

(2019) 02 J&K CK 0046

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 375 Of 2018

Gulzar Ahmad Dar

APPELLANT

Vs

State Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 14-02-2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978 — Section 13
Code Of Criminal Procedure, 1973 — Section 161
Constitution Of India, 1950 — Article 21, 22, 22(5)

Citation : (2019) 02 J&K CK 0046

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : M. A. Qayoom, Asif Maqbool, Mir Suhail

Final Decision : Disposed Off

Judgement

1. Challenge is thrown to the Order no.49/DMP/PSA/18 dated 06.10.2018, passed by District Magistrate, Pulwama - respondent no.2 herein, whereby Gulzar Ahmad Dar son of Ali Mohd Dar resident of Larve, Kakpora District Pulwama (for brevity the "detenu"), has been placed under preventive detention, on the grounds set out in petition in hand.

2. Counter affidavit has been filed by the respondents, vehemently resisting the petition.

3. Heard the learned counsel for the parties and considered the matter.

4. The learned counsel for the petitioner has stated that the allegations made in the grounds of detention are vague, non-existent and no prudent man can make a representation against such allegation and passing of detention on such grounds is unjustified and unreasonable. The next submission of the learned counsel for the petitioner is that the detenu was not provided the material, both for and against him placed before the detaining authority for arriving at the subjective satisfaction and, therefore, the detenu was prevented to make an

effective representation, which amounts to infraction of provisions of Section 13 of J&K Public Safety Act, 1978, read with Article 22(5) of the Constitution of India. He also states that there is a delay of one year in passing the impugned detention order by the detaining authority on 06.10.2018, inasmuch as the last alleged activity attributed to the detenu which resulted in lodgement of FIR bearing no.267/2017 had taken place a year before.

The delay between the activity and the detention order vitiates the detention order. To cement his submissions, the learned counsel for the petitioner has placed reliance on *Lakshman Khatik v. The State of West Bengal* AIR 1974 SC 1264; *Rekha v. State of Tamil Nadu & another*, (2011) 5 SCC 244; *Saeed Zakir Hussain v. State of Maharashtra* 2012 (II) SLJ (SC); and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

5. In repudiating the above contentions, the learned counsel for the respondents has contended that for justifiable reasons an order for detention could be made in respect of a person who was in custody and that all the technical requirements had been complied with, more particularly as required under the Act of 1978, which provide that earliest opportunity of making a representation be provided to detenu.

6. The question of personal liberty of a person is sacrosanct and the State Authority cannot be permitted to take it away without following the procedure prescribed by the law, otherwise it would be violative of the fundamental rights guaranteed under Articles 21 and 22 of the Constitution. The law of the preventive detention could be described as a "jurisdiction of suspicion" and the compulsion of values of freedom of the democratic society and of the social order sometimes might compel a curtailment of individual's liberty. Be that as it may, the personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in Part III thereof. The State has been granted the power to curb such rights under the criminal laws as also under the laws of preventive detention, which, therefore, are required to be exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are, by any means, prejudicial to the interest and the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order. [See: *Ayya alias Ayub v. State of U.P. & Anr.*, (1989) 1 SCC 374; *Yumman Ongbi Lembi Leima v. State of Manipur* (2012) 2 SCC 176]

7. While having glance of the detention record, produced by the learned counsel for the respondents, it comes to fore that the detenu has not been furnished the material referred to by the detaining authority in the grounds of detention that led to subjective satisfaction that the preventive detention of the detenu was necessary to prevent the detenu from acting in any manner prejudicial to the public order. The endorsement on the overleaf of the detention order made by the Executing Officer, namely, SI, Gh Rasool, No.115539/ARP P/S Pulwama, at the time of the execution of the detention order, does unequivocally show that the copy of dossier of detention; copies of FIR(s); copy of sight plan; copy of

