

(2018) 11 J&K CK 0071

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 220 Of 2018

Ghulam Mohi-Ud-Din Wani @APPELLANT@Hash State Of Jammu & Kashmir And Anr

Date of Decision : 09-11-2018

Acts Referred:

Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 — Section 3(3)
Jammu And Kashmir Public Safety Act, 1978 — Section 8, 13
Constitution Of India, 1950 — Article 21, 22(3), 22(5)

Citation : (2018) 11 J&K CK 0071

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Mir Shafaqat Hussain, Mir Suhail

Judgement

1) By the instant petition, petitioner seeks quashment of the order of detention bearing No.13/DMP/PSA/18 dated 31.07.2018. In terms of said order, Ghulam Mohi-ud-din Wani (hereinafter referred to as the detainee), has been taken into preventive custody while invoking powers under Clause (a) of Section 8 of the J&K Public Safety Act and so has been lodged in District Jail, Kathua.

2) The petitioner's case, as set out in the petition, is that the detainee, without any justification and cause was arrested sometime back from his shop, where after detention order impugned was slapped upon 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 maintenance of public order. 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) Firstly, learned counsel for the petitioner would contend that the order of detention has been passed on the basis of the material produced by Senior Superintendent of Police, Awantipora, before the District Magistrate, such as dossier and other connected documents as reflected in the order of detention. Neither copy of the letter dated 23.07.2018 addressed by SSP to the District Magistrate, referred in the impugned order, nor the material/connected documents accompanying said letter has been supplied to the detainee, therefore, detainee has been deprived from making an effective representation against his detention.

5) In opposition learned counsel for the respondents would contend that the material/documents, based on which detaining authority has derived satisfaction for passing the order of detention, have been supplied to the detainee.

6) From the perusal of the detention records, as produced, nothing comes to the fore to show that the material forming base of the grounds of detention has been supplied to the detainee which has prejudiced the detainee as he could not submit an effective representation against his detention in absence of such material. Infringement of such right guaranteed under Article 22(5) of the Constitution would render the order of detention as illegal.

7) It is quite apposite to quote para 10 of the judgment of the Hon'ble Apex Court in "Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others", (1982) 3 SCC 440:

"10. Two propositions having a bearing on the points at issue in the case before us, clearly merge from the aforesaid resume of decided cases : (a) all documents, statements and other materials incorporated in the grounds by reference and which have influenced the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detenu along with the grounds or in any event not later than five days ordinarily and in the 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. Relying upon this legal position counsel for the petitioner urged before us that in the instant case a breach of the mandate contained in Article 22 (5) read with Section 3 (3) of the COFEPOSA is clearly involved because of three things that have happened, namely, (i) supply of Urdu translations of the bulk of documents and statements incorporated in the grounds and relied upon by the detaining authority was delayed beyond the normal period of 5 days without any exceptional circumstances obtaining in the matter, (ii) the alleged exceptional circumstances

purporting to justify the delay and the fact that the reasons had been recorded in writing were not communicated to the detenu which has prevented him from making effective representation against his continued detention and (iii) Urdu translations of quite a few documents and statements incorporated in the grounds and relied upon by the detaining authority have not been supplied to him at all. As regards the first two aspects counsel relied upon two decisions of the Patna High Court, namely, *Bishwa Mohan Kumar Sinha v. State of Bihar and Ors.*(1) and *Bishwanath Prasad Keshari v. State of Bihar & Ors.*(2) where the Patna High Court has taken the view that not merely should the exceptional circumstances exist justifying the delayed supply of the grounds of detention but these should be communicated to the detenu to enable him to make an effective representation. Counsel urged that because of the aforesaid failure the continued detention of the petitioner must be held to be illegal. We find considerable force in these submissions made by the counsel for the petitioner."

8) Next learned counsel for the petitioner contended that the detenu has been informed to make representation to the government but has not been informed that he can make a representation before the detaining authority, which is an infringement of a valuable right.

9) Perusal of the material available on file, reveals that vide communication dated 31.07.2018, issued by District Magistrate, Pulwama, detenu has been informed to make a presentation to the Government, so clearly he has not been asked to make a representation before the District Magistrate (Detaining Authority). The position has already been settled i.e. when there is such a breach of right, the order of detention becomes unsustainable. The said issue has been considered by a Division Bench of this Court in "*Tariq Ahmad Dar v. State of J&K & ors*" (LPAHC No.43/2017) while relying on the decision of the Hon'ble Supreme Court in the case of "*State of Maharashtra and others v. Santosh Shankar Acharya*" (AIR 2000 SC 2504). The said question as noted in the Division Bench decision in *Tariq Ahmad Dar's* case (*supra*) was answered in affirmative which meant that unless and until the detenu was communicated that he had a right to make a representation to the detaining authority, there would be an infraction of the Constitutional right under Article 22(5) of the Constitution of India and that the detention order would be vitiated. The Division Bench in *Tariq Ahmad Dar's* case observed as under:

