

(2018) 08 J&K CK 0011

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition Nono.38 Of 2018

**Basharat Ahmad Mir @APPELLANT@Hash State Of Jammu & Kashmir And
Another**

Date of Decision : 03-08-2018

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22(5), 226
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 120B, 302, 307
Jammu and Kashmir Public Safety Act, 1978 — Section 8, 13
Arms Act, 1959 — Section 7, 27

Citation : (2018) 08 J&K CK 0011

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. District Magistrate, Budgam â?" respondent no.2 herein (for brevity â?? detaining authorityâ?), aiming at to prevent Shri Basharat Ahmad Mir @

Ustad Umar son of Late Abdul Khaliq Mir resident of Munpappy, Budgam (for short â??detenuâ?) from acting in any manner prejudicial to the

security of the State, by Order no.DMB/PSA/04 of 2018 dated 14.02.2018, has placed detenu under preventive detention and directed his lodgement

in Central Jail, Kotebhalwal, Jammu. It is this order, of which petitioner is aggrieved and throws challenge thereto on the grounds set out in petition on hand.

2. The case set up in petition on hand is that detenu was arrested by security forces without any justification on 25.12.2013 and was implicated in

case already registered in police station Chadoora, bearing FIR no.216/2013 under Section 302, 307, 120-B, RPC and detenu was put to trial in the

said case. Detenu is claimed to have been acquitted of the charges levelled against him and jail authorities of Central Jail were directed to release

detenu from custody. However, detenu was not released and was taken to CIK Humhama, where he was detained illegally for several days.

Thereafter detenu is said to have been shifted to police station Budgam, where he was implicated in a case bearing FIR no.448/2013. While being in

custody, detenu was shifted to Central Jail in terms of order no.DMB/PSA/13 of 2017 dated 19.05.2017, which was challenged in HCP

no.165/2017. This Court by order dated 20.2.2017 quashed the aforesaid detention order. Copy of the said order was served upon respondents, but

they did not release detenu and shifted him to police station Budgam, where he was illegally detained for several days and thereafter was taken in

custody in connection with case FIR mno.448/2013 P/S Budgam. While being in custody of said FIR, detenu was once again shifted to Central Jail

Kotebhalwal, to be detained in preventive custody in terms of impugned detention order. Petitioner claims that she approached office of respondent

no.2 and unofficially obtained Photostat copies of order of detention, communication letter and grounds of detention.Â

3. Though granted several opportunities, yet respondents have opted not to file their reply in opposition to petition on hand. As a consequence

whereof, right to file counter/reply stands closed by this Court in terms of order dated 4th June 2018. However, learned counsel for respondents has

produced detention record.

4. I have heard learned counsel for parties and considered the matter. I have gone through the detention record made available by learned GA.

5. Prior to adverting to case in hand, it would be appropriate to say that right of personal liberty is most precious right, guaranteed under the

Constitution. It has been held to be transcendental, inalienable and available to a person independent of the Constitution. A person is not to be

deprived of his personal liberty, except in accordance with procedures established under law and the procedure as laid down in Maneka Gandhi v.

Union of India, (1978 AIR SC 597), is to be just and fair. The personal liberty may be curtailed, where a person faces a criminal charge or is

convicted of an offence and sentenced to imprisonment. Where a person is facing trial on a criminal charge and is temporarily deprived of his

personal liberty owing to criminal charge framed against him, he has an opportunity to defend himself and to be acquitted of the charge in case

prosecution fails to bring home his guilt. Where such person is convicted of offence, he still has satisfaction of having been given adequate opportunity to contest the charge and also adduce evidence in his defence. However, framers of the Constitution have, by incorporating Article 22(5) in the Constitution, left room for detention of a person without a formal charge and trial and without such person held guilty of an offence and sentenced to imprisonment by a competent court. Its aim and object is to save the society from activities that are likely to deprive a large number of people of their right to life and personal liberty. In such a case it would be dangerous for the people at large, to wait and watch as by the time ordinary law is set into motion, the person having dangerous designs, would execute his plans, exposing general public to risk and causing colossal damage to life and property. It is, for that reason, necessary to take preventive measures and prevent the person bent upon to perpetrate mischief from translating his ideas into action. Article 22(5) Constitution of India therefore leaves scope for enactment of preventive detention law.

6. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done, but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of likelihood of detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. The Supreme Court in *Haradhan Saha v. State of W.B.* (1975) 3 SCC 198, points out that a criminal conviction, on the other hand, is for an act already done, which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a Court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case, a person is punished to prove his guilt and the standard is proof, beyond reasonable doubt, whereas in preventive detention a man is prevented from doing something, which it is necessary for reasons mentioned in the Act, to prevent.Â

7. It is long back that an eminent thinker and author, Sophocles, had to say: ""Law can never be enforced unless fear supports them."" This statement was made centuries back, but it has its relevance, in a way, with enormous vigour, in today's society. Every right-thinking citizen is duty bound to show esteem to law for having an orderly, civilized and peaceful society. It has to be kept in mind that law is antagonistic to any type of disarray. It

is completely intolerant of anarchy. If anyone flouts law, he has to face the ire of law, contingent on the concept of proportionality that the law

recognizes. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within

constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from

unwarranted hazards. It is sometimes said in an egocentric and uncivilised manner that law cannot bind the individual actions which are perceived as

flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy,

the individual notions are to be ignored. At times certain activities, wrongdoings, assume more accent and gravity depending on the nature and

impact of such deleterious activities on the society.Â It is neither to be guided by a sense of sentimentality nor to be governed by prejudices. Acts

or activities of individual or a group of individuals, prejudicial to the security of the State, have magnitude of across-the-board disfigurement of

societies. No court should tune out such activities, being won over by passion of mercy. It is the obligation of the court to constantly remind itself the

right of society is never maltreated or marginalised by the doings an individual or set of individuals propagate and carry out.

8. Article 22(5) of the Constitution of India and Section 13 of J&K Public Safety Act, 1978, guarantee safeguard to detenu to be informed, as soon

as may be, of grounds on which order of detention is made, which led to the subjective satisfaction of detaining authority and also to be afforded

earliest opportunity of making representation against order of detention. Detenu is to be furnished with sufficient particulars to enable him to make a

representation, which on being considered, may obtain relief to him.Â Detention record, made available by learned counsel for respondents, reveals

that detention order was made on proper application of mind, to the facts of the case and detenu was delivered at the time of execution of detention

order, the material and grounds of detention and also informed that he had a right to represent against his preventive detention. Perusal of overleaf

of detention order depicts its execution. It is mentioned therein that in compliance to District Magistrate, Budgam's detention order, ASI Bashir

Ahmad no.643/BD EXK 841730 of police station Budgam, took the custody of detenu. It also reveals that detention order has been executed on

10.01.2018 and notice of the order and entire material/relevant documents pertaining to detenu, i.e. copy of grounds of detention, PSA warrant, copies of FIRs, statement of witnesses, copy of dossier, have been given to detenu against proper receipt, by reading over and explaining the same to him in his own languages, i.e. Urdu/Kashmir, which he understood fully. The detenu is shown to have been informed that he may make representation to the government and detaining authority against detention order, if he so desire. The grounds of detention are definite, proximate and free from any ambiguity. The detenu has been informed with sufficient clarity what actually weighed with Detaining Authority while passing detention order.Â Detaining Authority has narrated facts and figures that made the authority to exercise its powers under Section 8 of Act of 1978 and record subjective satisfaction that detenu was required to be placed under preventive detention in order to prevent him from acting in any manner prejudicial to the security of the State.Â

