

(2018) 12 J&K CK 0068

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 299 Of 2018

Imtiyaz Nazir Dar @APPELLANT@Hash State Of Jammu & Kashmir & Ors

Date of Decision : 20-12-2018

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978, — Section 8, 13
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 307, 427
Arms Act, 1959 — Section 7, 27
Constitution Of India, 1950 — Article 22(5), 22(6)

Citation : (2018) 12 J&K CK 0068

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Shafqat Nazir, Mir Suhail

Judgement

1) By the instant petition, petitioner has sought quashment of the order of detention bearing No.23/DMP/PSA/18 dated 30.08.2018. In terms of said order, the person of Imtiyaz Nazir Dar (hereinafter referred to as the detainee), has been taken into preventive detention by invoking powers under Section 8 of the J&K Public Safety Act.

2) The detention order has been challenged, mainly, on the grounds that the detaining authority has failed to apply its mind to the fact whether the preventive detention of the detainee was imperative notwithstanding the fact that he was already in custody. To this, it has been added that the respondent No.2 has passed the order of detention on the dictates of the sponsoring agency i.e. the officer who has prepared the police dossier and no attempt has been made by respondent No.2 to scan and evaluate it before passing the order of detention.

3) Counter has filed by the respondents wherein it is stated that the grounds of detention have been furnished to the detainee. The detaining authority has complied with the requirements of law. The detainee has failed to avail the remedy prescribed under the Act. He has not filed the representation against the orders of detention. The detainee is involved in number of criminal cases. Order of detention has been passed on justifiable grounds. Detention record has been

produced to lend support the stand taken in the counter affidavit.

4) Heard learned counsel for the parties and also perused the records.

5) The main plank of argument of the learned counsel for the petitioner is that since the detinue was in custody of the police authorities besides for others, for substantive offence, therefore, there was no need to direct his preventive detention. The arrest of the detinue in the said criminal cases at the time of passing of the orders of detention has not been disputed.

6) Perusal of the detention records reveals that has been shown involved in FIR No.22/2018 registered at Police Station Pulwama for commission of offences under Section 307 RPC, 7/27 Arms Act, $\frac{3}{4}$ Exp. Substances Act, FIR No.105/2018 P/S Pulwama under Section 427 RPC, $\frac{3}{4}$ Exp. Substances Act, 03 PDD Act and FIR No.128/2018 P/S Pulwama under Section 307 RPC, $\frac{3}{4}$ Exp. Substances Act.

7) The arrest of the detention in connection with aforesaid criminal cases, at the time of passing of impugned order of detention, has not been disputed by the respondents in the counter affidavit. Since the detinue 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 detinue 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 detinue 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."

8) The same view has been repeated and reiterated by the Hon'ble Supreme Court in the judgment delivered in the case of "V. Shantha v. State of Telangana

& Others" (AIR 2017 SC 2625). Para 13 of the said judgment is relevant to be quoted as under:

"The order of preventive detention passed against the detainee states that his illegal activities were causing danger to poor and small farmers and their safety and financial well-being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detainee 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 the society from his evil deeds. The rhetorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the draconian powers of preventive detention. To classify the detainee as a "goonda" affecting public order because of inadequately yield from the chilli seed sown by him and prevent him from moving for bail even is a gross abuse of the statutory power of preventive detention. The grounds of detention are ex-facie extraneous to the Act."

9) Testing the instant case on the touchstone of the law laid down above, the detainee could not have been detained after taking recourse to the provisions of the Public Safety Act when he was already in the custody of the police authorities in the cases, the details whereof have been given in the grounds of detention. His custody in police for the offences referred in the grounds of detention, has been converted into the custody under the impugned detention order. May be the detaining authority might have been laboring under the belief that the detainee applies for bail, he may succeed in seeking his release but this apprehension of the detaining authority could have been guarded against by resisting and opposing the bail application. In the event of his release on bail, the State could have exercised its right to knock at the doors of higher forum. This single infraction knocks the bottom out of the contention raised by the State that the detainee can be detained preventatively when he is already in custody and has not applied for bail. It cuts the very root of the State Act. The State could have taken recourse to the ordinary law of the land.

