
(2019) 04 J&K CK 0077

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 475 Of 2018

Ishhrat Hussain Sheikh

APPELLANT

Vs

State Of Jammu & Kashmir And Ors

RESPONDENT

Date of Decision : 29-04-2019

Acts Referred:

Constitution Of Jammu And Kashmir, 1956 — Section 8
Arms Act, 1959 — Section 7, 27
Unlawful Activities (Prevention) Act, 1967 — Section 16, 18, 20, 38
Indian Penal Code, 1860 — Section 307

Citation : (2019) 04 J&K CK 0077

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Arshad Andrabi, N. H. Shah

Final Decision : Allowed

Judgement

1) Challenge in this petition is to order No.70/DMA/PSA/2018 dated 12.11.2018, passed by District Magistrate, Anantnag (respondent No.2 herein), whereby Ishrat Hussain Sheikh son of Gh. Qadir Sheikh resident of Ranipora Achabal District Anantnag (hereinafter referred as the detainee), in exercise of powers conferred under Section 8 of the J&K Public Safety Act has been ordered to be taken into preventive custody.

2) Learned counsel for the petitioner highlighted various grounds while seeking quashment of impugned order but the star ground is that detainee has been shown involved and arrested in connection with case FIR No.84/2018 registered at P/S Achabal for commission of offences under Section 307, 7/27 Arms Act, 16, 18, 20 38 ULA(P) Act wherein he has already been admitted to bail by the court of Principal Sessions Judge, Anantnag on 01.10.2018, however, he was not released and instead his custody was shifted to District Jail, Anantnag. According to learned counsel, when the detainee was already implicated in a criminal case, there was no requirement of passing the detention order. For issuing detention

order, no compelling reasons have been given by the detaining authority. The impugned order, according to learned counsel for the petitioner, has been passed illegally and there has been sheer non-application of mind on the part of detaining authority.

5. Learned counsel for the petitioner has also submitted that nonetheless the issuance of impugned detention order on 12.11.2018, judicial custody of the petitioner has been sought by the Investigating Officer from the Special Judge under ULA(P) Act and the said request has been acceded to and the judicial remand granted.

6. On perusal of the record, it transpires that the petitioner was already in custody in connection with case FIR No.84/2018. It is trite that preventive orders can be passed even when a person is in police custody or involved in a criminal case but for so doing, compelling reasons are to be recorded. No such reason has been recorded. When it is so, order of detention becomes unsustainable. It shall be quite apposite to quote Para 5, 6 and 7 of the judgment of the Hon'ble Apex Court in "Surya Prakash Sharma v. State of U. P. and others, 1994 SCC (Cri) 1691,:

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this court since it state first came up for consideration before a Constitution Bench in Rameshwar Shaw vs District Magistrate Burdwan to eschew prolixity we refrain from detailing all those cases accept that of Dharmendra Sugan Chand Chelawat v. Union of India wherein a three judge Bench after considering all the earlier relevant decisions including Rameshwar Shaw answered the question in the following words:

"The decisions referred to above lead to the conclusion that an order for detection can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detailing authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression compelling reasons in the context of making an order for detention of a person already in in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in judicial custody at the time of making the order

of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment made in the grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail "he may again indulge in serious offences causing threat to public order". (emphasis supplied) To put it differently, the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

7. On the conclusions as above we quash the order of detention."

3) 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 detenu 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 detenu 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 detenu 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."

4) 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 detenu 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 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 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."

5) 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 at 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.

6) The non-application of mind on the part of detaining authority is conspicuous as the contention raised on behalf of the petitioner that he continues to be in judicial custody despite the issuance of order impugned and same is shown to have been executed. Even the sponsoring agency i.e. SSP, Anantnag, has not been able to explain as to how the judicial custody of the petitioner was sought or was warranted after the detention order was passed and stated to be acted upon. The learned Sr. AAG had been asked to explain the said aspect of the case when during the course of hearing of the matter, learned counsel for the petitioner raised the issue.

7) 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 grounds alone, therefore, other grounds projected in the petition are not required to be dealt with.

8) 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 aforesaid ground alone, therefore, other grounds projected in the petition are not required to be dealt with.

9) Taking conspectus of the aforesaid discussion, petition is allowed, order No. 70/DMA/PSA/2018 dated 12.11.2018, is quashed. The detainee is directed to be released from the preventive custody, unless, of course, he is not required in connection with any other case.

10) The Registry to return the detention record to the learned counsel for the respondents.