
(2019) 09 J&K CK 0082

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 480 Of 2018

Khurshid Ahmad Lone

APPELLANT

Vs

State Of Jammu & Kashmir And Ors

RESPONDENT

Date of Decision : 17-09-2019

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 3, 8(a), 13, 14(2)
Code Of Criminal Procedure, 1973 — Section 161
Unlawful Activities (Prevention) Act, 1967 — Section 13
Constitution Of India, 1950 — Article 22, 22(5), 22(6)

Citation : (2019) 09 J&K CK 0082

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Syed Musaib, Sheikh Feroz

Final Decision : Disposed Of

Judgement

Rashid Ali Dar, J

1. By virtue of order bearing No. 25/DMB/PSA of 2018 dated 12.12.2018, (for short impugned order) passed by respondent no. 2 - District Magistrate, Bandipora, the detainee namely Khursheed Ahmad Lone S/o Mohammad Jamal Lone R/o Manzpora Naidkhai, Hajin, Bandipora has been taken into preventive custody by invoking powers under Clause (a) of Section 8 of the J&K Public Safety Act 1978 (for short the Act), as his activities were found to be prejudicial to the 'maintenance of public order' so has been lodged in Kotbhalwal Jail, Jammu. Quashment of the said order is sought on the following grounds in terms of the petition: -

(a) That the allegations/grounds of detention are vague and mere assertion of the detaining authority and no prudent man can make an effective representation against these allegations and can only be defended in the court of law. The cases mentioned in the grounds of detention have no nexus with the detainee and has been fabricated by the police in order to justify its illegal action

of detaining the detainee. The detaining authority has mentioned one FIR in the grounds of detention, however, the allegation levelled therein against the detainee are far from reality.

(b) That the detainee has no knowledge of the cases referred in the grounds of detention as he was neither arrested in any of the case nor his attendance was ever sought by the concerned police station in connection with any investigation. Further, the detainee without any investigation was arrested and the police authorities with preconceived mind sought detention order and the respondent No. 2 without applying its mind has passed the impugned detention order, seemingly passed the detention order upon the dictates of police authorities.

(c) That the detainee was already in custody and had a case being alleged against him but same fact has not been mentioned in the detention order which is in violation of various judgements of Hon'ble Apex Court as well as this High Court, hence there was no occasion for the respondent no. 2 to pass the impugned order when the detainee was to face investigation in a criminal case.

(d) That the detaining authority has not prepared the grounds of detention by itself, which is a pre-requisite for him before passing any detention order. Thus non-preparation of grounds of detention order by the detaining authority has rendered the detention order bad in law.

(e) That the detaining authority has not furnished the material and other connected documents i.e. dossier, copies of FIRs, statements recorded under Section 161 of Cr. PC and the communication received from Superintendent of Police relied upon by him for passing the order of detention to the detainee to enable him to make an effective representation against the said order, therefore, the constitutional rights guaranteed to the detainee under Article 22 (5) of the Constitution stand infringed.

(f) That the detainee was not informed that within what time he can make a representation against his detention order to the detaining authority or to the Government, no period was specified, which is in total violation of the rights of the detainee as guaranteed under Article 22 and Section 13 of PSA.

(g) That the detaining authority has not mentioned in the grounds of detention as to whether the detainee has moved a bail application before the competent court or not. Further, the grounds of detention were never explained to the detainee in his local Kashmiri or Urdu language which he could have understood.

2. Respondents have filed the counter affidavit wherein it is submitted that the detainee was eager to join militancy and as such developed close links with militants operating in the area and used to provide every logistic support to them for carrying anti-national/subversive activities in the peripheries of Sumbal and its adjacent area.

His activities have potentially disturbed the public peace and tranquility and has played key role in order to enforce separatist's protest calendar resulting in law

and order problem in the area. The detention order alongwith grounds of detention and other relevant material were supplied to the detainee through Dy. Superintendent of Police, Kotbhalwal, Jammu and the respondents have also followed the provision of Public Safety Act and the detainee has been detained only after following due procedure in terms of Public Safety Act. Further, the detainee stands detained on the reasons mentioned in the grounds of detention and the detainee is further involved in various FIR's mentioned in the grounds of detention. The material on the basis of which the grounds of detention were framed by respondent no. 2 were supplied to the detainee and there is proper application of mind and the respondent no. 2 was fully satisfied for detaining the detainee for the grounds explained in the grounds of detention.

