
(2019) 03 J&K CK 0064

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 361 Of 2018

Faheem Ahmad Wagay

APPELLANT

Vs

State Of Jammu & Kashmir And Ors

RESPONDENT

Date of Decision : 15-03-2019

Acts Referred:

Jammu And Kashmir High Court Rules, 1999 — Rule 138(3)
Constitution Of India, 1950 — Article 21, 22(3)(b)

Citation : (2019) 03 J&K CK 0064

Hon'ble Judges : Rashid Ali Dar, J; Sanjay Kumar Gupta, J

Bench : Division Bench

Advocate : Wajid Haseeb, Mir Shafqat Hussain, Showkat Ahmad Naqashbandi

Final Decision : Disposed Off

Judgement

1) By medium of instant petition, quashment of order of detention bearing No.20/DMK/PSA/2018 dated 04.10.2018, is sought on the grounds detailed out therein.

2) Preventive orders, so as to deter a person from acting in any way which shall be threatening the security of the State or public order, have to be passed. However, the power in issuing preventive orders has to be exercised in such a manner which would show that all the safeguards as against the orders of detention have been taken into consideration and respected. Liberty is precious, curtailment thereof can be by way of exception but it must have some reasonable basis. In absence of any solid basis, tampering with the right of liberty is not permissible. Any person who, in any way, threatens security of the State or public order has to be dealt with iron hands but constitutional guarantees under such guise cannot be permitted to be defeated.

3) 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 maintenance of public order 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".

4) Instant case, in effect, is one wherein order of detention absolutely suffers from non-application of mind and on plain reading of the material available on record shows that it has been passed in violation of the constitutional rights guaranteed to the petitioner. The non-application of mind on the part of detaining authority is writ large as in the order impugned Detaining Authority has recorded that "on the basis of grounds of detention placed before me by the Sr. Superintendent of Police" he has derived satisfaction regarding detention of the detenu. It is to be made clear that whatever material is collected by the Police or any other agency has to be placed before the Detaining Authority and it is then the Detaining Authority who, on scrutiny, has to ascertain as to whether there is any solid base for the allegations as shall be contained in the material so collected. The authority has to derive subjective satisfaction and then to formulate grounds of detention. In the instant case it appears that deriving of

subjective satisfaction has become a casualty. Simply whatever has been mentioned in the dossier has been mentioned in the grounds of detention, that is why in the order of detention it is recorded that satisfaction is derived from the grounds of detention placed on record by SSP when the allegations contained therein are not substantiated by any record.

5) The Hon'ble Apex Court as well as this Court in most of the cases have set at rest as to how the safeguards guaranteed against the preventive laws have to be respected but still non-adherence is repeated.

6) The non-application of mind is further exposed by the fact that in the grounds of detention, detinue has been shown involved in FIR No.183/2016, 191/2016 and FIR No.313/2017, however, the detinue in these FIRs has been admitted to bail but this fact has not been made mention of in the grounds of detention. Either detaining authority has been kept in dark or otherwise detaining authority has not applied its mind properly. 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 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....."

7) The impugned order of detention on the face of it is not only vague and unsupported by any material but also appears to be an arbitrary exercise of power, hence quashed. The detinue is direction to be released from the preventive custody provided he is not required in connection with any other case.

8) Petition disposed of accordingly.

Pronounced today in terms of Rule 138(3) of J&K High Court Rules, 1999.