
(2019) 04 J&K CK 0071

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeals In Habeous Corpus (LPAHC) No. 05 Of 2019

Ghulam Mohi-Ud-Din Najar

APPELLANT

Vs

State And Ors

RESPONDENT

Date of Decision : 30-04-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161
Unlawful Activities (Prevention) Act, 1967 — Section 16, 18B, 39
Constitution Of India, 1950 — Article 22(5)

Citation : (2019) 04 J&K CK 0071

Hon'ble Judges : Ali Mohammad Magrey, J;Tashi Rabstan, J

Bench : Division Bench

Advocate : Shafqat Nazir, Asif Maqbool

Judgement

Ali Mohammad Magrey, J

1. The present appeal has been preferred by the detainee, Ghulam Mohi-ud-Din Najar, through his father, Ghulam Mohammad Najar, against the judgment and order dated 06.03.2019, delivered by a Single Judge of this Court in HCP No.328/2018 in which the detention order No. 73/DMB/PSA/2018 dated 17.09.2018, issued by the District Magistrate, Baramulla, was challenged. By virtue of the said detention order, the appellant was placed under preventive detention in exercise of powers under Section 8 of the J&K Public Safety Act, 1978. The said appellant was ordered to be lodged at Central Jail, Kote-Balwal, Jammu.

2. The said detention order was executed on 20.09.2018. At that point of time, admittedly, the said detainee was already in custody in connection with FIR No.244/2018 under Section 16,39,18-B ULA P Act, registered at Police Station Sopore.

3. The learned Single Judge dismissed the said Habeas Corpus Petition after examining the contentions of the parties and arriving at the conclusion that none

of the detainee's constitutional and statutory rights had been violated by passing of the detention order in question.

4. The learned counsel for the appellant has raised primarily four issues before us questioning the validity of the detention. The first point taken by the learned counsel for the appellant is that the detention order was passed while the appellant was already in custody in respect of the criminal case under FIR No.244/2018. In these circumstances, it was submitted by the learned counsel for the appellant, the detaining authority ought to have satisfied himself with the fact that there was imminent likelihood of release of the detainee in that case and that it was necessary to detain the appellant in order to prevent him from indulging in prejudicial activities. According to the learned counsel for the appellant, there is no such satisfaction recorded in the grounds of detention. He placed reliance on the decision of the Supreme Court in the case of *Surya Prakash Sharma v. State of U.P. and others*: 1994 SCC (Cri) 1691 to submit that since the said satisfaction was not recorded, the detention order was vitiated.

5. The second point taken by the learned counsel for the appellant was that non-supply of relevant material/ documents also vitiated the detention order. In this context, it was the case of the appellant that no documents at all were supplied to the appellant/ detainee. The non-supply of relevant documents seriously undermines the capacity of a detainee to make an effective representation against the detention and that in itself would be a ground to declare the detention void. This right flows from the Constitution of India. In support, he referred to the decision of the Supreme Court in the case of *Ibrahim Ahmad Batti V. State of Gujarat*, (1982) 3 SCC 440, the Apex Court, relying on its earlier judgments in *Khudiram Das v. State of W. B.*, (1975) 2 SCR 81; *Ichhu Devi Choraria v. Union of India*, (1980) 4 SCC 531.

6. The third point raised by the learned counsel for the appellant was based on non-application of mind of the detaining authority with reference to having mentioning in the order of detention and grounds of detention that the activities of the detainee are prejudicial to the security of the State, while as in the counter affidavit, it is mentioned that the activities of the detainee are prejudicial to the public order.

7. The fourth point raised by the learned counsel for the appellant was based on vagueness in grounds of detention.

8. On the other hand, Mr. Asif Maqboo, learned GA, defended the judgment of the learned Single Judge, as also the detention order and he responded to each of the points. With regard to the first point he submitted that there is a mention in the grounds of detention about the arrest of the detainee with reference to the FIR No.244/2018. Therefore, according to him, the detaining authority was aware of the fact that the detainee was already in custody when the detention order was passed. He, therefore, submitted that the point raised by the learned counsel for the appellant on this score was untenable.

9. With regard to the plea of non-supply of material/ documents, Mr. Asif Maqbool, learned GA, placed before us the record pertaining to the detention. On going through the same, we find that there is a signed document said to have been signed by the detainee, Ghulam Mohi-ud-Din Najar, in English. The said document is titled "Receipt of Grounds of Detention". The text of the said document is set out herein below:

"RECEIPT OF GROUNDS OF DETENTION

Received total (10 leaves) copy of detention warrant (01 leaf), grounds of detention (02 leaves), along with other documents (06 leaves) through executing officer ASI Nasir Ali No. 77/KL, EXK-842189 of DPL Sopore vide District Magistrate Baramulla letter No. DMB/PSA/2018/368-72 dated 17.09.2018 by reading over in English language and explained to me in Kashmiri language which I understood fully. I have been also informed that I can make representation to the Government as well as detaining authority i.e, District Magistrate Baramulla against this detention order if I so desire.

Sd/-

Signature attested Name Gh. Mohi-ud-Din Najar @ Shazad S/o Gh. Mohammad Najar

R/o Hardshiva Sopore

District Baramulla"

10. Based upon the said receipt, Mr. Asif Maqbool, learned GA submits that the grounds of detention had been supplied along with other relevant documents and, therefore, the appellant cannot make any grievance on this ground.

11. With regard to the non-application of mind, detaining authority having mentioned the reason for detaining the detainee as security of the State and in the grounds of detention as public order. It is submitted that there is no non-application of mind, as the relevant is only reasons recorded in grounds of detention. With regard to plea of vagueness of the grounds is concerned, Mr. Asif Maqbool, learned GA submits that the grounds are clear and without any ambiguity.

