

(2019) 02 J&K CK 0045

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 222 Of 2018

Hazik Ahmad Rather

APPELLANT

Vs

State Of Jammu & Kashmir And Anr

RESPONDENT

Date of Decision : 14-02-2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978 — Section 8
Constitution Of India, 1950 — Article 21, 22(3)(b), 22(5)

Citation : (2019) 02 J&K CK 0045

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M. Ashraf Wani, Mir Suhail

Final Decision : Disposed Off

Judgement

1) By medium of instant petition, quashment of order of detention bearing No.08/DMK/PSA/2018 dated 26.07.2018, issued by District Magistrate, Kulgam, in exercise of powers conferred by clause (a) of Section 8 of the J&K Public Safety Act, 1978, is sought on the grounds detailed out therein.

2) In order to deter a person from acting in any manner prejudicial to the security, sovereignty and integrity of the State or public order, detention order can be and has to be passed. However, the power in issuing preventive orders has to be exercised in a manner which would show that all the safeguards as against the orders of detention are taken into consideration and respected. Liberty is precious, curtailment thereof can be by way of exception but it must have some reasonable basis. In absence of any solid base, to tamper with the right of liberty is not permissible. Any person who, in any way, threatens security of the State or public order has to be dealt with iron hands but constitutional guarantees under such guise cannot be permitted to be defeated.

3) 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 and such power shall 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 order of preventing a person from acting in any manner which shall be prejudicial, in the instant case, to the maintenance of public order but while doing so 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.

4) Instant case, in effect, is one where the order of detention absolutely suffers from non-application of mind and on plain reading shows that it has been passed in violation of the constitutional rights guaranteed to the petitioner. The non-application of mind on the part of detaining authority is writ large as in the order impugned Detaining Authority has recorded that "on the basis of grounds of detention placed before him by the Superintendent of Police" he has derived satisfaction regarding detention of the detainee. It is to be made clear that whatever material is collected by the Police or any other agency has to be placed before the Detaining Authority and it is then the Detaining Authority who, on scrutiny, has to ascertain as to whether there is any solid base for the allegations as levelled in the material so collected. After sifting the material, the detaining authority has to derive subjective satisfaction and to formulate grounds of detention. In the instant case it appears that deriving of subjective satisfaction has become a casualty. Simply whatever has been mentioned in the dossier has been mentioned in the grounds of detention, that is why in the order of detention it is recorded that satisfaction is derived from the grounds of detention placed on record by SSP when the allegations contained therein are not substantiated by any record.

5) The non-application of mind is further exposed by the fact, as contended by the learned counsel for the petitioner, the detainee has been shown involved in FIR Nos.260/2017 of P/S Qazigund & 275/2017 of P/S Qazigund. In the aforesaid FIRs, the detainee had been admitted to bail but this fact has not been made mention of in the grounds of detention though reference to said FIRs has been made. Either detaining authority has been kept in dark or otherwise detaining authority has not applied its mind properly. While detaining a person under Public Safety Act, detaining authority is under a legal obligation to analyze all the circumstances and material and then to gather conclusion about the requirement of depriving a person of his personal liberty. Non-mention about the grant of bail is serious lapse which in turn gives rise to the inference that there is non-application of mind. For this, support can be had from the judgment rendered by the Hon'ble Apex Court in the case of "Anant Sakharam Raut v. State of Maharashtra and another" reported in AIR 1987 SC 137.

6) It is also projected that the detainee has been disabled from making an

effective and purposeful representation against his detention as the material which formed base of the grounds of detention and consequent order of detention has not been furnished to him thereby his right guaranteed under Article 22(5) of the Constitution has been violated.

7) The submission appears to have force as nothing has been brought on record to show that the relevant material has been supplied to the detainee. It needs no emphasis that the detainee cannot be expected to make a meaningful exercise of his constitutional and statutory rights guaranteed under Article 22(5) of the Constitution of India unless and until the material on which the detention is based, is supplied to the detainee. The failure on the part of detaining authority to supply material renders detention order illegal and unsustainable. Non-supply of the material would amount to violation of Article 22(5) of the Constitution of India, so deprivation of a valuable right. In this view, I am fortified by the judgments of the Hon'ble Apex Court in the case of "Sophia Gulam Mohd. Bham v. State of Maharashtra & ors" (AIR 1999 SC 3051), Thahira Haris etc. etc. Vs. Government of Karnataka & Ors, AIR 2009 SC 2184 and "Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others", (1982) 3 SCC 440.

8) 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.

9) Preventive detention, in effect, is an invasion to personal liberty which infringe the right to liberty guaranteed by Article 21 of the Constitution of India. Preventive detention, in view of exception to Article 21, has to be reasonable, shall not be on the ipse dixit of the detaining authority. Preventive detention wherever permissible shall adhere to the procedural safeguards. Infraction of

safeguards renders the order of detention unsustainable. The Hon'ble Supreme Court in catena of judgments has made it clear as to what is the value of the 'constitutional safeguard' and as to what is the value of right to liberty guaranteed under Article 21 of the Constitution of India. In my 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) The impugned order of detention on the face of it is not only vague and unsupported by any material but also appears to be an arbitrary exercise of power, hence quashed. The detenue is directed to be released from the preventive custody provided he is not required in connection with any other case.

11) Petition succeeds, shall, accordingly stand disposed of.