3. Heard learned counsel for the petitioner and learned Dy. AG.

4. According to learned counsel for petitioner, the detainee has been ordered to be kept in preventive custody on the basis of activities referred in the grounds to have occurred up to 2016. The impugned detention order according to him is third one passed by the respondents in quick succession. He has brought on record a copy of the order dated 10.10.2017 passed in HCP No. 111/2017. Perusal of which reveals that the earlier two detention orders passed viz detainee have been quashed by the Co-ordinate Bench of this court on 30.12.2016 and 10.10.2017. Reference of the cases in which the detainee is stated to be involved pertained to the year 2013, 2014 and 2016. Mention of FIR No. 61/2016 has also been made therein according to him. In the grounds of detention forming part of the impugned detention order, the detainee has been shown to be involved in FIRs Nos. 345/2007, 192/2010, 27/2013, 40/2013, 26/2014, 53/2014, 97/2014 and 06/2016 for commission of various offences including offence under Section 13 ULA(P) Act. It is further contended that in these cases detainee had neither applied for bail nor was bail granted to him. Further, the material forming base for the detention has not been supplied to the detainee disabling him from making an effective and purposeful representation against his detention. The right guaranteed under Article 22(5) of the Constitution of India, as such, is infringed. There is complete non-application of mind on the part of detaining authority while passing the impugned detention order as the detaining authority has not scanned the relevant material and has not formulated the grounds of detention itself. Reliance has been placed on the following judgments:

a) 1973 STPL 2522 S C, Chotka Hembram vs. State of W.B and Ors.

b) Sajad Ahmad Mir vs. State of J&K and ors; HCP No. 207/2017 date of decision 02.11.2017.

c) Jitendra Vs. District Magistrate and ors; 2004 CriLJ 2967.

5. In Chotka Hembram's case their Lordships observed as under:

"According to Sub-Section (2) of Section 14 of the Act 'the revocation or expiry of a detention order shall not bar the making of a fresh detention order under

Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be is satisfied that such an order should be made." It would, therefore, follow that if an order for the detention of a person had been made under the Act and that order was either subsequently revoked or the period of which the detention order was made has expired, the said order would not stand in the way of making of a fresh order of detention under Section 3 of the Act against the same person provided fresh facts arise after the date of the said revocation or expiry. If no fresh facts come into being after the date of revocation or expiry as may warrant the making of an order of detention, the requisite condition precedent to making of the subsequent order could be no-existent as it would not be permissible to make a subsequent order of detention under Section 3 of the Act".

6. In another case titled "Sajad Ahmad Mir Vs. State of J&K and Ors". the Co ordinate bench of this court observed:

"It is settled that once the detention order is quashed, whatever grounds which formed base, cannot be used for passing fresh order of detention unless fresh facts, as would emerge after release of the detainee from the custody, warranting detention. When the detainee is never released, there could be no new facts which could form base for the grounds of detention. In the judgments reported in AIR 1974 SC 1155 and AIR 1974 SC 432, the principle, as has been laid down, is that the fresh order of detention on same grounds on which earlier order was passed, is illegal. It has also been settled that fresh detention can be order only on fresh facts".

7. In Jitendra's case, pertinent observations are :

"We made no bones in observing that a partial communication of a right (in the grounds of detention) of the type in the instant case wherein the time limit for making a representation is of essence and is not communicated in the grounds of detention, would vitiate the first fundamental right guaranteed to the detainee under Article 22 (5) of the Constitution of India, namely of being communicated, as soon as may be the ground of detention".

8. Learned counsel for the petitioner further contended that in the impugned order of detention, it is recorded that the District Magistrate was satisfied to prevent the detainee from acting in any manner prejudicial to the "maintenance of public order", whereas, in the grounds of detention, in a para at one place , it is recorded that the activities of the detainee are extremely hazardous to "public order and safety" 'and at another place, it is recorded that the activities of the detainee are detrimental for the "security and sovereignty of the State". Finally, it has been concluded as under: -

"In view of the above enumerated facts and circumstances your activities have been found to be potentially dangerous for maintenance of public peace and order. Your behavior and conduct have remained incorrigible and there is every

likelihood of your continuing with the nefarious activities designed to thwart the Government established by law. You have remained indulging with your previous agenda of fomenting and creating trouble in Sumbal and its adjacent area by instigating and provoking the youth for resorting to stone pelting which will be dangerous to the maintenance of public peace and order."

