
(2018) 08 J&K CK 0010

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition Nono.392 Of 2017

**Haroon Ahmad Sheikh @APPELLANT@Hash State Of Jammu & Kashmir
And Another**

Date of Decision : 03-08-2018

Acts Referred:

Jammu and Kashmir Public Safety Act, 1978 — Section 8, 8(2), 8(4), 13, 19, 19(2)
General Clauses Act, Samvat, 1977 — Section 21
Constitution of India, 1950 — Article 21, 22(1), 22(3), 22(3)(b), 22(5)

Citation : (2018) 08 J&K CK 0010

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

1. District Magistrate, Kupwara " respondent no.2 herein (for brevity " detaining authority?), has by order no.20-DMK/PSA of 2017 dated

02.12.2017, has placed Shri Haroon Ahmad Sheikh son of Late Alif-ud-din Sheikh resident of Amrohi, Karnah District Kupwara, (for short

"detenu") under preventive detention and directed his lodgement in District Jail Udhampur. It is this order, of which petitioner is aggrieved and

throws challenge thereto on the grounds set out in petition on hand.

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

3. I have heard learned counsel for parties and considered the matter. I have gone through the detention record made available by learned GA.

4. Section 8 of the J&K Public Safety Act of 1978, and, in particular, Subsection (2) thereof, envisages that a detention order can be passed, inter alia,

by a District Magistrate. Sub-Section (4) of Section 8 of the Act envisions that when any order is made under Section 8 by a person mentioned in

Subsection (2), he shall forthwith report the fact to the Government together with grounds on which order has been made and such of particulars as in

his opinion have a bearing on the matter, and no such order shall remain in force for more than 12 days after making thereof unless in the meantime it

has been approved by Government. This clearly implies that though District Magistrate can make a detention order, such detention order requires to

be approved by Government not later than 12 days from the date of the order. Section 19 of the Act of 1978 says about revocation of detention

orders. It envisages that without prejudice to the provisions of Section 21 of General Clauses Act, Samvat 1977, a detention order may, at any time, be

revoked or modified by the Government, notwithstanding that the order has been made by any officer mentioned in Subsection (2) of Section 8.

Subsection (2) of Section 19 says that shall be no bar in making a fresh order of detention against a person on the same facts as an earlier order of

detention made against such person in any case where earlier order of detention or its continuance is not legal on account of any technical defect or

earlier order of detention has been revoked by reason of any apprehension, or for avoiding any challenge that such order or its continuance is not legal

on account of any technical defect,Â provided that in computing the maximum period for which a person against whom such fresh order of detention

has been issued may be detained, the period during which such person was under the earlier order of detention shall be excluded. Thus, Subsection (1)

clearly indicates that without prejudice to the provisions of Section 21 of the General Clauses Act, Samvat 1977, a detention order may, at any time be

revoked or modified by the Government notwithstanding that the order has been made by the Officer mentioned in sub-section (2) of Section 8 of the

Act. What Subsection (1) of Section 19 provides is that, apart from detaining authority, the Government is also entitled to revoke or modify detention

order made by detaining authority, who happens to be, inter alia, a District Magistrate. It also implies that till approval is granted by the Government

under subsection (4) of Section 8 of Act of 1978, detaining authority retains jurisdiction to revoke detention order in terms of Section 21 of the General

Clauses Act, Samvat 1977.

5. It may not be out of place to mention here that till the Government grants approval to detention order in terms of Subsection (4) of Section 8 of Act

of 1978, detaining authority has power to add to, amend, vary or rescind inter alia, any order issued by him which includes a detention order. 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 detention order is approved by the State Government, detaining authority can entertain representation from detenu in exercise

of powers of the General Clauses Act of Bombay 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 detenu that he could make a representation to detaining authority so

long as the order of detention has not been approved by the State Government in a case where 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 detenu under Article 22(5) of the

Constitution of India and that the ratio of the Constitutional 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. In the end

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

infirmary 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.

6. From the above, it is unequivocally clear that non-communication of fact that detenu can make a representation to detaining authority, till 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 J&K Public Safety

Act, 1978. Failure of such non-communication would invalidate the order of detention.Â

7. It is pertinent to mention here, apart from what has been discoursed herein before, that reverence of life is inseparably concomitant with the dignity of a human being who is basically divine, not obsequious. A human personality is indued with potential infinitude and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, â??a brief candleâ?, or â??a hollow bubbleâ?. The spark of life gets more splendiferous when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of â??creative intelligenceâ?. When a dent is created in the reputation, humanism is paralysed. Reverence for the nobility of a human being has to be the cornerstone of a body polity that believes in orderly progress. But, some, the incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our Constitutional philosophy and it has its ubiquitous presence and the majesty and sacrosanctity dignity cannot be allowed to be crucified in the name of precautionary incarceration. Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, â??the reverence of life offers me my fundamental principle on moralityâ?. The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands.Â

8. Article 22(3)(b) of the Constitution of India, which vouchsafes preventive detention, is only an exception to Article 21 of the Constitution. An exception is an exception and cannot ordinarily nullify the full force of main rule, which is right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting civil liberties of people and not to put them in immurement for a long period shorn of recourse to a lawyer and without a trial. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in essence a detention order of three months, or any other period(s), is a punishment of that particular periodâ??s incarceration. What difference is it to detenu whether his

immurement is called preventive or punitive? Besides, in cases of preventive detention no offence is proved and justification of such detention is suspicion or reasonable probability, and there is no conviction that can only be warranted by legal evidence. Preventive detention is every so often described as a "jurisdiction of suspicion", Detaining authority passes detention order on subjective satisfaction. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to rule of law.

