
(2017) 12 J&K CK 0031
In the Jammu And Kashmir High Court
Case No : 308 of 2017

Ghulam Nabi Khan @ Naba Khan

APPELLANT

Vs

State of JK & Ors.

RESPONDENT

Date of Decision : 19-12-2017

Acts Referred:

Constitution of India, Article 21, Article 22 -
Ranbir Penal Code, 1860, — Section 147, Section 307, Section 148, Section 506,
Section 149, Section 332, Section 353, Section 427, Section

Citation : (2017) 12 J&K CK 0031

Hon'ble Judges : M. K. Hanjura

Bench : SINGLE BENCH

Advocate : Syed Musaib, Asif Maqbool

Final Decision : Allowed

Judgement

1. By dint of order bearing No.98/DMB/PSA/2017 dated 7th of September, 2017, passed by the Respondent No.2/District Magistrate

Baramulla, in exercise of powers conferred in him under Clause (a) of Section (8) of the Jammu and Kashmir Public Safety Act, 1978 (for short

The Act of 1978""), one Ghulam Nabi Khan @ Nab Khan S/o Ghulam Mohammad Khan R/o Bangdara Kreeri, District Baramulla, has been

detained and lodged in District Jail, Kathua.

2. The detainee has challenged the said order of detention, chiefly, on the ground that the relied upon documents for detaining him have not been

served on him and, therefore, his right to make an effective representation has been affected. To this, it has been added that the detaining authority

has failed to apply its mind to the fact whether the preventive detention of the detainee was imperative, notwithstanding his custody in a substantive

offence. It has also been stated that the Respondent No. 2 has passed the order of detention on the dictates of the sponsoring Agency, i.e. the

Officer who has prepared the police dossier and no independent attempt has been made by the Respondent No.2 to scan and evaluate it before

passing the order of detention.

3. Counter has been filed by the Respondents, wherein it is stated that all the relied upon material for detaining the detainee have been furnished to

the detainee and that the detaining authority has complied with the requirement of Clause 5 of Article 22 read with Article 21 of the Constitution of

India. The detainee has failed to avail the remedy prescribed under the Act. He has not filed the representation against the order of detention. It has

also been stated that the detainee is involved in six FIRs registered at Police Station, Kreeri, viz. FIR No. 58/2016 for the offences under Sections

307, 147, 148, 149, 353, 336, 427 RPC; FIR No. 60/2016 for the offences under Sections 147,148, 341, 336, 427 RPC; FIR No. 79/2016 for

the offences under Sections 147, 148, 149, 336, 332, 341, 307 RPC; FIR No. 86/2016 for the offences under Sections 13 ULA P Act and 506

RPC; FIR No. 88/2016 under Sections 147, 148, 149, 336, 341, 427 RPC; and FIR No. 92/2016 for the offences under Sections 307, 147,

148, 149, 336, 353, 427 RPC. In the end, it has been urged that since the order of detention has been passed on justifiable grounds, therefore, the

instant Habeas Corpus petition merits dismissal, and it may, accordingly, be dismissed.

4. Heard and considered.

5. The main plank of the argument of the learned counsel for the detainee is that the relied upon material for detaining the detainee has not been

provided to the detainee in its entirety, as a consequence of which, the right of the detainee to make a meaningful representation has been denied.

On perusal of the record relating to the detention of the detainee, as made available before the Court by the learned Government Advocate, what

gets revealed is that the detainee has been provided the copy of the detention order, the letter addressed to the detainee and a copy of the grounds

of detention containing 19 leaves. However, the details of the aforesaid 19 leaves and the contents thereof, except the ones stated above, have not

been spelt out. Therefore, apparently, the relevant material viz. copies of FIRs

registered against the detainee, etc. have not been supplied to the detainee. This infringement, in view of the well settled principles of law governing the field, renders the order of detention liable to be set aside.

Resort can, in this behalf, be had to the law laid down by the Hon"ble Apex Court of the country in case titled ""Thahira Haris V. Government of

Karnataka"", reported in ""AIR 2009 SC, 2184"", at Paragraph Nos. 27 and 28, which are reproduced hereunder, verbatim et literatim:

27. There were several grounds on which the detention of the detainee was challenged in these appeals but it is not necessary to refer to all the

grounds since on the ground of not supplying the relied upon documents, continued detention of the detainee becomes illegal and detention order

has to be quashed on that ground alone.

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detainee who has been detained in pursuance of

the order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other

material relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable

the detainee at the earliest opportunity to make effective and meaningful representation against his detention.

6. Looking at the instant case from the other perspective, the detainee has pleaded, in his petition, that he was in custody of the police authorities

for a substantive offence and, therefore, there was no need to direct his preventive detention. In the Counter Affidavit, this plea of the petitioner has

not been rebutted or proved otherwise. It has been stated in the Counter Affidavit that the detainee is involved in six FIRs registered at Police

Station, Kreeri, viz. FIR No. 58/2016 for the offences under Sections 307, 147, 148, 149, 353, 336, 427 RPC; FIR No. 60/2016 for the

offences under Sections 147, 148, 341, 336, 427 RPC; FIR No. 79/2016 for the offences under Sections 147, 148, 149, 336, 332, 341, 307

RPC; FIR No. 86/2016 for the offences under Sections 13 ULA P Act and 506 RPC; FIR No. 88/2016 under Sections 147, 148, 149, 336,

341, 427 RPC; and FIR No. 92/2016 for the offences under Sections 307, 147, 148, 149, 336, 353, 427 RPC. The arrest of the detainee at the

time of the passing of the order of detention has not been disputed.

7. Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, the question that arises for

consideration is whether an order of detention could be passed on the face of such an eventuality? The answer to this question is an emphatic

No", taking into consideration the law laid down by the Hon'ble Supreme Court in paragraph No.24 of the judgment delivered in the case of

Sama Aruna v. State of Telangana & Anr.", reported in "AIR 2017 SC 2662", which may be noticed :

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.

8. The same view has been repeated and reiterated by the Hon'ble Supreme Court in paragraph No. 13 of the judgment pronounced in the case

of "V. Shantha v. State of Telangana & others", reported in "AIR 2017 SC 2625", that reads as under :

13. 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 inadequate 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.

9. 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 Act of 1974"", when he was already in the custody of the police authorities in the cases, the details whereof have been given hereinbefore. His custody in police for the offences stated above, has been converted into the custody under the impugned detention order. May be the detaining authority might have been laboring under the belief that if 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 a higher forum. This single infraction knocks the bottom out 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 at the very root of the State action. The State could have taken recourse to the ordinary law of the land.

10. Life and liberty of the citizens of the State 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, except in due course of law and for the purposes sanctioned by law.

11. In the backdrop of what has been said and done above, the instant Habeas Corpus petition is allowed, as a consequence of which, the order of detention bearing No. 98/DMB/PSA/2017 dated 7th of September, 2017,

passed by the Respondent No. 2-District Magistrate, Baramulla, is

quashed with a further direction to the respondents to release the person of Ghulam Nabi Khan @ Nab Khan S/o Ghulam Mohammad Khan R/o

Bangdara Kreeri, District Baramulla, forthwith from the preventive custody.

12. The record, as produced by the learned Government Advocate, be returned to him with utmost dispatch.