9. Learned Dy. AG submits that the impugned detention order has been passed properly and petition is liable for dismissal. He has placed reliance on the judgment in " D.M. Nagaraja vs. Government of Karnataka and Ors." (AIR 2011 SC W 5608). The observation in the regard:

"We have already extracted criminality, criminal activities starting from the age of 30 and details relating to eleven case mentioned in the grounds of detention. It is not in dispute that QAZI in AMJADoneYOUSUF case he has been convicted and sentenced to undergo rigorous imprisonment for a term of nine years. He had been acquitted in two case and four cases are pending against him wherein he was granted bail by the Courts. It is the subjective satisfaction of the detaining authority that in spite of his continuous activities causing threat to maintenance of public order, he was getting bail one after another and indulging in the same activities. In such circumstances based on the relevant materials and satisfying itself, namely that it would not be possible to control his habitually in continuing the criminal activities by resorting to normal procedure, the detaining authority passed an order detaining him under the Act No. 12 of 1985. In view of enormous materials which are available in the grounds of detention, such habitually has not been cited in the above referred Rehka (2011 AIR SC W 2262) (Supra) . We are satisfied that the said decision is distinguishable on facts with reference to the case on hand and contention based on the same is liable to be rejected".

Considered.

10. Perusal of the detention reveals that the content and composition of the grounds of detention in successive detention orders remains same with only minor additions attributed to the developments subsequent to the detention orders, unmindful of the fact that the detainee all along remained in detention. Once we find the grounds of detention in support of quashed/revoked detention order(s) and one under challenge to be, in substance, identical, it is next to be seen what is its fall out on the detention order. It is quite evident from the perusal of grounds of detention that the activities referred to and attributed to the detainee in terms of FIR Nos. 345/2007, 192/2010, 27/2013, 40/2013, 26/2014, 53/2014, 97/2014 and 06/2016 for commission of various offences including offence under Section 13 ULA(P) Act. No fresh activity is attributed to the detainee, which, accordingly, vitiates the impugned detention order.

11. It is settled position of law that the fresh detention order could not be based on the activities referred in detention orders which were quashed by this Court. It may be proper in this regard to have reliance on the judgement of the

Supreme Court in Chhagan Bhagwan Kahar v. N. L. Kalna and others reported in AIR 1989 SC 1234:

"12. It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention, there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari, the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing rule, it nullifies the entire order".

12. In Jahangir Khan Fazal Khan Pathan v. The Police Commissioner, Ahmedabad and another [AIR 1989 SC 1812], the Supreme Court held:

".....It is, therefore, clear that an order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the Court, and if such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making a detention order, the order of detention will be vitiated. It is of no consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered."

13. Again in Ramesh v. State of Gujarat [AIR 1989 SC 1881], it is held:

"10. On a careful scrutiny of grounds of detention, we unreservedly hold that the detaining authority has taken into consideration the two criminal cases mentioned under Sr. Nos. 1 and 2 of the table which were the materials in the earlier order of detention that had been quashed and that it cannot be said that those two cases are mentioned only for a limited purpose of showing the antecedents of the detainee."

14. It may need to be underlined that the District Magistrate has not been himself certain as to whether activities of the detainee are dangerous for "maintenance of public order" or "security and sovereignty of the State" because in grounds of detention finally he has concluded that his activities are potentially dangerous for maintenance of public peace and order", therefore, he is required to be deterred from unlawful activities whereas in the order of detention he has recorded that his activities are prejudicial to the "maintenance of public order". The said position suggests that the detaining authority has not applied its mind while passing the order of detention, rendering the order impugned unsustainable. Judgment of Hon'ble Apex Court captioned G.M. Shah Vs. State of J&K, reported in (1980) 1 SCC 132 reveals the legal position at Para 9 :

"As observed by Hidayatullah, J. (as he then was) in Dr. Ram Manohar - Lohia v. State of Bihar & Ors. one has to imagine three concentric circles, in order to understand the meaning and import of the above expressions. 'Law and order'

represents the largest circle within which is the next circle representing "public order" and the smallest circle represents "security of State". It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of State. It is in view of the above distinction, the Act defines the expressions "acting in any manner prejudicial to the security of the State" and "acting in any manner prejudicial to the maintenance of public order" separately. An order of detention made either on the basis that the detaining authority is satisfied that the person against whom the order is being made is acting in any manner prejudicial to the security of the State or on the basis that he is satisfied that such person is acting in any manner prejudicial to the maintenance of public order but which is attempted to be supported by placing reliance on both the bases in the grounds furnished to the detent has to be held to be an illegal one vide decisions of this Court in *Bhupal Chandra Ghosh v. Arif Ali & Ors.*(2) and *Satya Brata Ghose v. Arif Ali & Ors*(3)."

