
(2019) 04 J&K CK 0089

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 40 Of 2018

Ashaq Hussain Malik

APPELLANT

Vs

State Of Jammu & Kashmir And & Ors

RESPONDENT

Date of Decision : 19-04-2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978, — Section 8, 103
Unlawful Activities (Prevention) Act, 1967 — Section 13
Constitution Of India, 1950 — Article 21, 22(3), 22(3)(b), 22(5), 22(6)

Citation : (2019) 04 J&K CK 0089

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M. A. Makroo, N. H. Shah

Judgement

1. Detenu - Ashiq Hussain Malik son of Mohammad Shafi Malik resident of Arwani Tehsil Bijbehara District Anantnag, through his father, by the instant petition, seeks quashment of detention order No.73/DMA/PSA/DET/2018 dated 16.01.2019, passed by District Magistrate, Anantnag, (for brevity "Detaining Authority") in exercise of powers conferred under Section 8 of the J&K Public Safety act, 1978.

2. The detention order, through the medium of petition on hand, has been challenged on the grounds that during the intervening night of 6th and 7th of December, 2018, the detenu was arrested in connection with case FIR No.168/2018 registered at Police Station, Bijbehara, under Section 13 ULA(P) Act and while in custody he has been taken into preventive custody pursuant to impugned detention order. Respondents are stated to have ignored to provide material relied upon by the detaining authority while passing the impugned order of detention and thus deprived the detenu of his Constitutional and Statutory rights. Grounds of detention are stated to be vague, baseless, non-existent and unfounded.

3. The respondents, in their counter affidavit, have disputed the averments made

in the petition. They have stated that the provisions of the Public Safety Act have been followed and the detenue has been detained only after following due procedure prescribed in terms of Public Safety Act. The grounds of detention were explained to the detenue in the Urdu and Kashmiri language. There has been proper application of mind for detaining the detenue. The detenue has been provided all the material which was considered by the detaining authority while passing the impugned order. In the ends, it has been prayed that the petition may be dismissed with costs. Learned counsel for the respondents has produced the detenue record so as to lend support to the stand taken in the counter affidavit.

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

5. Learned counsel for the petitioner projected that when the detenue was already in custody, there was no need to direct his preventive detention. Further, arrest of the detenue in connection with aforesaid criminal case, at the time of passing of the order of detention, has not been disputed.

6. The object of passing the order of detention is to deter a person from acting in any manner prejudicial to the security of the State or public order. When the movement of the person is already under curtailment i.e. is in custody in connection with a criminal case, then there can be no requirement of preventive detention, unless, of course, circumstances exist for passing order of detention. Preventive laws have the effect of depriving a person of liberty which is precious, deprivation thereof at times may be unavoidable, for justifying such deprivation, safeguards as are provided by law are required to be respected. A person who dares to cause any type of insecurity or threatens security of the State has to be dealt with iron hand but for so doing the Constitutional safeguards as are available are also to be respected.

7. Law is well settled that when a person is in custody of the police, the detaining authority is required to spell out the reasons as to why a person who was already in substantive custody was being detained in preventive custody. Absence of such reasons in the grounds of detention renders the detention illegal and such an order would clearly demonstrate non-application of mind of the detaining authority. In this view, I am fortified by the judgment of this in "Mohammad Hussain Dar v. State and others" reported in 2007(2) JKJ HC-231.

8. It is settled position of law that a person involved in a criminal case can be detained under the provisions of preventive laws provided there are compelling circumstances for so doing otherwise the order of detention shall be bad. In this connection, it is quite apt to quote following Para from the judgment "T. P. Moideen Koya vs. Government of Kerala and Ors." reported in 2004 (8) SCC 106:

".....in law there is no bar in passing a detention order even against a person who is already in custody in respect of a criminal offence if the detaining authority is subjectively satisfied that detention order should be passed and that there must be cogent material before the authority passing the detention order

for inferring that the detainee was likely to be released on bail"

9. Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, question arises for consideration whether an order of detention could be passed on the face of such an eventuality? The answer to this question is emphatically "No", taking into consideration the law laid down by the Hon'ble Apex Court in "Sama Aruna v. State of Telangana & Anr" (AIR 2017 SC 2662). Para 24 of the said judgment is apposite to be quoted herein below:

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-03. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detainee was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."