9. Preventive detention law makes room for detention of a person without a formal charge and without trial. The person detained is not required to be produced before the Magistrate within 24 hours, so as to give an opportunity to the Magistrate to peruse the record and decide whether the detenu is

to be remanded to police or judicial custody or allowed to go with or without bail. The detenu cannot engage a lawyer to represent him before the

detaining authority. In the said background it is of utmost importance that whatever procedural safeguards are guaranteed to the detenu by the

Constitution and the preventive detention law, should be strictly followed. Right to liberty guaranteed by Article 21 implies that before a person is

imprisoned a trial must ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to

properly defend himself except through a lawyer. The importance of a lawyer to enable a person to properly defend himself has been elaborately

explained by the Supreme Court in *A.S. Mohd. Rafi v. State of Tamilnadu* AIR 2011 SC 308 and *Md. Sukur Ali v. State of Assam*, JT 2011 (2) SC

527. As observed by Mr Justice Sutherland of the U.S. Supreme Court in *Powell v. Alabama*, 287 U.S. 45 (1932) "Even the intelligent and

educated layman has small and sometimes no skill in the science of law, and hence, without a lawyer he may be convicted though he is innocent.

Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article

22(3) specifically excludes the applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of

preventive detention to very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after

long, arduous, historical struggles, will become nugatory. In *State of Maharashtra & Ors. Vs. Bhaurao Punjabrao Gawande*, (2008) 3 SCC 613 this

Supreme Court observed:

“...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a

Constitution whereby a government was established, their second object, equally important, was to protect the people against the government. That is

why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of

fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against

executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a

lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample

upon human rights which the country had fought hard to preserve. They believed like Jefferson that “an elective despotism was not the

Government we fought for”. And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from

without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide A.K. Roy Vs. Union of India (1982)

1 SCC 271, and Attorney General for India Vs. Amratlal Prajivandas, (1994) 5 SCC 54.”

10. The Constitution Bench of the Supreme Court in M. Nagaraj & ors. Vs. Union of India & ors. (2006) 8 SCC 212, observed:

“It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any

Constitution by reason of the basic fact that they are members of the human race.”

11. The Nine Judge Constitution Bench of the Supreme Court in I.R. Coelho (dead) By LRs. Vs. State of T.N., (2007) 2 SCC 1, observed:

“It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution..... Fundamental

rights occupy a unique place in the lives of civilized societies and have been described in judgments as “transcendental”, & inalienable, and

primordial”.

12. In the present case, averment of learned counsel for respondents is that

there are very serious allegations against detenu as he has always been in the lead role in nefarious activities, which are hazardous to the sovereignty and integrity of the country and has been creating law and order problem in the area of Kupwara and its adjacent areas and in order to accomplish antisocial agency. And in this connection, various criminal cases are already going on against detenu under various provisions of Ranbir Penal Code and if he is found guilty, he will be convicted and given appropriate sentence.

Maybe, offences allegedly committed by detenu attract punishment under prevailing laws but that has to be done under prevalent laws and taking recourse to preventive detention laws would not be warranted. Detention cannot be made a substitute for ordinary law and absolve investigating authorities of their normal functions of investigating crimes, which detenu may have committed. After all, preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. The Supreme Court in *Rekha v. State of Tamil Nadu* AIR 2011 SCW 2262, while emphasising need to adhere to procedural safeguards, observed:

“It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as jurisdiction of suspicion, The Detaining Authority passes the order of detention on subjective satisfaction. Since Clause (3) of Article 22 specifically excludes the applicability of Clauses (1) and (2), the detainee is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital.”

13. It may not be out of place to mention here that preventive detention is not a quick alternative to 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 detention of a person is a serious matter affecting the liberty of

the citizen. Preventive detention cannot be resorted to when sufficient remedies are available under general laws of the land for any omission or commission under such laws, the Supreme Court observed.

Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu 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. No doubt the offences alleged to have been committed by detenu are such as to attract punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws would not be warranted. Preventive detention involves 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 crimes which the detenu may have committed. After all, 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's* case and *V. Shantha v. State of Telangana* case (supra) and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

14. A Bench of this Court vide judgement dated 3rd July 2018, passed in HCP no.399/2017 titled *Daulat Ali Mughal v. State of J&K and others*, has dealt with and set at rest the controversy, which is also identical to the petition on hand inasmuch as the cases bearing FIR nos.279/2017 and 90/2017, made use of for slapping detention order in above petition (HCP no.399/2017), have also been relied upon by detaining authority in detention order impugned in instant petition. In that view of matter and as doctrine of precedence also implies and demands, the instant petition merits disposal on the same lines as has been adopted in HCP 399/2017.

15. Based on the above discussion, petition is disposed of and detention order no.20-DMK/PSA of 2017 dated 02.12.2017 is quashed. Respondents are directed to release detenu, namely, *Shri Haroon Ahmad Sheikh* son of *Late Alif-ud-din Sheikh* resident of *Amrohi, Karnah District Kupwara*, be released, if not required in any other case. Disposed of.

16. Record of HCP no.399/2017 be sent to the records.
17. Detention record be returned to counsel for respondents.