

(2018) 11 J&K CK 0105

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 254 Of 2018

Gowhar Ayoub Bhat @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 28-11-2018

Acts Referred:

Constitution Of India, 1950 — Article 21, 22(3)(b)

Citation : (2018) 11 J&K CK 0105

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M. A. Qayoom, Irfan Andleeb

Final Decision : Allowed

Judgement

1. Challenge in this petition is to the order No.67/DMB/PSA/2018 dated 30.08.2018, passed by District Magistrate, Baramulla-respondent No.2 herein, whereby Gowhar Ayoub Bhat (hereinafter referred to as the detainee), has been taken into preventive detention and lodged in Central Jail, Kotebhuwal.
2. Respondents have filed the counter affidavit wherein they have disputed the contentions raised in the petition.
3. Heard learned counsel for the parties and also perused the records.
4. Learned counsel for the petitioner contended that detainee has been booked in two criminal cases, i.e. FIR No.165/2018 and FIR No.232/2018 registered at Police Station, Sopore but despite that he has been detained under the provisions of Public Safety Act without assigning any compelling reasons. When it is so, the order of detention as invalid.
5. It is trite that when a person is involved in criminal case/cases, it has to be recorded that there are compelling reasons for passing the order of detention. No such reason has been recorded. It shall be apposite to quote Para 5 of the judgment of the Hon'ble Apex Court in "Surya Prakash Sharma v. State of U. P. and others, 1994 SCC (Cri) 1691, has held 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 state first came up for consideration before a Constitution Bench in *Rameshwar Shaw vs District Magistrate Burdwan* to eschew prolixity we refrain from detailing all those cases accept that of *Dharmendra Sugan Chand 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 detection 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 detailing authority was aware of the fact that the detainee is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee is already in detention. The expression compelling reasons in the context of making an order for detention of a person already in 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 detainee is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detainee, 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. In the grounds of detention, it is nowhere mentioned as to whether detainee in connection with criminal cases registered against him was released on bail or as to whether he had applied for bail. On the contrary, it is positive assertion of the counsel for the petitioner that the detainee had neither applied for bail nor was released on bail. The Detaining Authority too has not given any cogent reason so as to derive satisfaction or to record compelling reasons for passing the order of detention.

7. The contention raised, on perusal of the grounds of detention as well as the detention record, is found to be correct, so non-application of mind is explicit which renders the order of detention illegal. In my view I am fortified by the judgment rendered in the case captioned "*Anant Sakharam Raut Vs. State of Maharashtra and others*" reported in AIR 1987 SC 137. Para 8 of the judgment is apt to be quoted:

"We hold that there was clear non-application of mind on the part of the detaining authority about the fact that the petitioner was granted bail when the order of detention was passed. In the result we set aside the judgment of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith.

8. Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, question arises for consideration whether an order of detention could be passed on the face of such an eventuality? The answer to this question is emphatically "No", taking into consideration the law

laid down by the Hon'ble Apex Court in "Sama Aruna v. State of Telangana & Anr" (AIR 2017 SC 2662). Para 24 of the said judgment is apposite to be quoted herein below:

"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."

9. The personal liberty protected under Article 21 of the Constitution of India is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. 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. Such power has to 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 preventive order, still then procedural safeguards are to be respected. Breach in observing the procedural safeguards gives right to the detainee to claim that he has been prejudiced as his liberty has been curtailed de hors the law. In this view, I am fortified by 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.

10. For the stated reasons and the law laid down by the Hon'ble Apex Court, petition is allowed and impugned detention is quashed. Further custody of the detainee shall be governed in accordance with the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against him.

11. Detention records as produced are returned to the learned counsel for the respondents.