

(2019) 01 J&K CK 0013

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeals In Habeous Corpus (LPAHC) No. 09 Of 2018

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

Date of Decision : 30-01-2019

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 307
Armed Forces (Special Powers) Act, 1958 — Section 07, 27
General Clauses Act, 1897 — Section 3, 11, 11(1), 11(2), 21
Constitution Of India, 1950 — Article 226

Citation : (2019) 01 J&K CK 0013

Hon'ble Judges : Ali Mohammad Magrey, J;Sanjeev Kumar, J

Bench : Division Bench

Advocate : Mir Shafaqat Hussain, Saad Ganai

Final Decision : Allowed

Judgement

Sanjeev Kumar J

1. This intra Court Appeal is directed against the judgment of the learned Single Judge dated 03rd August 2018, passed in HCP no. 38/2018, whereby the petition filed on behalf of one Basharat Ahmad Mir S/o Late Abdul Khaliq Mir R/o Munpappy, Budgam (hereinafter referred to as detenu) seeking to challenge the detention order passed under Jammu and Kashmir Public Safety Act (for brevity PSA) has been dismissed. Apart from other grounds of challenge taken by the petitioner in this Appeal, the ground which is strenuously urged is that the detention of the detenu on the selfsame grounds on which earlier detention order had been passed and subsequently quashed by this Court, was sheer abuse of police power by the State.

2. Having heard learned counsel for the appellant and perused the record, we are of the view that this Appeal must succeed on the aforesaid ground alone. This also obviate the necessity of dealing with other grounds of challenge urged on behalf of the appellant-detenu.

3. Admittedly, the writ petition filed on behalf of the detenu challenging his

detention on various grounds has remained un-rebutted. We do not find any reply affidavit filed on behalf of the State or Detaining Authority. Perusal of the detention record produced, however, reveals that in view of the active involvement of the appellant in terrorist activities and his affiliation with LeT Terrorist Outfit, the appellant was, in the year 2013, booked under FIR No. 216 of 2013 under section 302, 307, 120-B RPC registered at Police Station Chadoora for his involvement in the killing of Shri Shabir Ahmad, the then SHO Police Station, Chadoora. It may be noted that even before registration of the aforesaid FIR, which ultimately ended in acquittal of the detenu, he had remained under detention in PSA wherefrom he was subsequently released on completion of term.

4. There is a reference to another incident of 24th December, 2013 with regard to the terrorist activities of the detenu. He was booked under FIR No.448 of 2013 under section 307 RPC and 07/27 Armed Act in Police Station Budgam for the aforesaid incident. It is not, however, coming forth from the records as to what happened to the aforesaid FIR, but as is discernible from the grounds of detention, the detenu was once again detained under PSA vide District Magistrate Budgam's Order No.DMB/ PSA/ 13/2017 dated 19th May, 2017. Obviously while passing the aforesaid detention order, the activities of the detenu indulged till 19th May 2017, had been taken note of. It is not disputed before us that the aforesaid order of detention too could not stand scrutiny of this Court and the same was quashed. What prompted the Detaining Authority to pass a fresh order of detention, impugned in the writ petition, is anybody's guess. There is, however, bald assertion in the last para of the grounds of the detention suggesting that normal law of the land has not deterred the detenu from indulging in subversive activities prejudicial to the security of the State. There is absolutely no mention in the grounds of the detention with regard to any activity the detenu has indulged in or continued with after quashment of his earlier detention order dated 19th May, 2017.

5. For the foregoing reasons and in view of the settled legal position, fresh order of detention on the selfsame grounds is vitiated in the law and therefore could not sustain. We are supported by three Judge Judgement of the Supreme Court rendered in the case of Ibrahim Bachu Bafan vs. State of Gujarat (1985) 2 SCC 24. While noticing similar provision of Conservation of Foreign Exchange and provisions of Smuggling Activities Act 1974 (COFEPOSA), Supreme Court in paragraph 10 has held thus:-

" ...The power conferred under clauses (a) and (b) of sub-section (1) of Section 11 is in fact extension of the power recognized under Section 21 of the General Clauses Act and while under the General Clauses Act, the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of Section 11 (1) of the Act are also entitled to exercise the power of revocation. When the High Court exercises jurisdiction under Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like habeas corpus or certiorari it quashes the order impugned before it and by

declaring the order to be void and striking down the same it nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, therefore, our clear opinion that in a situation where the order of detention has been quashed by the High Court, sub-section (2) of Section 11 is not applicable and the detaining authority is not entitled to make another order under Section 3 of the Act on the same grounds".

6. This judgement was subsequently followed by the Supreme Court in the case of Chhagan Bagwan Kahar vs. N. L. Kalna & Ors, 1989 AIR 1234. Referring to earlier judgement of the Supreme Court in the case Ghulam Nabi Zaki vs. State of Jammu and Kashmir, 1970 (3) SCR 35: 1971 CriLJ (N) 24 which was rendered in the context of State PSA and also taking note of Constitution Bench Judgement in the case of Hadibandhu Dass vs. District Magistrate Cuttak (1969) 1 SCR 227, the Supreme Court in the case supra concluded thus:-

"... It emerges from the above authoritative judicial pronouncements that even if the order of detention come to an end either by revocation or by expiry of the period of detention there must be fresh facts of passing a subsequent order. A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing rule it nullifies the entire order. In the present case, no doubt, the order of detention contains fresh facts. In addition to that the detaining authority has referred to the earlier detention order and the judgement of the High Court quashing it, presumably for the purpose of showing that the detenu in spite of earlier detention order was continuing his bootlegging activities".

7. It is thus seen that detaining authority while arriving at subjective satisfaction has not only taken into consideration the future prospectus of the detenu indulging in similar activities but has also taken into consideration the grounds on which the earlier order of detention dated 19th May, 2017 had been passed. The judgement referred to above lend support to the contention of the learned counsel for the appellant that the detention order without fresh material was not sustainable.

8. The learned Single Judge has not adverted to the aforesaid ground of challenge. We, therefore, are inclined to interfere with the judgement impugned.

9. It may be noted that pursuant to the opinion of the Advisory Board, the detenu was directed to be detained under PSA for the period of six months in the first instance vide Government Order No. Home/PB-V/290 dated 13th March,

2018 which on its expiry w.e.f. 22nd August 2018, was further extended for a period of six months in terms of Government Order No. Home/PB-V/888 of 2018 dated 20th August 2018, which extended period, shall now, expire on 21st February, 2019.

10. For the foregoing reasons, this Appeal is allowed. Judgement of the Single Bench is set aside. The order of detention impugned in the writ petition 14th February, 2018 is quashed. Consequently, the detenu namely Basharat Ahmad Mir S/o Late Abdul Khaliq Mir R/o Munpappy, Budgam is directed to be released unless he is required in some other case.

11. Detention record produced by Mr. Saad Ganai, learned GA be returned.