10) Learned counsel for the petitioner next contended that the detainee has been disabled from making an effective representation against the detention. In this connection it is contended that the material forming base of the grounds of detention has not been furnished to the detainee.

11) Though in the counter affidavit it is projected that the material forming base of the grounds of detention was served to the detainee but no receipt having been obtained from the detainee has been produced before this Court to negate the submission referred above. Non-supply of the material would amount to violation of Article 22(5) of the Constitution of India, so deprivation of a valuable right.

12) In paras 27 and 28 of the judgment captioned Thahira Haris etc. etc. Vs.

Government of Karnataka &Ors, reported in AIR 2009 Supreme Court 2184, Hon'ble Apex Court has held as under:

"27. There were several grounds on which the detention of the detainee was challenged in these appeals but it is not necessary to refer to all the grounds since on the ground of not supplying the relied upon document, continued detention of the detainee becomes illegal and detention order has to be quashed on that ground alone.

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detainee who has been detained in pursuance of the order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detainee at the earliest opportunity to make effective and meaningful representation against his detention.

13) The learned counsel for the detainee has also argued that the Officer, who handed over the detainee to the concerned jail authorities of Central Jail along with the relevant documents, should have filed an affidavit in the matter indicating the fact that he has explained the grounds of detention to the detainee in the language which he understood, which has not been done.

14) The submission appears to be forceful as nothing has been brought on record to show that the contents of grounds of detention were read over to the detainee in Kashmiri language, which language he understood fully. To eradicate all the doubts, it was incumbent on the part of the person, who did the exercise of handing over the documents and conveying the contents thereof to the detainee, to file an affidavit in order to attach a semblance of fairness to his actions. Resort can, in this behalf, be had to the law laid down by the Apex Court of the country in the case of "State Legal Aid Committee, J&K versus State of J&K & others, reported in AIR 2005 SC 1270, wherein it has been held as under:

"Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to show that the requirements of Section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of order of detention to be disclosed/communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assessee and he was informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detainee refused to receive copy of the detention order and also refused to put his signatures on the documents. The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement LPA

(HC) 107/2017 10 of 16 to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of Section 13 of the Act."

15) Para 20 of the judgment rendered in the case of Lallubhai Jogibhai Patel vs Union Of India & Ors reported in 1981 AIR 728, shall also be advantageous to be quoted:

"20. It is an admitted position that the detenu does not know English. The grounds of detention, which were served on the detenu, have been drawn up in English. It is true that Shri C. L. Antali, Police Inspector, who served the grounds of detention on the detenu, has filed an affidavit stating that he had fully explained the grounds of detention in Gujarati to the detenu. But, that is not a sufficient compliance with the mandate of Article 22(5) of the Constitution, which requires that the grounds of detention must be "communicated" to the detenu. "Communicate" is a strong word. It means that sufficient knowledge of the basic facts constituting the 'grounds' should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the 'ground' to the detenu is to enable him to make a purposeful and effective representation. If the 'grounds' are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed. If any authority is needed on this point, which is so obvious from Article 22(5), reference may be made to the decisions of this Court in Harikishan v. State of Maharashtra: and Haribandhu Dass. v. District Magistrate (AIR 1969 SC 43) (ibid)."

16) Life and liberty of the citizens are of paramount importance. A duty is cast on the shoulders of the Court to enquire that the decision of the Executive is made upon the matters laid down by the Statute and that these are relevant for arriving at such a decision. A citizen cannot be deprived of personal liberty guaranteed to him/her by the Constitution and of which, he/she cannot be deprived except in due course of law.

17) Having regard to the above discussion, the impugned order of detention orders of detention bearing No.23/DMP/PSA/18 dated 30.08.2018 being unsustainable, as such, quashed. Further custody of the detenue shall be governed in accordance with the orders as shall be passed by the court of competent jurisdiction in the criminal cases registered against him.

18) Registry to return the detention records to the learned counsel for the respondents.