12. Mr. Asif Maqbool, learned GA, submits that insufficiency of supply of material shall not form a ground for vitiating the detention of the appellant. He further submits that the detainee was required to file representation on the material whatever supplied and could have projected the grounds of non-supply of the material before the detaining authority, which he has failed, therefore, non-supply of material vitiates the detention, has no substance. He further averred that there is no non-application of mind or vagueness in grounds. He has referred to and relied upon the Judgment reported as (1986) 1 Supreme Court Cases 404 titled Shiv Ratan Makim Vs. Union of India and AIR 2001 Supreme Court 301 titled R. Keshava Vs. M. B. Prakash and Ors.

13. We have heard learned counsel for the parties, perused the records and considered the matter.

14. We shall first consider the point with regard to the ground of satisfaction that has to be recorded by the detaining authority in case the detenu is already in custody in connection with some other case. In this context we need to refer to the decision of the Supreme Court in *Surya Prakash Sharma* (supra). Paragraphs 5, 6 and 7 being relevant are extracted as under:

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in *Rameshwar Shaw v. District Magistrate, Burdwan*. To eschew prolixity we refrain from detailing all those cases except that of *Dharmendra Suganchand Chelawat v. Union of India*, wherein a three Judge Bench, after considering all the earlier relevant decisions including *Rameshwar Shaw* answered the question in the following words:

"The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention: and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in judicial custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment made in grounds of detention that if the aforesaid *Surya Prakash Sharma* is released on bail "he may again indulge in serious offences causing threat to public order". (emphasis supplied) To put it differently, the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

7. On the conclusions as above we quash the order of detention."

15. In the present case there is no mention of the fact that the detenu had been

arrested in connection with FIR No.244/2018, the compelling reasons referred to above, have not been indicated in the grounds of detention. In other words, the grounds of detention nowhere make a mention or indicate satisfaction that the detinue was being likely to be released from custody in near future. Therefore, in view of the decision of the Hon'ble Apex Court in Surya Prakash Sharma, this alone would vitiate the detention order.

16. Coming to the second point, which pertains to the non-supply of relevant material in order that the detinue could make an effective representation against his detention. According to Mr. Asif Maqbool, learned GA, 10 (ten) leaves of documents including grounds of detention had been served upon the detinue. On examination of the record, we find that 10 (ten) leaves that are said to have been served upon the detinue are (i) Copy of detention order = 01 leaf, (ii) Grounds of detention = 02 leaves and (iii) Other connected documents = 06 leaves, total nine leaves, though the receipt mentioned ten leaves.

17. This in itself would vitiate the detention order as the detinue would have been incapacitated from making an effective representation, when he was not supplied the material, mention whereof is made in the detention order, viz copy of FIR No. 244/2018, site plan, arrest memo, statements under Section 161 Cr.PC. Even if we assume that ten leaves of documents were supplied to the detinue, including the copy of FIR, dossier and statement under Section 161 Cr.PC, but the record reveals that the connected documents, which formed the basis for detaining authority to detain the detinue are thirteen leaves. Therefore, full material has not been supplied to the detinue, as such, there has been non-compliance on the part of the detaining authority resulting in the detention order becoming invalid inasmuch as it is in violation of the constitutional and statutory mandate.

18. We may refer to Judgment of Hon'ble Apex Court in case Ibrahim Ahmad Batti V. State of Gujarat, (1982) 3 SCC 440, the Apex Court, relying on its earlier Judgments in Khudiram Das v. State of W. B., (1975) 2 SCR 81; Icchu Devi Choraria v. Union of India, (1980) 4 SCC 531. Para 10 of the Judgment being relevant is extracted as under:-

" Two propositions having a bearing on the points at issue in the case before us, clearly emerge from the aforesaid resume of decided cases: (a) all documents, statements and other materials incorporated in the grounds by reference and which had influenced the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detinue along with the grounds or in any event not later than 5 days ordinarily and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of his detention, and (b) all such material must be furnished to him in a script or language which he understands and failure to do either of the two things would amount to a breach of the two duties cast on the detaining authority under Article 22(5) of the Constitution."

19. In Khudiram case (supra), the Apex Court has explained what is meant by 'grounds on which the order is made' in context of the duties case upon the detaining authority and the corresponding rights accruing to the detenu under Article 22(5).

20. In Smt. Icchu Deve Case (Supra), the Supreme Court has taken the view that documents, statements and other materials referred to or relied upon in the grounds of detention by the detaining authority in arriving at its subjective satisfaction get incorporated and become part of the grounds of detention by reference and the right of the detenu to be supplied copies of such documents, statements and other materials flows directly as a necessary corollary from the right conferred on the detenu to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available the latter cannot be meaningfully exercised.

21. We have also considered the submissions of Mr. Asif Maqbool, learned GA, in so far as non-supply of complete material is concerned. As per the constitutional and statutory mandate, the detaining authority is under obligation to supply the material/documents forming the basis for detention of the detenu. The Judgments referred to and relied upon by Mr. Asif Maqbool, learned GA, are not relevant being not connected with the issues raised by the appellant, therefore, distinguishable.

22. For all these reasons, the impugned judgment dated 06.03.2019 passed by the learned Single Judge in Habeas Corpus Petition No. 328/2018 is set-aside and the detention order No. 73/DMB/PSA/2018 dated 17.09.2018 is quashed. The appellant is directed to be released forthwith if he is not otherwise in custody in connection with some other case(s).