"14.The Supreme Court, after considering the Constitutional Bench decision in *Kamleshkumar Ishwardas Patel v. Union of India* (1995) 4 SCC 51, came to the conclusion that until the detention order is approved by the State Government, the Detaining Authority can entertain the representation from the detenu in exercise of powers of the Bombay General Clauses Act and annul revoke or modify the order, as is provided under Section 14 of the Maharashtra Act. The Supreme Court held that, this being the position, non-communication of the fact to the detenu that he could make a representation to the Detaining Authority so long as the order of detention has not been approved by the State Government

in a case where the order of detention is issued by an officer other than the State Government under Section 3(2) of the Maharashtra Act would constitute an infraction of a valuable right of the detenu under Article 22(5) of the Constitution and that the ratio of the Constitution Bench decision in case of Kamleshkumar's case (supra) would apply notwithstanding the fact that in Kamleshkumar's case (supra) the Court was dealing with an order of detention issued under the provisions of COFEPOSA Act. Ultimately the Supreme Court held as under:-

"This being the position, it goes without saying that even under the Maharashtra Act a detenu will have a right to make a representation to the detaining authority so long as the order of detention has not been approved by the State Government and consequently non-communication of the fact to the detenu that he has a right to make representation to the detaining authority would constitute an infraction of the valuable constitutional right guaranteed to the detenu under Article 22(5) of the Constitution and such failure would make the order of detention invalid. We, therefore, see no infirmity with the impugned judgment of the Full Bench of the Bombay High Court to be interfered with by this Court. These appeals accordingly fail and stand dismissed."

15. From a reading of the said decision, it is abundantly clear that non-communication of the fact that the detenu can make a representation to the Detaining Authority, till the detention order is not approved by the Government, would constitute an infraction of a valuable Constitutional right guaranteed under Article 22(5) of the Constitution of India as also of the right under Section 13 of the Jammu and Kashmir Public Safety Act, 1978. Failure of such non-communication would invalidate the order of detention.

16. The plea of the learned counsel for the respondents, that the detenu could make a representation to the State Government and that such an opportunity had been provided, would be of no consequence for the simple reason that the Government's approval of the detention order came later i.e., on 28.12.2016 whereas, the detention order was executed upon the detenu on 24.12.2016 and between that date and 28.12.2016 he had a right to make a representation to the Detaining Authority i.e., the District Magistrate, Baramulla, to revoke the detention order. That opportunity not having been given, vitiated the detention order. In other words, the detention order stood vitiated and invalidated on 22.12.2016 itself.

17. In view of the foregoing, we need not to consider any of the other pleas sought to be raised by the learned counsel for the appellant, inasmuch as the detention order has been invalidated because of non-communication of the fact that the detenu could make a representation to the Detaining Authority. The detention order having become invalid, the detenu is liable to be released forthwith insofar as this detention order is concerned.

10) In the present case, there has been failure to communicate to the detenu that he could make a representation to the detaining authority. On account of

such lapse on the part of detaining authority, the detention order is vitiated.

11) Next it is contended by the learned counsel for the petitioner that there has been non-application of mind on the part of detaining authority as the grounds of detention appear not to have been formulated by the detaining authority itself.

12) The submission appears to have substance. One of the requirements for deriving subjective satisfaction is to formulate the grounds of detention which shall form basis for passing the order of detention. In the order impugned as passed by District Magistrate, it is recorded; "Whereas on the basis of dossier placed before me by the Superintendent of Police, Awantipora, vide his No.Conf/PSA/2018/5554-57 dated 23.07.2018, I am satisfied....." which shows that detaining authority has not scanned and sifted the material itself for preparation of the grounds of detention, which clearly shows that there has been non-application of mind on the part of detaining authority which passing the impugned detention order.

13) Right to liberty as guaranteed under Article 21 of the Constitution can be negated in view of Article 22(3) (b) of the Constitution which is an exception to Article 21 of the Constitution. The said exception authorizes the concerned authorities to pass preventive detention but while passing such orders, the authority concerned is required to be alive to the personal liberty of a person and such power shall be exercised in a manner which may not have the trappings of depriving a person of the guaranteed liberty. In short an exceptional case has to be made out for passing the order of preventing a person from acting in any manner which shall be prejudicial, in the instant case, to the security of the State but while doing so procedural safeguards are to be respected. Breach in observing the procedural safeguards gives right to the detenu to claim that he has been prejudiced as his liberty has been curtailed de hors the law. In this connection it shall be quite relevant to quote paras 37 and 38 of the judgment rendered by a Bench of three

Hon'ble Judges of the Hon'ble Apex Court in case captioned "Rekha Vs. State of Tamil Nadu and anr", reported in (2011) 5 SCC 244:

"37. As observed in Abdul Latif Abdul Wahab Sheikh v. B. K. Jha vide SCC para 5: (SCC p.27)

"5....The procedural requirements are the only safeguards available to a detenu 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 rights guaranteed to him in that regard."

As observed by Mr. Justice Douglas of the United States Supreme Court in Joint Anti-Fascist Refugee Committee v. McGrath:(US p. 179)

"...It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards are the

main assurances that there will be equal justice under law".

38. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experience".

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

15) Having regard to the above discussion, the impugned order of detention impugned is unsustainable, as such, quashed. Respondents are directed to release the detenu from the preventive custody forthwith, provided he is not required in connected with any other case.

16) Detention record be returned to be learned counsel for the respondents.