

(2018) 12 J&K CK 0014

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 244 Of 2018

Ashiq Hussain Ganai @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 12-12-2018

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8(a)
Arms Act, 1959 — Section 7, 25

Citation : (2018) 12 J&K CK 0014

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Saad Rafi Ganai, Usman Gani

Judgement

1) Noticing the activities of Ashiq Hussain Ganaie (hereinafter referred to as the detainee) prejudicial to the security of the State, he, pursuant to order No.12/DMB/PSA of 2018 dated 16.07.2018, passed by District Magistrate, Bandipora, has been taken into preventive custody by invoking powers under Clause (a) of Section 8 of the J&K Public Safety Act and so has been lodged in Kote Bhalwal Jail, Jammu. By the instant petition, validity of the said order is assailed on the grounds referred therein.

2) Learned counsel for the petitioner projected various grounds while seeking quashment of the impugned order but the star ground is that as per grounds of detention, the detainee has been arrested on 01.07.2018 in case FIR No.119/2018 registered by Police Station Bandipora for commission of offences punishable under Section 7/25 Arms Act and so was in custody of said Police Station when the order of detention has been passed. There was no requirement of passing the order of detention. That apart, in the grounds of detention it has been recorded that there is every likelihood and possibility that the detainee may seek bail. The detainee has not moved any application for grant of bail, as is projected in the petition, then how the detaining authority in the grounds of detention has recorded that there are apprehensions of the detainee getting bail, shows as to how the detaining authority has applied its mind. Learned contended that when bail application has not been filed, how could detaining authority

record satisfaction that there is likelihood of release of the detainee on bail.

3) It is evident that the detaining authority has not applied its mind properly while passing the impugned order. While detaining a person under Public Safety Act, detaining authority is under a legal obligation to analyze all the circumstances and material and then to gather conclusion about the requirement of depriving a person of his personal liberty. Non-mention about the grant or otherwise of bail is serious lapse which in turn gives rise to the inference that there is non-application of mind. Similar situation has been dealt with by the Apex Court. It is quite relevant to quote following portion from para 8 of the judgment rendered by the Hon'ble Apex Court in the case of "Anant Sakharam Raut v. State of Maharashtra and another" reported in AIR 1987 SC 137:-

"We hold that there was clear non-application of mind on the part of detaining authority about the fact that the petitioner was granted bail when the order of detention was passed. In the result we set aside the judgement of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith....."

4) It is further projected that 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.119/2018 registered in Police Station, Bandipora and his arrest in the said FIR, at the time of passing of the order of detention, has not been disputed.

5) The Hon'ble Apex Court in para 27 of the judgment *Rekha Vs. State of Tamil Nadu and anr*", (2011) 5 SCC 244 has held as under:-

"27. In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detainee being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed".

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 detenu 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 detenu 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) In the counter affidavit nowhere it has been stated that there was any co-accused who has been granted bail and in case it would have been so, then detaining authority could be justified in stating that there is likelihood of the detenu being released on bail.

8) Right to liberty as guaranteed under Article 21 of the Constitution can be negated in view of Article 22(3) (b) of the Constitution which is an exception to Article 21 of the Constitution. The said exception authorizes the concerned authorities to pass preventive detention but while passing such orders, the authority concerned is required to be alive to the personal liberty of a person and such power shall be exercised in a manner which may not have the trappings of depriving a person of the guaranteed liberty. In short an exceptional case has to be made out for passing the order of preventing a person from acting in any manner which shall be prejudicial, in the instant case, to the security of the State but while doing so procedural safeguards are to be respected. Breach in observing the procedural safeguards gives right to the detenu to claim that he has been prejudiced as his liberty has been curtailed de hors the law. 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".

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, therefore, other grounds projected in the petition are not required to be dealt with.

10) Having regard to the above discussion, the impugned order of detention impugned is unsustainable, as such, quashed. Further custody of the detenue shall be governed by the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against.