority to give interim relief to a party which is auxiliary to the main relief to which the party would be entitled if it succeeds in its petition. The Supreme Court at the same time has cautioned that the jurisdiction of the High Court to grant relief to the detenu is very narrow and very limited and the discretion for interim relief is not to be exercised as a matter of course but is to be exercised in rarest of rare cases,

8. The Supreme Court. in *The State of Bihar Vs. Rambalak Singh and Others*, , relied on a famous case of *State of U.P.* which sparked off a lot of controversy throughout the country. Ultimately a reference was made by the President of India to the Supreme Court under Article 143 of the Constitution of India and the Supreme Court answered the reference laying down certain propositions about the jurisdiction of the High Court and about the privilege of the House of Legislature. The controversy was essentially between private persons and the legislature, but since judiciary had intervened to protect the rights of private persons which was not liked by the Legislature, who initiated proceedings against the two sitting judges of the Lucknow Bench of the Allahabad High Court. The power of the High Court to grant interim bail in Habeas Corpus petitions was recognized though that power in the said reference was exercised entirely on different facts. The Legislative Assembly had issued warrants of arrest against a citizen for contempt of Legislative Assembly. The petitioner in that case moved to the High Court through an Advocate for issuance of writ of Habeas Corpus. The citizen was released on bail by the High Court. The legislative Assembly initiated proceedings against Judges of the High Court. Advocate, and citizen for having committed contempt of the House. On reference being made by the President of India to the Supreme Court, the Supreme Court opined that neither the Judges, citizen, nor the Advocate had committed contempt. High Court had the power to grant interim relief.

9. On the aforesaid discussions Mr. S. T. Hussain submitted that grant of interim bail in the present case was in aid of and auxiliary to the main relief which may be available to the party on final determination. It is contended that this Court has the jurisdiction to employ all such means and to do all such acts which are essential for the exercise of its jurisdiction under

Article 226 of the Constitution.

10. Mr. Mufti Mehraj-ud-Din. Addl. Advocate General on the other hand has relied on a Full Bench authority in Vedprakash Devkinandan

Chiripal and etc. Vs. State of Gujarat and Another, . A Full Bench of the Gujarat High Court has held that a detenu cannot ordinarily seek a writ of

mandamus in cases where he has not surrendered nor has been served with an order of detention. Even filing of the writ petition under Art, 226 is

not competent before the detenu surrenders. It is only after surrender of the detenu that the High Court in its writ jurisdiction can consider the

legality or otherwise of the grounds of detention. Till then its power to review the grounds of detention cannot be invoked.

11. Scheme of the Public Safety Act also shows that the detention of detenu is to be ordered only on the grounds which are specified in Section 8

of the Act, The laws relating to detention are saved by the Constitution, A person can be detained to prevent him from acting in a manner which is

specified in Section 8 of the Act. The detention is not ordered under the provisions of Public Safety Act for any punitive purpose nor is a citizen

detained for having committed an offence. The provision of interim bail pending the hearing of a writ petition by a detenu against his order of

detention, which is termed by him as illegal is not to be covered by the provisions of Criminal P.C. and no bail under that provision can be granted

to a detenu. However, after the detenu has surrendered and he challenges the grounds of detention as being illegal or unconstitutional. High Court

will not be deprived to pass such orders in aid of and auxiliary to the main relief which it may pass in the writ petition. In rarest of rare cases

execution of the detention order can be stayed by the High Court. Which are those cases cannot be exhaustively narrated, but a few of them may

be enumerated.

1) Where the order of detention is without jurisdiction detention under Public Safety Act can be ordered by the persons who are expressly

empowered to make the detention order and if the detention order is made by a person who is not vested with that power and that detention is

challenged in the High Court in writ jurisdiction. High Court may exercise discretion with regard to stay of operation of such patently illegal

detention order.

2) Where a citizen is detained not on any grounds specified in Section 8 of the Public Safety Act, but only at the whim of the detaining authority

and the detention order says that such and such person is detained u/s 8 of the Public Safety Act. Such an order will be palpably illegal and without

jurisdiction. The High Court may in its writ jurisdiction stay its execution.