15. It has been noticed hereinabove that one of the contentions raised by the detinue is that he has not been furnished requisite material on which the detaining authority has arrived at subjective satisfaction. Photostat copy of the acknowledgement of the detinue regarding receipt of documents bearing correction vis-a-vis number of leaves, has been furnished. It is being represented that 22 leaves, were furnished to the detinue through ASI Abdul Rashid, Belt No. 84/BPR. P/S Sumbal Bandipora and he also read over the same in English and explained in Kashmiri /Urdu. The affidavit of the said officer has not been brought on record. Omission on the part of the detaining authority to do so impels the court to believe the stand taken on behalf of the detinue, thus all the documents were not furnished. Non-supply of the material would amount to violation of Article 22(5) of the Constitution of India, so deprivation of a valuable right. The Hon'ble Apex Court in its judgment captioned *Thahira Haris etc. etc. Vs. Government of Karnataka & Ors*, reported in AIR 2009 Supreme Court 2184, has held as under:

"27. There were several grounds on which the detention of the detinue 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 detinue 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 detinue 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 detinue at the earliest opportunity to make effective and meaningful representation against his detention.

16. It is important to note that as per grounds of detention the detinue is an

illiterate person. Nothing has been brought on record by the respondents to indicate that the translated copies of the grounds of detention have been supplied to the detenu. This vividly can be inferred to have prejudiced the detenu in the exercise of his right to make an effective representation against his detention. For this, Para

13 of the judgment of Hon'ble Apex Court in Ibrahim Ahmad Batti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam vs. State of Gujarat and others', (1982) 3 SCC 440, shall be quite apposite to be reproduced herein:

"Lastly, Urdu translations of quite a few documents and statements referred to in the grounds of detention and relied upon by the detaining authority were admittedly not supplied to the detenu at all and the only explanation given by the counsel for the respondents at the hearing has been that most of these documents (Urdu translations whereof were not supplied) comprised statements of accounts which had figures in English with some English words written in capital letters and some documents were in Hindi and Gujarati and the record (statements of Rekha, her sister Indi and one Jayantilal Soni, all co-conspirators of the detenu, recorded during the investigation) clearly shows that the petitioner knows English figures, understands English words written in capital letters and can also converse or talk in Hindi and Gujarati and as such the non-supply of Urdu translations of these documents cannot be said to have caused any prejudice to the petitioner in the matter of making a representation against his detention. In our view, the explanation is hardly satisfactory and cannot condone the non-supply of Urdu translations of these documents. Admittedly, the petitioner is a Pakistani national and Urdu seems to be his mother tongue and a little knowledge of English figures, ability to read English words written in capital letters and a smattering knowledge of Hindi or Gujarati would not justify the denial of Urdu translations to him of the material documents and statements referred to as incriminating documents in the grounds and relied upon by the detaining authority in arriving at its subjective satisfaction. In fact, the claim made before us on behalf of the detenu that he only knows Urdu cannot be brushed aside as false especially in view of the fact that the same was accepted on the earlier occasion by the Advisory Board who had actually opined that failure to supply Urdu translations of grounds of detention and documents had vitiated the earlier order of detention and following this opinion respondent No. 1 had revoked the said order. Moreover, with the assistance of counsel on either side we have ourselves gone through many of these documents and statements and it is not possible to say that most of them are merely statements of account containing figures in English with English words written in capital letters. These documents recovered from three flats in three different societies, include, for instance, documents like bills and vouchers showing purchases made from some shops, while a large number of documents are in Hindi and Gujarati and relate to transactions in contraband articles like gold, silver, watches, etc., and comprise accounts of such transactions, the figures as well as recitals pertaining to which

are entirely in Gujarati. All these, in our view, are material documents which have obviously influenced the mind of the detaining authority in arriving at its subjective satisfaction and these are all in a script or language not understood by detenu, and, therefore, the non-supply of Urdu translations of these documents has clearly prejudiced the petitioner in the exercise of his right to make an effective representation against his detention and hence the safeguard contained in Article 22(5) is clearly violated."

17. It shall be quite advantageous to quote following para from the judgment rendered in case captioned Powanammal vs. State of T. N. and another reported in 1999 (2) SCC 413:

"The amplitude of the safeguard embodied in Article 22(5) extends not merely to oral explanation of the grounds of detention and the material in support thereof in the language understood by the detenu but also to supplying their translation in script or language which is understandable to the detenu. Failure to do so would amount to denial of the rights of being communicated the grounds and of being afforded the opportunity of making a representation against the order."

18. For the afore-stated reasons, the impugned detention order bearing No. 25/DMB/PSA of 2018 dated 12.12.2018 is found unsustainable so quashed. The detenu namely Khursheed Ahmad Lone S/o Mohammad Jamal Lone R/o Manzpora Naidkhai, Hajin, Bandipora is directed to be released from the preventive custody provided he is not required in connection with any other case.

19. The record, as produced, be returned to the learned counsel for the respondents.

Disposed of as above.