

(2018) 12 J&K CK 0018

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 239 Of 2018

**Firdous Ahmad Wani @APPELLANT@Hash State Of Jammu & Kashmir
And Others**

Date of Decision : 11-12-2018

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8(a)
Lawful Activities (Prevention) Act, 1967 — Section 10
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 102B, 505(i)(B)
Constitution Of India, 1950 — Article 21, 22, 22(3), 22(3)(b), 22(3)(1), 22(3)(2)

Citation : (2018) 12 J&K CK 0018

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Musavir Mir, Shah Aamir

Judgement

1) Impugned is order No.66/DMB/PSA/2018 dated 20.08.2018, whereby District Magistrate, Baramulla (respondent no.2), has, in exercise of powers under clause (a) of Section 8 of J&K Public Safety Act, 1978, placed one Firdous Amad Wani @ Nusrat Bai son of Late Ghulam Mohammad Wani resident of Mohalla Bazar Seri Warpora, Pattan District Baramulla (for brevity "detenue") under

preventive detention and directed his lodgement in Central Jail Kotebhelwal, on the grounds, submissions and averments enumerated in writ petition.

2) The respondents filed their Reply and resisted the writ petition. Detention record has been made available by learned Additional Advocate General.

3) Heard learned counsel for the parties at length and considered their submissions and have gone through the record.

4) The learned counsel for the petitioner has projected various grounds while assailing the validity of impugned detention order but the star ground is that the detenue was already in custody when the impugned order was passed but no compelling reasons have been given for passing the impugned order.

5) The main plank of argument of the learned counsel for the petitioner is that

the since the detenue was in custody of the police authorities besides for others, for commission of substantive offence, therefore, there was no need to direct his preventive detention. The arrest of the detenue in the said criminal cases at the time of passing of the orders of detention has not been disputed.

6) Since the detenue 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 detenue 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 detenue 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."

7) 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 detenue 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 detenue 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 detenue as a "goonda" affecting public order because of inadequately yield

from the chilli seed sown 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."

8) The next star ground, as highlighted by the learned counsel for the petitioner, is that as per grounds of detention, the detenu has been arrested on 26.07.2018 in connection with case FIR No.148/2018 registered at Police Station, Pattan for commission of offences punishable under Section 10 ULA(P) Act, 120-B, 505(i) (B) RPC. When bail application has not been filed, how could detaining authority record satisfaction that there is likelihood of release of the detenu on bail. In this connection, para 27 from the judgment of the Hon'ble Apex Court in "Rekha Vs. State of Tamil Nadu and anr, reported in (2011) 5 SCC 244" shall be quite apposite to be quoted herein:

"27. In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed".

9) In the instant case, in the grounds of detention, the detaining authority has categorically recorded that there is likelihood of detenu being admitted to bail when, in fact, no such bail application has been filed, therefore, to say there is likelihood of his release on bail, is imaginary.

10) Testing the instant case on the touchstone of the law laid down above, the detenu 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 detenu 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 the bottom out of the contention raised by the State that the detenu 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.

11) Life and liberty of the citizens are of paramount importance. A duty is cast on the shoulders of the Court to enquire that the decision of the Executive is made upon the matters laid down by the Statute and that these are relevant for arriving at such a decision. A citizen cannot be deprived of personal liberty guaranteed to him/her by the Constitution and of which, he/she cannot be deprived except in due course of law.

12) Article 22(3)(b) of the Constitution of India, which vouchsafes preventive detention, is only an exception to Article 21 of the Constitution. An exception is an exception and cannot ordinarily nullify the full force of main rule, which is right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting civil liberties of people and not to put them in immurement for a long period shorn of recourse to a lawyer and without a trial. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in essence a detention order of three months, or any other period(s), is a punishment of that particular period's incarceration. What difference is it to detenu whether his immurement is called preventive or punitive? Besides, in cases of preventive detention no offence is proved and justification of such detention is suspicion or reasonable probability, and there is no conviction that can only be warranted by legal evidence. Preventive detention is every so often described as a 'jurisdiction of suspicion', Detaining authority passes detention order on subjective satisfaction. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to rule of law. Since Clause (3) of Article 22 specifically excludes applicability of clauses (1) and (2), detenu 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 procedural safeguards, howsoever technical, is mandatory and vital.

13) The Supreme Court in *Rekha v. State of Tamil Nadu* AIR 2011 SCW 2262, while making reference to law laid down in *Kamleshwar Ishwar Prasad Patel v. Union of India and Others* (1995) 2 SCC 51, observed that history of liberty is history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of nature of alleged activities of detenu. The Supreme Court quoted with approval the observation made in *Ratan Singh v. State of Punjab and others* 1981 (4) SCC 481, emphasising need to ensure that the Constitutional and Statutory safeguards available to a detenu were pursued in letter and spirit observed:

"But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenu's."

14) Procedural requirements are only safeguards available to a detenu, for the

reason that the Court is not expected to go behind subjective satisfaction of detaining authority. As laid down by the Supreme Court in *Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and another* (1987) 2 SCC 22, 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.

15) It is germane to point out here that individual liberty is a cherished right that is one of most valuable fundamental rights guaranteed by our Constitution to citizens of the country. In the scheme of Constitution, utmost importance has been given to life and personal liberty of individual. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established. In the matter of preventive detention, there is deprivation of liberty, therefore, safeguards provided by Article 22 of the Constitution of the India, have to be scrupulously adhered to. Procedural reasonableness, which is invoked, cannot have any abstract standard or general pattern of reasonableness. The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all provide the basis for considering the reasonableness of a particular provision. The procedure embodied in the Act has to be judged in the context of the urgency and the magnitude of the problem, the underlying purpose of the restrictions and the prevailing conditions.

16) The history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is of great importance. Personal liberty protected under Article 21, is so sacrosanct and so high in the scale of constitutional values that it is the obligation of detaining authority to show that impugned detention meticulously accords with the procedure established by law. However, the constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In a case of preventive detention, no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time, when a person's greatest of human freedoms, i.e. personal liberty, is deprived, the laws of preventive detention are required to be strictly construed, and a meticulous compliance with the procedural safeguards, howsoever technical, has to be mandatorily made. Reference in this regard is made to *Haradhan Saha v. The State of West Bengal & Others*, (1975) 3 SCC 198 and *Union of India v. Paul Manickam & Another*, (2003) 8 SCC 342.17) It may not be out of place to

mention here that preventive detention is not a quick alternative to normal legal process, is the saying of the Supreme Court in *V. Shantha v. State of Telangana & ors*, AIR 2017 SC 2625. The Supreme Court has held that preventive detention of a person by a State after branding him a 'goonda' merely because the normal legal process is ineffective and time-consuming in 'curbing the evil he spreads', is illegal and that detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when sufficient remedies are available under the general laws of the land for any omission or commission under such laws, the Supreme Court observed. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu 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. To classify the detenu as a 'notorious stone pelter' cannot be sufficient to invoke the statutory powers of preventive detention. No doubt the offences alleged to have been committed by detenu are such as to attract punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws would not be warranted. Preventive detention involves detaining of a person without trial in order to prevent him from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes which the detenu may have committed. After all, preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. My views are fortified by the judgements rendered in *Rekha's case* and *V. Shantha v. State of Telangana case (supra)* and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

18) 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 above referred grounds, therefore, other grounds projected in the petition are not required to be dealt with.

19) Having regard to the above discussion, the impugned order of detention bearing No. 66/DMB/PSA/2018 dated 20.08.2018, is quashed. The respondents are directed to set the detenu at liberty provided he is not required in connection with any other case.

20) Registry to return the detention records to the learned counsel for the respondents.