

(1982) 01 J&K CK 0001
In the Jammu And Kashmir High Court

German Singh

APPELLANT

Vs

State of Jammu and Kashmir and Others

RESPONDENT

Date of Decision : 27-01-1982

Acts Referred:

Jammu and Kashmir Public Safety Act, 1978 — Section 8

Citation : (1982) CriLJ 1552

Hon'ble Judges : I.K. Kotwal, J

Bench : Single Bench

Judgement

I.K. Kotwal, J.—The petitioner, German Singh, has been detained in Central Jail, Jammu, pursuant to an order passed by District

Magistrate, Jammu, on 17-8-1981 u/s 8 of the Jammu & Kashmir Public Safety Act, 1978 (hereinafter the Act), with a view to prevent him from

acting in any manner prejudicial to the security of the State. He was taken into custody on 24-6-1981 in F.I.R. No. 5/81 u/s 3 of the Enemy

Agents Ordinance and was in judicial custody in the said case, when the aforesaid order of detention was passed and served upon him. He has

challenged his detention inter alia on the ground that he being already in custody, no order of detention could have been passed against him without

considering whether or not his detention was still necessary in the interest of the security of the State.

2. It is common ground that pursuant to the order of Additional Sessions Judge, Jammu, the petitioner had been committed to judicial custody and

was lodged in Central Jail, Jammu, a place where under-trials are kept in judicial lock-up, when the impugned order of detention was passed and

served upon him. The learned Additional Advocate General on the authority of Masood Alam etc. Vs. Union of India (UOI) and Others, has,

however argued that merely because the petitioner was already in custody in connection with a different case, his detention under the Act cannot be considered to be illegal. The detaining authority, if satisfied, that his detention was necessary with a view to preventing him from acting in any manner prejudicial to the security of the State, could have still detained him in terms of Section 8 of the Act. In particular, he has invited my attention to the following passage occurring in the judgment:

The next point urged is that the petitioner had been served with the order of detention, dated June 25, 1972, when he was in jail and that such service is invalid rendering the petitioner's detention void. This submission is equally unacceptable. There is no legal bar in serving an order of detention on a person who is in jail custody if he is likely to be released soon thereafter and there is relevant matter on which the detaining authority is satisfied that if free, the person concerned is likely to indulge in activities prejudicial to the security of the State or maintenance of public order....

3. There can be no quarrel with the proposition that the fact that the ground of detention could be a subject matter of criminal prosecution is not enough to vitiate a detention order if the detaining authority does not choose to prosecute him but only passes an order keeping him under preventive detention. In the instant case, however, in none of the counter-affidavits filed on behalf of the State it has been averred that the petitioner was going to be released soon because the State was not in a position to try him for the substantive offence in F.I.R. No. 5/81 for paucity of evidence or any other similar reason. Where a person charged with a substantive offence has been kept in judicial custody, the detaining authority before it can pass an order of preventive detention against him on the same facts, must address itself to the question whether or not he should be prosecuted for the offence or merely kept under preventive detention. It cannot pass an order of his preventive detention in a mechanical way at its sweet will or convenience and make preventive detention a substitute for punitive detention where the detenu can be conveniently put on criminal trial. Personal liberty being the most cherished and valuable of all the liberties recourse to preventive detention should be taken in those few cases where the detenu cannot be put on criminal trial for reasons beyond the control of the prosecution. In the present case, as already observed, there

is no indication that this question was present to the mind of the detaining authority when the detention order came to be passed by it. In taking this

view I am supported by the following observations made by their Lordships in *Kanchanlal Maneklal Chokshi Vs. State of Gujarat and Others*, :

In *Ashok Murlidhar v. State of Gujarat Spl. Criminal Appln. No. 230 of 1978 (Guj.)*, Divan C.J. and Majumdar, J., appeared to think that the

Bench of five Judges of this Court which decided *Haradhan Saha Vs. The State of West Bengal and Others*, , had taken a view different from that

expressed in *Bhut Nath Mete Vs. The State of West Bengal*, , *Srilal Shaw Vs. The State of West Bengal and Others*, and *Dulal Roy Vs. The*

District Magistrate, Burdwan and Others, . We do not think there is any such conflict as thought by the Division Bench of the Gujarat High Court.

The principles emerging from a review of the above cases may be summarised in the following way: The ordinary criminal process is not to be

circumvented or short-circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute

bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order

of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in

the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was

necessary to make an order of preventive detention...

On this ground alone, the impugned order of detention cannot survive, which is quashed accordingly. Since the petitioner is also in judicial custody

in F.I.R. No. 5/81, no order directing the State to release him forthwith from custody can be passed.