
(1993) 12 J&K CK 0007
In the Jammu And Kashmir High Court
Case No : HC (W) No. 70 of 1993

Dharam Singh

APPELLANT

Vs

State and Ors.

RESPONDENT

Date of Decision : 29-12-1993

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Public Safety Act, 1978 — Section 8

Citation : (1994) 1 SriLJ 269

Hon'ble Judges : V.K.Gupta, J

Bench : Single Bench

Advocate : Onkar Seth, K.S.Johal, A.Kapoor, Advocates appearing for the Parties

Judgement

1. Order No. PSA/DMS/113/92 Dated 4th Sept. 1992 issued by the District Magistrate, Srinagar passed under section 8 of the Jammu and

Kashmir Public Safety Act, 1978 whereby the petitioner .was detained for a period of two years is under challenge in this petition filed by him

through his father under Article 22 of the Constitution of India. Counter affidavit has been filed on behalf of the detaining authority that is

respondent No.2 in the petition. Other respondents have not filed counteraffidavits despite opportunities granted. Their right was accordingly

closed because of the preemptory nature of the order passed by court on 581993.

2. Mr. K.S. Johl. learned counsel appearing for the petitioner urged a number of grounds in favour of the petitioner's pleas for challenging and

assailing the detention order and for quashing and setting it aside as being unconstitutional and illegal. I need not, however, go into all such pleas

because I propose to allow this petition on a solitary ground. 3. The admitted case of the parties is that before the petitioner was detained under

section 8 of the Public Safety Act vide detention order impugned in this petition he stood arrested in substantive offences in FIR No.27/92 under

section 3/4 TADA, 302, 307, 120B RFC etc. In these substantive offences in the said FIR, he was arrested on 19th March, 1992. This has been

clearly reflected and unambiguously admitted in para5 (II) of the counteraffidavit of respondent No.2. The petitioner's contention is that at the time

of passing of detention order, he was in custody, it was obligatory upon the detaining authority to have shown his awareness about such previous

custody of the petitioner in substantive offences and then to disclose that despite his previous custody, there were compelling reasons for detaining

him under the preventive detention law. There is plenty of force in the submissions of the petitioner on this account. Law is well settled [SIC] and a

person can be detained under the preventive detention law if he is already in custody, but two conditions are required to be satisfied before such a

detaining authority issues detention order. Firstly, that the detaining authority is aware of the detenue's previous custody and secondly, that there are

compelling reasons for detaining him despite his being in custody. There is no doubt that detention is based on subjective satisfaction of the

detaining authority and the court, while deciding the question of the Validity of the detention order does not enquire into the subjectivity of the

detaining authority nor does it probe into his mind when he passed the detention order. There is also no doubt that if the detaining authority assigns

compelling reasons either in the detention order itself or in the grounds of detention or for that matter in the return filed in the court in answer to writ

petition, the court does not examine the validity of such compelling reasons and takes them to their face value. The facts in the present case are,

however, different. In the grounds of detention, the following observation has been made by the detaining authority.

.....No doubt, you are presently lodged in Addl. Lock up,

but there is very apprehension that you may get release on bail which will defeat the purpose to deter you from continuing subversive

activities.....

In grounds (b) and (c) of para5 of the writ petition, petitioner has clearly, unequivocally and categorically stated that he has not so far applied for

grant of bail in FIR No. 27/92 in which he stood arrested in substantive offence

before his detention U/S 8 of Public Safety Act, and therefore, the apprehension of the detaining authority about his being released on bail is wholly misconceived, baseless and unfounded. In other words, according to the petitioner, if the petitioner has not applied for bail so far, there is no question of his being released on bail, particularly when substantive offences for which he was arrested in FIR 27/92 are no minor offences, because these are punishable with death sentence and imprisonment for life. The aforesaid factual averment of the petitioner regarding his not having applied for bail has been admitted by the respondents in the counteraffidavit of respondent No.2. Respondent No.2 does not say that the petitioner has applied for bail. It in fact admits by implications that the petitioner had not applied for bail because had he applied for bail, the counteraffidavit would have said so and then given details about such application. All that the counteraffidavit says is that the provisions of Public Safety Act do not bar detaining a person even if he has not applied for bail in substantive offences in which he stood arrested before being detained under the preventive detention law, 4. I am in total agreement with the contention of the learned counsel for the petitioner. In a case where a detainee has not even applied for bail, especially when he stands arrested in such substantive offences where the refusal of bail is a rule and the grant is only an exception, there cannot be compelling reasons for detaining such a person under preventive detention law [SIC] the detaining authority cannot justify the detention of the detainee on this ground. The situation becomes altogether different when a person arrested in substantive offences applies for bail. In such a situation, of course, the detaining authority can be justified, in the process of his application of mind that there can be chances of his being released on bail and, therefore, he based on such subjectively orders his detention under preventive detention law. Whether ultimately the criminal court seized of the matter grants bail to the detainee or does not grant bail is an entirely different matter. Mere filing of bail application before the competent criminal court and its pendency can be considered to be a sufficient ground and a good reason for enabling a detaining authority to detain a person under preventive detention law, even if he already stands arrested in substantive offences. This undoubtedly is irrespective of the nature of the offences for which he stood

arrested before his detention under preventive detention law or whether such offences are bailable or totally nonbailable. That is a matter entirely depending upon the subjective satisfaction of the detaining authority and the court cannot substitute its own opinion or subjective satisfaction to that of the detaining authority and leave the matter for him to be decided. I am saying so because, whenever the bail application is moved by a person accused of substantive offences in which he stands arrested, it is for the detaining authority at that stage to see as to whether, depending upon facts and circumstances of the case, there are chances, good or bad, weak or strong, remote or close, of his being released on bail. He being the detaining authority under preventive detention law, by the very nature of things is entrusted with the task of deciding the question, at that stage, as to whether or not to deter him from acting in any manner prejudicial to the security of the State or the maintenance of public order or, for whatever other reasons permissible under law. The court will not either probe into the working of detaining authority or into his subjective satisfaction.

5. The case here of course is entirely different. The detaining authority will be wholly unjustified, if he orders detention of a person under preventive detention who already stands arrested in substantive offences, when such a person had not even applied for bail. As already noticed, this is all die more glaring when the offences for which he has been arrested are not only nonbailable, but so heinous that the ground of bail by the competent criminal court is, in normal course an exception and its refusal, a rule. Also, when in such offences the relevant criminal and penal laws prohibit the competent criminal court to order the grant of bail, except after proper notice to the State and only after affording adequate opportunity of hearing to the prosecution. In such cases, when accused therefore, does not even apply to the competent criminal court for grant of bail, assigning the reason of the apprehension in the mind of detaining authority about his being released on bail is wholly impermissible under the scheme of the Article 22 (5) of the Constitution of India and cannot be countenanced by any court as being a justified and plausible ground for detaining such a person under the preventive detention law. Such an order of detention can surely be assailed to be suffering from gross nonapplication of mind, or at lease a grossly improper application of mind. No court in such a situation, therefore, can possibly uphold such a detention order or approve the

act of such a detaining authority. For the foregoing reasons, therefore, I have no hesitation in allowing this petition, the petition accordingly is

allowed and the impugned detention order is hereby quashed and set aside. A writ of mandamus is also issued against the respondents directing

them, as a consequence to release the petitioner from preventive detention, if he is not required in any other case. No order as to costs.