9. Learned counsel for petitioner has stated that the allegations/ grounds of detention are vague and the instances and cases mentioned in grounds of detention have no nexus with detenu and have been fabricated by police in order to justify its illegal action of detaining detenu. It may not be out of place to mention here that the Supreme Court, in several decisions, has held that even one prejudicial act can be treated as sufficient for forming the requisite satisfaction for detaining the person.Â Fleeting look of detention record produced by learned counsel for respondents and grounds of detention would reveal that detenu is a PAK trained hard core militant, affiliated with Lashker-e-Toiba terrorist outfit, which is one of the most dreaded organisation operating in the State of J&K. Detenu is stated to have crossed over to Pakistan Occupied Kashmir for obtaining training in the use/handling of arms and ammunition and after spending three and a half months, he returned back to the Valley, but he was arrested and in view of his antinational activities, he was detained under Public Safety Act and lodged in Kathua Jail. After his release, detenu is stated to have not shun the path of violence and worked as over ground worker for Lashker-e-Toiba outfit. Detenu is alleged to have remained in touch with some Lashkar-e-Toiba militants. The record also reveals that detenu and other militants hatched a conspiracy to kill Shri Shabir Ahmad, the then SHO P/S

Chadoora and in pursuance to the said conspiracy on 12.12.2013, the militants are said to have fired upon said Shabir Ahmad, who attained martyrdom and some other police personnel were injured. For the said incident a case Fir no.216/2013 under Section 302, 307, 120-B, RPC was registered in police station Chadoora. During the course of investigation it is averred to have come to surface that detenu along with his fellow terrorists was involved in the said case. Accordingly a charge sheet of the case was produced against detenu and his associates before the competent court of law, but he was acquitted by the court. On 24.12.2013, the record also reveals, during cordon, detenu accompanying militants, paved way for their escape from the spot and in this regard a case FIR no.448/2013 under Section 307, 7/27 Arms Act was registered in police station Budgam. Detenu is said to have been placed under preventive detention vide detention order no.DMB/PSA/13/2017 dated 19.05.2017, but the said detention order was quashed by this Court. The detention record also divulges that there are strong inputs that detenu may again indulge in antinational activities as he is shrewdly operating from behind the curtain in order to obviate the possibility of incriminating himself in substantive law. The record of detention also suggests that the fact is that credible inputs have unequivocally suggests that detenu is playing vital part in keeping the pot of terrorism boiling in the State and the security of the State would be jeopardised in case he is not again placed under preventive detention inasmuch as his track record is such that it is next to impossible that detenu would ever even think of shunning the path of violence and terrorism and he is close associate and aide of infiltrated PAK militant commanders. He is almost likely to help the youth in joining militant ranks and in the recent past militant activities have been on rise and it would be highly detrimental for security of the State if he is not detained under the provisions of Public Safety Act. Thus, it is deducible from detention record that there was material before detaining authority to come to conclusion and hence, it cannot be said that subjective satisfaction of detaining authority was wrongly arrived at or grounds of detention are selfcontradictory or vague. The role of detenu has been specifically described. Even otherwise it is settled law that this Court in proceedings under Article 226 of the Constitution is limited to scrutinizing whether detention order has been passed on material placed before it, it cannot go further and examine sufficiency of material.

This Court does not sit in appeal over decision of detaining authority. This Court cannot substitute its own opinion over that of detaining authority

when grounds of detention are precise, pertinent, proximate and relevant. This Court can only examine grounds disclosed by the Government in

order to see whether they are relevant to the object which the legislation has in view, that is, to prevent detenu from engaging in activities prejudicial

to security of the State or maintenance of public order. In this regard I am fortified by law laid down by the by the Supreme Court in State of

Gujarat vs. Adam Kasam Bhaya (1981) 4 SCC 216; State of Punjab vs. Sukhpal Singh (1990) 1 SCC 35; Union of India vs. Arvind Shergill (2000) 7

SCC 601; Pebam Ningol Mikoi Devi vs. State of Manipura, (2010) 9 SCC; and Subramanian vs. State of T.N. (2012) 4 SCC 699.Â

