
(2019) 02 J&K CK 0063

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 296 Of 2018

Irshad Ahmad Shah

APPELLANT

Vs

State Of Jammu & Kashmir & Ors

RESPONDENT

Date of Decision : 20-02-2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978 — Section 8

Citation : (2019) 02 J&K CK 0063

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Shafqat Nazir, Asifa Padroo

Judgement

1) By the instant petition, petitioner has sought quashment of the order of detention bearing No.09/DMK/PSA of 2018 dated 06.09.2018, passed by District Magistrate, Kupwara-respondent No.2 herein. In terms of said order, Irshad Ahmad Shah (hereinafter referred to as the detainee), has been taken into preventive custody by invoking powers under Section 8 of the J&K Public Safety Act, 1978.

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.

3) Respondents, on notice, appeared and filed counter affidavit wherein they justified passing of impugned detention order. Learned AAG also produced the detention record so as to lend support to 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 detainee was in custody of the police in connection with case FIR No.325/2018 P/S Handwara, therefore, there was no need to direct his

preventive detention. The arrest of the detainee in the said criminal cases at the time of passing of the orders of detention has not been disputed.

6) 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."

7) 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 sold 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."

8) 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 out the bottom 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.

9) In view of the facts of the present case and the law laid down by the Hon'ble Apex Court as quoted hereinabove, the order of detention impugned does not sustain on the above referred ground alone, therefore, other grounds projected in the petition are not required to be dealt with.

10) Having regard to the above discussion, the impugned order of detention order of detention bearing No.09-DMK/PSA of 2018 dated 06.09.2018, being unsustainable, as such, quashed. Further custody of the detainee shall be regulated in accordance with the orders as shall be passed by the court of competent jurisdiction in the criminal cases registered against him.

11) Detention record be returned to the learned counsel for the respondents.