

(2019) 05 J&K CK 0010

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 326 Of 2018

Jameel Ahmad Nadaf @APPELLANT@Hash State & Ors.

Date of Decision : 01-05-2019

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 3, 8(a), 13
Code Of Criminal Procedure, 1973 — Section 161, 164A
Constitution Of India, 1950 — Article 22(5)

Citation : (2019) 05 J&K CK 0010

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Arshie Zuhar, Asif Maqbool

Judgement

1. Impugned is the detention order No. 69/DMB/PSA/2018 dated 06.09.2018 passed by District Magistrate, Baramulla(respondent No.2) in exercise of powers conferred on him under Section 8(a) of the J&K Public Safety Act, 1978, in terms of which the detainee namely Jameel Ahmad Nadaf has been detained. The said detention order has been challenged in terms of the instant petition being in breach of the provisions of Article 22(5) of the Constitution of India.

2. It is being pleaded in the petition that the detaining authority-respondent No.2 has not attributed any specific allegation against the detainee. Furthermore, it is stated that he has been incapacitated in filing a representation as the grounds of detention are hyper technical in nature i.e. not in a language which could be understood by the detainee. It is being stated that the detainee has read upto 12th class only and it is not possible for him to understand such a hyper technical language. It is also the submission of learned counsel for the detainee that the order of detention and the connected documents annexed with the petition clearly show violation of the right of the detainee guaranteed in terms of the Article 22(5) of the Constitution of India, having been made.

3. In the counter affidavit filed on behalf of the respondents, it is stated that the detainee was ordered to be detained for maintenance of 'security of the State' and 'his remaining at large would cause more damage to the public property and

public order' and so in order to curb his activities it was found imperative to detain him under the provisions of J&K Public Safety Act, 1978.

4. Learned counsel for the detainee while being heard has reiterated the grounds taken in the petition. In addition, learned counsel submitted that the allegations levelled against the detainee are totally vague as nothing specific has been stated in the grounds of detention as to what kind of anti-national sentiments he was harbouring and what anti-national agenda he was propagating through social media groups?

Who were his mentors across the border, which border, is it China, Nepal, Pakistan or Bhutan? Nothing specific has been stated in the grounds of detention by the detaining authority. According to the learned counsel for the petitioner, bail has already been granted in favour of the detainee by the learned trial court but instead of releasing the detainee he has been shifted to the jail somewhere in Haryana.

Reliance has been taken on 1979 SLJ 233, Manzoor Ahmad Ganai Vs. State & Ors., wherein this Court has observed that if the grounds furnished to the detainee were vague or irrelevant, right to make representation under Article 22(5) of the Constitution becomes illusory and therefore, the ground must be clear and definite and must contain sufficient details to enable the detainee to make an effective representation. Para-9 of the said judgment shall be advantageous to be quoted hereunder:-

"9. Under Article 22(5) of the Constitution of India as well as under Section 13 of the Act, it is incumbent on the detaining authority to communicate to the detainee the grounds on which the order for his detention has been made and the detaining authority shall also afford the detainee an earliest opportunity for making a representation against the order to the Government. It has been laid down in various decisions of the Supreme Court in this regard that if the ground or grounds furnished to the detainee were vague or irrelevant the right to make a representation under Article 22(5) of the Constitution becomes illusory and therefore, the grounds must be clear and definite and must contain sufficient details to enable the detainee to make an effective representation."

5. On the other hand learned GA has submitted that the detainee was not illiterate person and the material furnished to him could be properly understood by him and representation could have been filed. He has taken reliance on the judgment of Hon'ble Apex Court referred in Union of India V. Arvind Shergil, AIR 2000 SC 2924, in particular Para-4, which reads as:-

"4. The High Court has virtually decided the matter as if it was sitting in appeal on the order passed by the detaining authority. Action by way of preventive detention is largely based on suspicion and the court is not an appropriate forum to investigate the question whether the circumstances of suspicion exist warranting the restraint on a person. The language of Section 3 clearly indicates that the responsibility for making a detention order rests upon the detaining

authority who alone is entrusted with the duty in that regard and it will be a serious derogation from that responsibility if the court substitutes its judgment for the satisfaction of that authority on an investigation undertaken regarding sufficiency of the materials on which such satisfaction was grounded. The court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation has in view, that is, to prevent the detainee from engaging in smuggling activity. The said satisfaction is subjective in nature and such a satisfaction, if based on relevant grounds, cannot be stated to be invalid. The concerned authorities have to take note of the various facts including the fact that this was a solitary incident in the case of the detainee and that he had been granted bail earlier in respect of which the application for cancellation of the same was made but was rejected by the court. In this case, there has been due application of mind by the concerned authority to that aspect of the matter as we have indicated in the course of narration of facts. Therefore, the view taken by the High Court in the circumstances of the case cannot be sustained."

6. Heard the rival arguments.

7. The detention record, as produced, reveals that the detainee was involved in FIR No. 172/2018. Involvement of the detainee in the aforementioned criminal case appears to have heavily weighed with the detaining authority while passing detention order. In the grounds of detention the respondents have not brought anything on record to indicate that the copies of FIR, statements recorded under Section 161/164-A Cr.PC and other material collected in connection with investigation of aforesaid case was ever 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. If the detainee is not supplied the material on which detention order is based, the detainee cannot be in a position to make an effective representation against his detention. The failure on the part of the detaining authority to supply material renders detention under illegal and unsustainable.

8. The Hon'ble Apex Court in the judgment rendered in the case of "Sophia Gulam Mohd. Bham V. State of Maharashtra & Ors. (AIR 1999 SC 3051), has held as under:-

"The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detainee to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detainee and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language."

9. Another argument raised by learned counsel for the petitioner that since the detainee was in the custody of the police at the time of passing of the detention order, therefore, the question that arises for consideration is whether an order of detention could be passed on the face of such an eventuality. The answer has to be 'no'. The law on the subject has been laid down by the Hon'ble Apex Court in *Sama Aruna V. State of Telangana & Anr.* (AIR 2017 SC 2662). Para 24 of the judgment reads as :-

"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 2002-2003. 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."

10. The same view has been reiterated in the case of *V. Shantha V. State of Telangana & Ors.* (AIR 2017 SC 2625), that reads as:-

"13. 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 inadequate 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.

11. 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 above referred case.

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

13. In the backdrop of what has been said and observed above, the instant petition is allowed. Order of detention No. 69/DMB/PSA/2018 dated 06.09.2018 passed by District Magistrate, Baramulla, impugned, is as such, quashed. The detainee namely Jameel Ahmad Nadaf S/o Mohammad Subhan Nadaf R/o Nadaf Colony, Sultanpora, Pattan, be released from the preventive custody forthwith provided he is not required in connection with any other case/cases.

14. Detention record, as produced, be returned to learned GA.