10. Learned counsel for petitioner also avers that detaining authority has made basis a single case in grounds of detention for slapping preventive

detention upon detenu inasmuch as in another FIR, detenu has been acquitted and that could not have been made use of for slapping detention on

detenu. It may not be out of place to mention here that the Supreme Court, in several decisions, has held that even one prejudicial act can be treated

as sufficient for forming requisite satisfaction for detaining a person. The power of preventive detention is a precautionary power exercised in

reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on

certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be, made before or during

prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The

pendency of prosecution is no bar to an order of preventive detention and an order of preventive detention is also not a bar to prosecution. Thus,

submission of learned counsel for petitioner that detaining authority should not make use of one of FIR, in which detenu has been acquitted, for

passing detention order, is specious.Â Discharge or acquittal of a person will not preclude detaining authority from issuing a detention order. In this

regard the Constitution Bench of the Supreme Court in Haradhan Saha's case (supra), while considering various facets concerning preventive

detention, observed:

32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be, made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu. 34. The recent decisions of this

Court on this subject are many. The decisions in *Borjahan Gorey v. State of W.B.*, *Ashim Kumar Ray v. State of W.B.*; *Abdul Aziz v. District*

Magistrate, Burdwan and *Debu Mahato v. State of W.B.* correctly lay down the principles to be followed as to whether a detention order is valid or

not. The decision in *Biram Chand v. State of U.P.*, (1974) 4 SCC 573, which is a Division Bench decision of two learned Judges is contrary to the

other Bench decisions consisting in each case of three learned Judges. The principles which can be broadly stated are these. First, merely because a

detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing

offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention

under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the

Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the

preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is

not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances.

11. Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanising the harsh authority over individual liberty. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation. These observations have been made by the Supreme Court in *The Secretary to Government, Public (Law and Order-F) and another v. Nabila and another* (2015) 12 SCC 127.

12. The Supreme Court in the case of *Debu Mahato* (supra), has observed that while ordinarily-speaking one act may not be sufficient to form the requisite satisfaction, there is no such invariable rule and that in a given case one act may suffice. That was a case of wagon-breaking and given the nature of the Act, it was held therein that one act is sufficient. The same principle was reiterated in the case of *Anil Dely v. State of W.B.* (supra). It was only a case of theft of railway signal material. Here too one act was held to be sufficient. Similarly, in *Israil SK v. District Magistrate of West Dinajpur* (1975) 3 SCC 292 and *Dharua Kanu v. State of W.B.* (1975) 3 SCC 527, single act of theft of telegraph copper wires in huge quantity and removal of railway fish-plates respectively, was held sufficient to sustain the order of detention. In *Saraswathi*

Seshagiri's (supra), a case arising under a single act, viz. attempt to export a huge amount of Indian currency was held sufficient. In short, the principle appears to be this: Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. That is the reason why single acts of wagonbreaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish-plates were held sufficient by the Supreme Court. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, as in the present case detenu has been apprehended with arms and ammunition, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity.Â Â

13. If one looks at the acts, the J&K Public Safety Act, 1978, is designed for, is to prevent, they are all these acts that are prejudicial to security of the State or maintenance of public order. The acts, indulged in by persons, who act in concert with other persons and quite often such activity has national level ramifications. These acts are preceded by a good amount of planning and organisation by the set of people fascinated in tumultuousness. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed, but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention.

The said views and principles have been reiterated by the Supreme Court in *Gautam Jain v. Union of India* another AIR 2017 SC 230. The judgements rendered in *Rajinder Arora v. Union of India and others* (2006) 4 SCC 796; *K. S. Nagamuthu v. State of T.N. and others*; *Deepak Bajaj v. State of Maharashtra & another* ; *Mst Zahida v. State of J&K and others* 2008 (I) SLJ 245; and judgement dated 16th July 2018 passed in HCP

no.30/2018 titled Reyaz Ahmad Dar v. State of J&K and others, referred to and relied upon by learned counsel for petitioner to buttress the case set

up by petitioner, in view of above discussion, would not render any aid and assistance to the case of petitioner inasmuch as the facts and

circumstances of aforesaid cases/ judgements, relied upon, are distinguishable from the case in hand.

14. For the foregoing discussion, the petition sans any merit and is, accordingly, dismissed.

15. Detention record be returned to learned counsel for respondents. Â