

(2018) 11 J&K CK 0074

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 49 Of 2018

Ashiq Hussain Bhat @APPELLANT@Hash State Of Jammu & Kashmir And Anr

Date of Decision : 09-11-2018

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8

Citation : (2018) 11 J&K CK 0074

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Mir Shafaqat Hussain, Saad Rafi Ganai

Final Decision : Allowed

Judgement

1) By virtue of order bearing No.DMB/PSA/05 of 2018 dated 27.02.2018, passed by respondent No.2-District Magistrate, Budgam, in exercise of powers under Section 8 of the J&K Public Safety Act, 1978, Ashiq Hussain Baht, has been taken into preventive custody and lodged in Central Jail, Kotebhalwal, Jammu. By dint of instant petition, quashment of the said order is sought on the grounds mentioned therein.

2) The petitioner's case, as set out in the petition, is that initially the detinue was taken into preventive custody in terms of order No.DMB/PSA/11 of 2017 dated 19.05.2017 which was challenged before this Court in HCP No.163/2017. The said petition was allowed vide judgment dated 23.01.2018 whereby detention order was set aside and detinue directed to be released but instead of releasing the detinue, he was taken into custody in connection with FIR No.448/2013 and while in custody was again detained in terms of DMB/PSA/05 of 2018 dated 27.02.2018, impugned in this petition. The allegations/grounds of detention are stated to be vague and mere assertions. The 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 detinue 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 and insisted that the activities of detainee are highly prejudicial to the maintenance of public order. It is pleaded that the detention order and grounds of detention were handed over to the detainee and same were read over and explained to him. The grounds taken by the petitioner are legally misconceived, factually untenable and without any merit. The learned counsel for the respondents has made available detention records to lend support to the case set up in the counter affidavit.

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

5) The main plank of argument is when the detainee was already in custody, there was no need to direct his preventive detention. It has been stated in the counter affidavit that the detainee is involved in FIR No.7448/2013 registered in Police Station, Budgam and his arrest in the said FIR, at the time of passing of the order of detention, has not been disputed.

6) 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."

7) It is further projected that the last alleged activity has occurred on 24.12.2013 and thereafter no activity has been attributed to the detainee and after a period of four more than four years, the impugned order of detention has been passed.

8) From the perusal of the grounds of detention it is evident that the last activity, in which allegedly indulged, took place on 24.12.2013. After a period of more than four year, the order of detention has been passed on 27.02.2018. Thus, there is inordinate delay in passing the order of detention, which has not been explained by the respondents. The Hon'ble Supreme Court in "Rajinder Arora v. Union of India" (2006) 4 SCC 796, has held that if no explanation is furnished for long delay in passing the order of detention, same is vitiated in law. Respondents have failed to explain the delay in passing the order of detention and, therefore, on this ground alone impugned order is liable to be quashed.

9) In view of the facts of the present case and the law laid down by the Hon'ble Apex Court as quoted hereinabove, the order of detention impugned does not sustain on above referred grounds, therefore, other grounds projected in the petition are not required to be dealt with.

10) In the backdrop of what has been stated above, the petition is allowed, a consequence of which, the order of detention bearing No. DMB/PSA/05 of 2018 dated 27.02.2018, passed by respondent No.2, quashed. Detenue is directed to be released from the preventive custody forthwith, unless, of course, not required in any other case.

11) The record, as produced, be returned to the learned counsel for the respondents.