

(2021) 05 J&K CK 0048

In the Jammu And Kashmir High Court

Case No : Writ Petition (Crl) No. 139 Of 2020, Criminal Miscellaneous No. 608, 609 Of 2020

Farooq Ahmad Bhat Alias Tawheedi

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 25-05-2021

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 13
Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 — Section 3(3)
Constitution Of India, 1950 — Article 19, 21, 22, 22(2)(b), 22(5)

Citation : (2021) 05 J&K CK 0048

Hon'ble Judges : Javed Iqbal Wani, J

Bench : Single Bench

Advocate : Syed Musaib, Asifa Padroo

Final Decision : Disposed Of

Judgement

1. The detainee namely Farooq Ahmad Bhat @ Tawheedi has filed the instant petition through his son Irfan Farooq, seeking quashment of detention

order bearing No. 102/DMB/PSA/2020 Dated 11.07.2020, passed by respondent No. 2 where under the detainee has been ordered to be detained

under Section 13 of the J&K Public Safety Act, 1978.

2. The order of detention is being challenged inter-alia mainly on the grounds that the same has been passed without application of mind, in that, the

detainee had been granted bail in all the FIRs referred to and relied upon in the grounds of detention and that the detaining authority despite having

received a representation of the detainee forwarded against the order of detention failed to consider the same.

3. Per contra, respondents in their reply affidavit justify the passing of order of

detention against the detainee contending that the same has been passed validly and legally by the detaining authority keeping in view the activities of the detainee being prejudicial to the maintenance of security of the State.

4. Heard learned counsel for the parties and perused the record.

5. Learned appearing counsel for the parties while making their respective submissions reiterated the contentions raised and grounds urged in their respective pleadings.

6. Before advertng to the controversy involved in the petition, it would be appropriate and advantageous to refer to the judgement of the Apex Court passed in case titled as *Rekha Vs. State of Tamil Nadu*, reported in 2011 (5) SCC 244 being relevant and germane herein, wherein at paras 29,

33 & 35 it has been observed and laid down as under: -

29. Preventive detention is, by nature, repugnant to democratic ideas and an antithesis to the rule of law. No such law exists in the USA and in

England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal

but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed

by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the

land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

33. No doubt it has been held in the Constitution Bench decision in *Haradhan Saha* case that even if a person is liable to be tried in a criminal

court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a

preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in

Article 21 and 22 of the Constitution (which we have already explained). Article 22(3)(b) is only an exception to Article 21 and it is not itself a

fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before

sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his defence through his lawyer. It follows that if a person

is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be

able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to?

35. It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or

reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a

jurisdiction of suspicion (vide *State of Maharashtra v. Bhaurao Punjabrao Gawande*, SCC para 63). The detaining authority passes the order of

detention on subjective satisfaction. Since clause (3) of Article 22 specifically excludes the applicability of clauses (1) and (2), the detainee is not

entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power

the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however technical, is, in our

opinion mandatory and vital.

A reference to the judgement of the Apex court passed in case titled as *Abdul Wahab Sheikh Vs. B. K. Jha*, reported in 1987 (2) SCC 22

would also be relevant wherein at para 5, following has been noticed and observed as under: -

“We only desire to add that in a Habeas corpus proceeding, it is not a sufficient answer to say that the procedural requirements of

the constitution and the statute have been complied with before the date of hearing and therefore, the detention should be upheld. The procedural

requirements are the only safeguard available to a detainee 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 right guaranteed to him in that regard.

7. Coming to the first ground of challenge noted in the preceding paras, it is revealed that there is no denial to the fact by the respondents in the reply

affidavit that the detainee stands released in all the FIRs. Even the order of detention, grounds of detention, so much so the record does not anywhere

reveal or suggest that the detaining authority was aware about the said fact.