seizure memo; copy of arrest memo; statement of witnesses; and other related documents, were not supplied to the detenu at the time of execution of detention order or immediately thereafter. The grounds of detention make reference to the cases - FIR Nos.367/2010; 267/2017; 114/2017, to have been registered against the detenu. The involvement of the detenu in the aforesaid cases appears to have weighed with the detaining authority, while making the detention order. The record, as noted above, does not indicate that the copies of the aforesaid First Information Reports, the statements recorded under Section 161 Cr.P.C. and other material collected in connection with the investigation of the aforesaid cases, were ever supplied to the detenu. The abovementioned material, thus, assumes significance in the facts and circumstances of the case. It needs no emphasis, that the detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22(5) of the Constitution of India and Section 13 of the J&K Public Safety Act, 1978, unless and until the material on which the detention order is based, is supplied to the detenu. It is only after the detenu has all the said material available that he can make an effort to convince the detaining authority and thereafter the Government that their apprehension concerning the activities of the detenu are baseless and misplaced. If the detenu is not supplied the material, on which the detention order is based, he cannot be in a position to make an effective representation against his detention order. The failure on the part of the detaining authority to supply the material relied at the time of making the detention order to the detenu, renders the detention order illegal and unsustainable. While holding so, I draw the support from the law laid down in *Thahira Haris Etc. Etc. v. Government of Karnataka*, AIR 2009 SC 2184; *Union of India v. Ranu Bhandari*, 2008, Cr. L. J. 4567; *Dhannajoy Dass v. District Magistrate*, AIR, 1982 SC 1315; *Sofia Gulam Mohd Bham v. State of Maharashtra and others*, AIR, 1999, SC 3051; and *Syed Aasiya Indrabi v. State of J&K & ors*, 2009 (I) S.L.J 219.

8. The detention record also reveals that the FIR no.267/2017 has been lodged in police station Pulwama on 14.08.2017 whereas the impugned order of detention has been passed on 06.10.2018 and therefore, there is a delay of one year. It is not explained by the detaining authority why there was such a delay in passing the order of detention, which vitiates the detention itself. That apart, respondent no.2 has intriguingly in the concluding paragraph of grounds of detention mentioned that the activities as projected in the "dossier", run heavily against the detenu and are highly prejudicial to the security of the State. The Detaining Authority may get inputs from different agencies including Senior Superintendent of Police of the concerned District, the responsibility to formulate the grounds of detention, however, rests with the Detaining Authority. It is the Detaining Authority, who has to go through the reports and other inputs received by him from the concerned police and other agencies and on such perusal arrive at a subjective satisfaction that the detenu is to be placed under preventive detention. It is, thus, for the Detaining Authority to formulate the grounds of

detention and satisfy itself that the grounds of detention so formulated warrant passing of the preventive detention. The detention order, for the said reason, exhibits total non-application of mind by the detaining authority. The detention order is liable to be quashed on this ground alone.

9. It is worthwhile to mention here that the preventive detention is not a quick alternative to the normal legal process, is the saying of the Supreme Court in *V. Shantha v. State of Telangana & ors*, AIR 2017 SC 2625. The Supreme Court has held that preventive detention of a person by a State after branding him a 'goonda' merely because the normal legal process is ineffective and time-consuming in 'curbing the evil he spreads', is illegal and that the detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when the sufficient remedies are available under the general laws of the land for any omission or commission under such laws, the Supreme Court observed. Recourse to the normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu from indulging in further prejudicial activities, affecting the 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. No doubt the offences alleged to have been committed by the detenu are such as to attract the punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to the preventive detention laws would not be warranted. The preventive detention involves the detaining of a person without trial in order to prevent him from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating the crimes which the detenu may have committed. After all, the preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. My views are fortified by the judgements rendered in *Rekha v. State of Tamil Nadu* (supra) and *V. Shantha v. State of Telangana* case (supra) and *Sama Aruna* (supra).

10. For the foregoing reasons, the petition is disposed of and the detention Order no.49/DMP/PSA/18 dated 06.10.2018, passed by the District Magistrate, Pulwama, is quashed. The respondents are directed to release the detenu, namely, Gulzar Ahmad Dar son of Ali Mohd Dar resident of Larve, Kakpora District Pulwama forthwith, provided he is not required in any other case. Disposed of.

11. The detention record be returned to the counsel for the respondents.