3) Where the detaining authorities gives no reasons, but only says that since he is empowered to detain a person. Therefore he exercises the power

to detain a person. Such an order also will be patently illegal and High Court's jurisdiction to stay the operation of such an order could be invoked.

4) Where the detaining authority mentions that a citizen has no utility for the society or he is burden, therefore he is detained under the provisions of

Public Safety Act. such an order could be stayed in its writ jurisdiction.

12. The above are the only illustrative, cases. The detention order based on grounds cannot be stayed pending the disposal of the writ petition

unless the grounds are declared by the Court to be irrelevant, vague, non-existent, invalid or unconstitutional and so on and so forth. Where on

facts High Court is required to consider the validity or otherwise of the detention order, it cannot stay the operation of the detention order. It may

be made clear that stay of operation of the impugned detention order would inevitably result in release of the detenu at an interim stage. During the

pendency of the writ petition. It is only where there is a serious defect of the nature which is specified hereinabove that High Court's power to stay

execution of the order pending writ petition before it may be invoked because in that case High Court would be passing the order only : in aid of

and auxiliary to the main relief which it ultimately has to pass by quashing the patently illegal detention order and those orders which are void ab

initio or which may have been passed by incompetent person. But where High Court has to consider the facts and where it has to consider the

mala fides of detaining authority, it will be difficult for the High Court to assume satisfaction at the threshold about the suspension of the detention

order unless facts are considered,

13. Speaking generally, a detenu has no right to claim bail when he is detained under the Public Safety Act. Staying the execution of the order of

detention on the grounds which are mentioned hereinabove may result in enlarging a detenu on bail, but that power is to be exercised by the Court

very rarely only after the detenu has surrendered in pursuance of the detention order. If the detention is challenged on the basis of grounds being non-existent, irrelevant, vague, stale, outside the scope of provisions of Section 8 of the Public Safety Act, or on the ground of mala fides of detaining authority or any other like ground, the High Court will not suspend the execution of the order of detention which may have the effect of releasing the detenu on bail. High Court of course will uphold the claim of individual liberty within the prescribed limits of law. It cannot ignore the object which the order of detention is intended to serve. If the bail is granted in detention matters, that may lead to some dangerous consequences which are prejudicial to the interests of the community at large and that may frustrate the object of the Act itself. Provisions of Cr. P.C. with regard to grant or refusal of the bail are not applicable to the matters which arise out of the Public Safety Act and in its writ jurisdiction it will be improper for High Court to grant bail in detention matters.

14. In the present case we are faced with another difficulty of detenu not having surrendered in pursuance of the detention orders. Bail is claimed in anticipation is not permissible. The provisions of anticipatory bail or principles thereof cannot be invoked by the High Court in matters relating to the detention ordered under the Public Safety Act. High Court's jurisdiction to stay the detention orders which have not been served is also not proper because that may frustrate the very object of the detention law.

15. In a petition of mandamus, before service of order of detention. Court will not be within its power to ask the detaining authority to produce the grounds of detention. It is only when the detention order is ab initio void that the Court can dispense with the detailed enquiry and declare it so without going into the grounds of detention, but that can also be done only after the detention order has been served and the detenu has surrendered in pursuance of the detention order. In anticipation of service of detention order. High Court has no power to look into the grounds of the detention or detention order.

16. We have stated the principle about the stay of the execution of the order of detention, when it is patently illegal and void ab initio, etc. etc. in these cases detention order can be stayed only after the detenu has surrendered and is detained in pursuance of the detention order. But this will

not apply to a case where the detenu has not been detained in pursuance of detention order and he seeks stay of execution of detention order in

anticipation of his detention. We have not come across any provision of law or any authority where execution of detention order is stayed in

anticipation of detention of the detenu. Therefore, we are constrained to stay that the power to grant bail in anticipation of detention or to stay

detention orders in anticipation of detention cannot be made by the High Court in its writ jurisdiction under Article 226 read with Section 103 of

Jammu and Kashmir.

17. The reference is answered accordingly. Let the writ petitions be listed before the learned single Judge on consideration on merits.