

(2018) 09 J&K CK 0024

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition No.111 Of 2018

Ghulam Nabi Shah @APPELLANT@Hash State of J&K and anr

Date of Decision : 06-09-2018

Acts Referred:

Constitution of India, 1950 — Article 22(5)

Citation : (2018) 09 J&K CK 0024

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. Challenge in this petition is to the order No.02/DMP/PSA/18 dated 17.04.2018, passed by District Magistrate, Pulwama-respondent No.2 herein, whereby Gh. Nabi Shah (hereinafter referred to as the detainee), has been taken into preventive custody and lodged in District Jail, Kathua.

2. Host of grounds have been projected while seeking quashment of impugned order but the star ground is that the detaining authority-respondent

No.2, did not inform the detainee that, independent of his right to file representation against his detention to the Government, he has also a right to

submit representation to the detaining authority, thus violated constitutional and statutory rights of the detainee guaranteed under Article 22(5) of the

Constitution of India.Â

3. It is expected from the detaining authority while serving an order of detention, as a rule, to inform the detainee that he has a right to make a

representation against the order of detention to the detaining authority itself. The law insists upon the literal performance of a procedural requirement.

The need for observance of procedural safeguards, particularly in cases of deprivation of life and liberty, is of prima importance. It is, therefore,

imperative that the detaining authority must apprise a detainee of his constitutional right under Article 22(5) to make a representation against the order of detention.Â

4. In the judgment rendered by the Honâ??ble Apex Court in â??State of Maharashtra and others v. Santosh Shankar Acharyaâ? (AIR 2000 SC

2504), it has been held that â??detainee 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 noncommunication of the fact to the detainee that he has a right to make representation to

the Detaining Authority, would constitute an infraction of the valuable Constitutional right guaranteed to the detainee under Article 22(5) of the

Constitution and such failure would make the order of detention invalid.â??

5. Preventive laws have the effect of depriving a person of his liberty which is precious, however, deprivation thereof at times becomes indispensable.

For justifying such deprivation, the safeguards as are provided by law are also required to be respected. A person who dares to threaten maintenance

of public order has to be dealt with iron hand but the Constitutional safeguards as are available are also to be followed. The Article 21 of the

constitution of India has protected the life and personal liberty of people by providing that no person shall be deprived of his life or personal liberty

except according to the procedure established by law. The word established is used in Article 21 in order to denote and ensure that the procedure

prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the

precise extent of such deprivation. If a person is to be deprived of his life or liberty, the authority concerned is under a constitutional mandate to

follow the procedure established by law, the procedure prescribed for depriving a person of his life or liberty has to be reasonable, fair and just. The

protection contained in the article does not extend to only citizens but to all persons. The law providing for preventive detention has to be strictly

construed keeping in view the delicate balance between social security and citizen freedom. Thus if the preventive detention has not been ordered in

strict conformity with law authorizing detention, the detainee is entitled to be released.Â Â Â

6. Viewed thus, the petition is allowed and order No. 02/DMP/PSA/18 dated 17.04.2018, is quashed. Detenue is directed to be released from the preventive custody forthwith provided he is not required in connection with any other case(s).

7. Detention record, as produced, be returned to the learned counsel for the respondents.Â