10. It shall be apposite to quote Para 5 of the judgment of the Hon'ble Apex Court in "Surya Prakash Sharma v. State of U. P. and others, 1994 SCC (Cri) 1691, has held as under:

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this court since it state first came up for consideration before a Constitution Bench in Rameshwar Shaw vs District Magistrate Burdwan to eschew prolixity we refrain from detailing all those cases accept that of Dharmendra Sugan Chand Chelawat v. Union of India wherein a three judge Bench after considering all the earlier relevant decisions including Rameshwar Shaw answered the question in the following words The decisions referred to above lead to the conclusion that an order for detection can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detailing authority was aware of the fact that the detainee is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee is already in detention. The expression compelling reasons in the context of making an order for detention of a person already in in custody implies that there must be cogent

material before the detaining authority on the basis of which it may be satisfied that (a) the detainee is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detainee, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

11. Learned counsel for the petitioner next contended that the material forming base of the grounds of detention has not been supplied to the detainee thereby has been deprived from exercising his right guaranteed under Article 22(5) of the Constitution of making an effective representation against his detention, which renders the detention order bad.

12. In opposition learned counsel for the respondents would contend that the material/documents, based on which detaining authority has derived subjective satisfaction for passing the order of detention, have been supplied to the detainee and besides this, the narrations of acts of the detainee has also been given in the grounds of detention, therefore, detainee, in any way has not been prejudiced or disabled from making a representation. However, the detention record as produced failed the learned counsel for the respondents to justify his argument regarding supply of material to the detainee as no receipt in token of acceptance of material has been placed on record.

13. The Hon'ble Apex Court in the judgment rendered in the case of "Sophia Gulam Mohd. Bham v. State of Maharashtra & ors" (AIR 1999 SC 3051), has held as under:

"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."

14. In paras 27 and 28 of the judgment captioned "Thahira Haris etc. etc. Vs. Government of Karnataka & Ors, reported in AIR 2009 Supreme Court 2184, Hon'ble Apex Court has held as under:

"27. There were several grounds on which the detention of the detainee was challenged in these appeals but it is not necessary to refer to all the grounds since on the ground of not supplying the relied upon document, continued detention of the detainee becomes illegal and detention order has to be quashed on that ground alone.

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detainee who has been detained in pursuance of the order made

under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detainee at the earliest opportunity to make effective and meaningful representation against his detention.

15. Though in the counter affidavit, it has been stated that the grounds of detention have been read over to the detainee but no affidavit in support thereof has been filed which was required to be sworn by the said officer. Looking at the said ground from yet another angle, what can be said is that to eradicate all the doubts, it was incumbent on the part of the person, who did the exercise of handing over the documents and conveying the contents thereof to the detainee, to file an affidavit in order to attach a semblance of fairness to his actions. Resort can, in this behalf, be had to the law laid down by the Apex Court of the country in the case of "State Legal Aid Committee, J&K Vs. State of J&K & others", reported in AIR 2005 SC 1270, wherein it has been held as under:

"Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to show that the requirements of Section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of order of detention to be disclosed/communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assessee and he was informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detainee refused to receive copy of the detention order and also refused to put his signatures on the documents. The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement LPA (HC) 107/2017 10 of 16 to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of Section 13 of the Act."

16. Para 5 of the judgment rendered in the case of "Mohammad Shaban Chopan Vs. State and another" reported in 2003(II) 455 shall be advantageous to be quoted here-under:-

"5. Thus the stand taken by the detaining authority is that ASI Gh. Ahmad explained the grounds of detention to the detainee in Urdu and Kashmiri. However, affidavit of said ASI has not been filed. I have perused the record made available by Learned Counsel for the respondents. In the record there is a photocopy of C/Certificate of said ASI to that effect when the Learned Counsel was asked to produce the original, he expressed his inability to do so. The un-authenticated photocopy does not deserve to be noticed. Therefore, neither there is affidavit of said ASI nor any reliable document available on record to

substantiate the fact that ASI Ghulam Ahmad had actually explained the grounds of detention to the detenu in his own language. Bare statement of the detaining authority in this behalf is of no consequence as has been held by the Hon'ble Supreme Court in the above quoted authority. The detention order thus cannot be sustained being violative of mandate of law on the aforesaid ground alone."

17. Para 20 of judgment rendered in the case of "Lallubhai Jogibhai Patel vs Union Of India & Ors" reported in 1981 AIR 728 is advantageous to be quoted:

"20. It is an admitted position that the detenu does not know English. The grounds of detention, which were served on the detenu, have been drawn up in English. It is true that Shri C. L. Antali, Police Inspector, who served the grounds of detention on the detenu, has filed an affidavit stating that he had fully explained the grounds of detention in Gujarati to the detenu. But, that is not a sufficient compliance with the mandate of Article 22(5) of the Constitution, which requires that the grounds of detention must be "communicated" to the detenu. "Communicate" is a strong word. It means that sufficient knowledge of the basic facts constituting the 'grounds' should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the 'ground' to the detenu is to enable him to make a purposeful and effective representation. If the 'grounds' are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed. If any authority is needed on this point, which is so obvious from Article 22(5), reference may be made to the decisions of this Court in *Harikishan v. State of Maharashtra*: and *Haribandhu Dass. v. District Magistrate* (AIR 1969 SC 43) (ibid)."

