

(2018) 11 J&K CK 0077

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 223 Of 2018

Asif Nissar Malik @APPELLANT@Hash State Of Jammu & Kashmir And Ors

Date of Decision : 03-11-2018

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8, 13
Constitution Of India, 1950 — Article 22(5), 22(6)

Citation : (2018) 11 J&K CK 0077

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M.A. Makroo, Asif A. Bhat

Final Decision : Allowed

Judgement

1. In pursuance to order No.45/DMA/PSA/DET/2018 dated 01.08.2018, Asif Nissar Malik (hereinafter referred to as the detainee), has been taken into preventive custody by invoking powers under Section 8 of the J&K Public Safety Act as his activities were found to be prejudicial to the maintenance of "public order" so has been lodged in District Jail, Kathua. By the instant petition quashment of the said order is sought on the grounds enumerated in the petition.

2. Learned counsel for the petitioner contended that the detainee in connection with FIR No.78/2018 P/S Bijbehara was taken into custody and was admitted to bail by the Court of Chief Judicial Magistrate, Anantnag, on 23.07.2018 but was not released, instead was shown to have been taken into custody pursuant to impugned detention order. In the grounds of detention, it is nowhere mentioned that the detainee has been admitted to bail. It means detaining authority either has not applied its mind or the full material relatable to the detainee has not been placed before it.

3. The contention raised, on perusal of the grounds of detention as well as the detention record, is found to be correct, so non-application of mind is explicit which renders the order of detention illegal. In my view I am fortified by the judgment rendered in the case captioned Anant Sakharam Raut Vs. State of Maharashtra and others reported in AIR 1987 SC 137. Para 8 of the judgment is

apt to be quoted:

"We hold that there was clear non-application of mind on the part of the 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 judgment of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith.

4. Learned counsel for the petitioner next contended that the detinue has been disabled from making an effective representation against the detention. In this connection it is contended that the material forming base of the grounds of detention has not been furnished to the detinue.

5. Perusal of the detention records reveals that the submission has weight. Detention records shows that only copy of detention warrant and copy of grounds of detention (04 leaves) have been provided to the detinue while executing the detention warrant. Furnishing the copy of grounds of detention would not absolve the detaining authority from furnishing the material forming base of the grounds of detention as it is the material which would enable the detinue to make an effective representation against the detention. Non-supply of the material would amount to violation of Article 22(5) of the Constitution of India, so deprivation of a valuable right.

6. 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 detinue 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 detinue 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 detinue 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 detinue at the earliest opportunity to make effective and meaningful representation against his detention.

7. Next it is contended by the learned counsel for the petitioner that the detinue has also been disabled from making an effective representation by not supplying him the translated copies of the ground of detention which are in English language besides being in a hyper technical language which the detinue is not in a position to understand being illiterate.

8. The records, as produced by the learned counsel for the respondents, do not

suggest that the translated copies of grounds of detention have been supplied to the detainee, therefore, infringement of right guaranteed under Article 22(5) of the Constitution. The service of the grounds of detention on the detainee is a very precious constitutional right and the object behind the same is to enable the detainee to file an effective representation. It will be an empty formality to supply the grounds of detention to the detainee unless he is in a position to understand the same. In my view I am fortified by the judgment rendered by the Hon'ble Apex Court in the case "Chaju Ram Vs. The State of Jammu & Kashmir" reported in AIR 1971 SC 263. Following portion from para 9 of the judgment shall be quite apposite to be quoted:

"..... The detenu is an illiterate person and it is absolutely necessary that when we are dealing with a detenu who cannot read or understand English language or any language at all that the grounds of detention should be explained to him as early as possible in the language he understands so that he can avail himself of the statutory right of making a representation. To hand over to him the document written in English and to obtain his thumb impression on it in token of his having received the same does not comply with the requirements of the law which gives a very valuable right to the detainee to make a representation which right is frustrated by handing over to him the grounds of detention in an alien language. We are therefore compelled to hold in this case that the requirement of explaining the grounds to the detenu in his own language was not complied with."

9. It shall be quite advantageous to quote following para from the judgment rendered in case captioned Powanammal vs. State of T. N. and another reported in 1999 (2) SCC 413:

"The amplitude of the safeguard embodied in Article 22(5) extends not merely to oral explanation of the grounds of detention and the material in support thereof in the language understood by the detainee but also to supplying their translation in script or language which is understandable to the detainee. Failure to do so would amount to denial of the rights of being communicated the grounds and of being afforded the opportunity of making a representation against the order."

10. In para 3 of the counter affidavit it is projected that the grounds of detention were read over, explained and served to the detainee. On perusal of the records, it is found that the grounds of detention are shown to have been read over and explained to the detainee by one ASI Gh. Mohammad but no affidavit in support thereof has been filed which was required to be sworn by the said ASI Gh. Mohammad. 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 versus 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 detenu 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."

11. Taking conspectus of the above discussion, the petition is allowed and the impugned detention order bearing No.45/DMA/PSA/DET/2018 dated 01.08.2018, passed by District Magistrate, Anantnag, being unsustainable, is quashed. Detenu is directed to be set free from the preventive custody forthwith provided he is not required in connection with any other case.

12. Detention record be returned to the learned counsel for the respondents.