The law enjoins upon the detaining authority to be alive to all the facts and circumstances of the case and on application of mind to all those facts and circumstances, the detaining authority has to draw subjective satisfaction that the detention of the detainee becomes imperative. In case all the facts are not brought to the notice of the detaining authority or that the detaining authority is not aware of all the facts and circumstances and without considering the same it derives subjective satisfaction to detain a person, the same would amount to non-application of mind on its part.

A reference here to the judgment of the Apex passed in case titled as *Vijay Narain Singh Vs. State of Bihar and Ors.*, reported in 1984 (3) SC

14 being relevant and germane would be advantageous wherein following has been observed and noticed: -

It is well settled that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardized unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of an accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorizing such detention. When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinizing the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court.

The failure on the part of the detaining authority to show awareness with regard to the bail granted to the detainee in all the FIRs supra per-se amounts to non-application of mind on its part vitiating the order of detention.

8. So far as the second ground of challenge, as noticed in the preceding paras is concerned, there again is no denial by the respondents in their reply affidavit to the contention of the petitioner that a representation against the order of detention had been forwarded to the respondent No. 2 and that the same had not been considered.

Perusal of the copy of the representation attached with the petition, prima-facie suggest that same has been received by the office of respondent no. 2

on 18.08.2020. The failure of the respondents to reply to the said contention of the petitioner in law necessitates thus, drawing an adverse inference against them in this regard.

A reference here to the judgement of the Apex court passed in case titled as *Rahmatullah Vs. State of Bihar and Ors.*, reported in 1979 (4) SCC

559, being relevant and germane herein would be appropriate wherein at Para 4, it is noticed and observed as under: -

4. The normal rule of law is that when a person commits an offence or a number of offences, he should be prosecuted and punished in

accordance with the normal appropriate criminal law; but if he is sought to be detained under any of the preventive detention laws as may often be

necessary to prevent further commission of such offences, then the provisions of Article 22(5) must be complied with. Sub-Article (5) of Article 22

reads:

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as

soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a

representation against the order.

This Sub-Article provides, inter alia, that the detaining authority shall as soon as may be communicate the grounds of detention and shall afford him the

earliest opportunity of making a representation against the order. The opportunity of making a representation is not for nothing. The representation, if

any, submitted by the detenu is meant for consideration by the Appropriate Authority without any unreasonable delay, as it involves the liberty of a

citizen guaranteed by Article 19 of the Constitution. The non consideration or an unreasonably belated consideration of the representation tantamount

to non-compliance of Sub-Article (5) of Article 22 of the Constitution.

The non-consideration of the representation of the detenue by the respondents cannot but said to be infringement of Article 22(5) of the Constitution

thus, vitiating the order of detention.

9. In view of the aforesaid position obtaining in the matter the other grounds of challenge urged in the petition pale into insignificance and need not to

be dealt with.

10. The judgement relied upon by counsel for the respondents passed in case titled as Union of India Vs. Dampel Happy Dhakad reported in 2019

(20) SCC 609, is not applicable to the facts and circumstances of the case, in view of the fact that the following two points had arisen for

consideration therein;

(i) Whether the orders of detention were vitiated on the ground that relied upon documents were not served along with the orders of detention and

grounds of detention? Whether there was sufficient compliance of the provisions of Article 22(5) of the Constitution of India and Section 3(3) of the

COFEPOSA Act ?

(ii) Whether the High court was right in quashing orders merely on the ground that the detaining authority has not expressly satisfied itself about the

imminent possibility of the detenue being released on bail ?

The aforesaid points admittedly are not in issue in the instant petition and therefore, the judgement relied upon is misplaced.

11. Viewed thus, in the context what has been observed, analyzed and considered in the preceding paras the instant petition is allowed and consequent

to which the impugned order of detention bearing No. 102/DMB/PSA/2020 Dated 11.07.2020 is quashed, with the direction to the respondents to

release the detenue forthwith from the preventive custody, unless the detenue is required in any other case.

12. Disposed of along with all connected CrLM(s).

13. Registry to retain the scanned copy of the detention record with the file.