18. Preventive laws have the effect of depriving a person of his liberty which is precious, however, deprivation thereof at times becomes indispensable. For justifying such deprivation, the safeguards as are provided by law are also required to be respected. A person who dares to threaten maintenance of public order has to be dealt with iron hand but the Constitutional safeguards as are available are also to be followed. The Article 21 of the constitution of India has protected the life and personal liberty of people by providing that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The word established is used in Article 21 in order to denote and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the precise extent of such deprivation. If a person is to be deprived of his life or liberty, the authority concerned is under a constitutional mandate to follow the procedure established by law, the procedure prescribed for depriving a person of his life or liberty has to be reasonable, fair and just. The protection contained in the article does not extend to only citizens but to all persons. The law providing for preventive detention has to be strictly construed keeping in view the delicate balance between social security and citizen freedom. Thus if the

preventive detention has not been ordered in strict conformity with law authorizing detention, the detenu is entitled to be released.

19. Preventive detention, in effect, is an invasion to personal liberty which infringe the right to liberty guaranteed by Article 21 of the Constitution of India. Preventive detention, in view of exception to Article 21, has to be reasonable, shall not be on the ipse dixit of the detaining authority. Preventive detention wherever permissible shall adhere to the procedural safeguards. Infraction of safeguards renders the order of detention unsustainable. The Hon'ble Supreme Court in catena of judgments has made it clear as to what is the value of the 'constitutional safeguard' and as to what is the value of right to liberty guaranteed under Article 21 of the Constitution of India. In this connection, it shall be quite relevant to quote paras 37 and 38 of the judgment rendered by a Bench of three Hon'ble Judges of the Hon'ble Apex Court in case captioned "Rekha Vs. State of Tamil Nadu and anr", reported in (2011) 5 SCC 244:

"37. As observed in Abdul Latif Abdul Wahab Sheikh v. B. K. Jha vide SCC para 5: (SCC p.27)

"5....The procedural requirements are the only safeguards available to a detenu 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."

As observed by Mr. Justice Douglas of the United States Supreme Court in Joint Anti-Fascist Refugee Committee v. McGrath:(US p. 179)

"...It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards are the main assurances that there will be equal justice under law".

38. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experience".

20. Preventive detention as held in "A. K. Gopalan v. State of Madras" [1950 SCR 88] and reiterated in "Rekha v. State of Tamil Nadu"[AIR 2011 SCW 2262] is by its very nature repugnant to democratic ideals and an anathema to the rule of law. The Supreme Court in Rekha's case (supra), while emphasizing that Article 22(3)(b), Constitution of India, is to be read as an exception to Article 21, Constitution of India and not allowed to nullify the right to personal liberty guaranteed under the later, observed:

"Since, however, Article 22 (3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal, but we must confine the power of preventive detention to very narrow limits, otherwise we will be taking away the great right

to liberty guaranteed by Article 21 of Constitution of India, which was won after long arduous, historic struggle. It follows therefore that if law of land (Indian Penal Code and other penal statutes) can deal with the situation, recourse to the preventive detention law will be illegal."

21. The Court further 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 detainee 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."

22. In "Kamleshwar Ishwar Prasad Patel Vs Union of India and Others" [(1995) 2 SCC 51] the Supreme court 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 detainee."

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

"The procedural requirements are the only safeguards available to a detainee 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."

24. The baseline, that emerges from the above overview of case law on the subject of preventive detention is that whenever preventive detention is called in question in a court of law, the first and foremost task before the Court is to see whether the procedural safeguards, guaranteed under Article 22(5) Constitution of India and Preventive Detention Law pressed into service to slap the detention, are adhered to.

25. Keeping in view the hallmark of the cherished right to liberty in keeping with the object of Article 21 of the Constitution of India, while exercising power to order preventive detention, various procedural and other safeguards available have to be respected and adhered to. It is the bounden duty of the detaining authority to derive subjective satisfaction before passing the order of detention.

If record suggests that there is non-application of mind, that ipso facto means that subjective satisfaction is missing.

26. The cumulative effect of the aforesaid discussion leads to the only conclusion i.e. the order of detention impugned bearing No. 73/DMA/PSA/DET/2018 dated 16.01.2019, passed by respondent No.2-District Magistrate, Anantnag, is not valid, as such, quashed. Further custody of the detainee shall be regulated in accordance with the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against him.

27. Registry to return the detention record to the learned counsel for the respondents.