
(2019) 02 J&K CK 0025

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 284 Of 2018

Feroz Ahmad Naikoo

APPELLANT

Vs

State Of Jammu & Kashmir And Anr

RESPONDENT

Date of Decision : 05-02-2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978 — Section 8

Citation : (2019) 02 J&K CK 0025

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Parvaiz Nazir, Asifa Padroo

Judgement

1) By the instant petition, petitioner seek quashment of the detention order bearing No.08-DMK/PSA of 2018 dated 06.09.2018, issued by District Magistrate, Kupwara (for brevity "the detaining authority"). In terms of said order, Feroz Ahmad Naikoo son of Gh. Mohammad Naikoo resident of Safalpora Tehsil Kralgund Qaziabad District Kupwara (hereinafter referred to as the detainee), has been taken into preventive custody by invoking powers under Section 8 of the J&K Public Safety Act, 1978.

2) The petitioner's case, as set out in the petition, is that the detainee has been implicated in FIR No.325/2018 but despite that detention order impugned has been slapped against him. The respondents are stated to have ignored to provide material relied upon by the detaining authority while passing the impugned order of detention and thus deprived the detainee of his Constitutional and Statutory rights. Grounds of detention are stated to be vague, baseless, non-existent and unfounded.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and insisted that the activities of detainee are highly prejudicial to the security of the State. It is pleaded that the detention order and grounds of detention were handed over to the detainee and same were read over and

explained to him. The grounds taken by the petitioner are legally misconceived, factually untenable and without any merit. The learned counsel for the respondents has made available detention records to lend support to the case set up in the counter affidavit.

4) The main ground, as highlighted by the learned counsel for the petitioner, is that as per grounds of detention the detainee has been booked in FIR No.325/2018, and so was in custody of police authorities when the order of detention has been passed. There was no requirement of passing the order of detention. No compelling reasons have been mentioned for passing the order of detention.

5) Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, question arises for consideration whether an order of detention could be passed on the face of such an eventuality? The answer to this question is emphatically "No", taking into consideration the law laid down by the Hon'ble Apex Court in "Sama Aruna v. State of Telangana & Anr" (AIR 2017 SC 2662). Para 24 of the said judgment is apposite to be quoted herein below:

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-03. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detainee was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."

6) The same view has been repeated and reiterated by the Hon'ble Supreme Court in the judgment delivered in the case of "V. Shantha v. State of Telangana & Others" (AIR 2017 SC 2625). Para 13 of the said judgment is relevant to be quoted as under:

"The order of preventive detention passed against the detainee states that his illegal activities were causing danger to poor and small farmers and their safety and financial well-being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detainee from indulging in further prejudicial activities in the business of spurious seeds,

affecting maintenance of public order and that there was no other option except to invoke the provisions of the preventive detention Act as an extreme measure to insulate the society from his evil deeds. The rhetorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the draconian powers of preventive detention. To classify the detainee as a "goonda" affecting public order because of inadequately yield from the chilli seed sold by him and prevent him from moving for bail even is a gross abuse of the statutory power of preventive detention. The grounds of detention are ex-facie extraneous to the Act."

7) Testing the instant case on the touchstone of the law laid down above, the detainee could not have been detained after taking recourse to the provisions of the Public Safety Act when he was already in the custody of the police authorities in the cases, the details whereof have been given in the grounds of detention. His custody in police for the offences referred in the grounds of detention, has been converted into the custody under the impugned detention order. May be the detaining authority might have been laboring under the belief that the detainee applies for bail, he may succeed in seeking his release but this apprehension of the detaining authority could have been guarded against by resisting and opposing the bail application. In the event of his release on bail, the State could have exercised its right to knock at the doors of higher forum. This single infraction knocks at the bottom of the contention raised by the State that the detainee can be detained preventatively when he is already in custody and has not applied for bail. It cuts the very root of the state act. The State could have taken recourse to the ordinary law of the land.

8) In view of the facts of the present case and the law laid down by the Hon'ble Apex Court as quoted hereinabove, the order of detention impugned does not sustain on the aforesaid ground alone, therefore, other grounds projected in the petition are not required to be dealt with.

9) Having regard to the above discussion, the impugned order of detention impugned is unsustainable, as such, quashed. Further custody of the detainee shall be governed by the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against.

10) Registry to return the detention record to the learned counsel for the respondents.