

(1990) 06 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition No. 80 of 1990

Kulvinder Singh

APPELLANT

Vs

State and Anr.

RESPONDENT

Date of Decision : 29-06-1990

Acts Referred:

Constitution of India, 1950 — Article 21, 22

Citation : (1991) 1 Crimes 378 : (1990) JKLR 385 : (1991) KashLJ 175 : (1991) SriLJ 25

Hon'ble Judges : R.P.Sethi, J

Bench : Single Bench

Advocate : R.P.Bakshi, Parmod Kohli, Advocates appearing for the Parties

Judgement

Alleging him to be a hard core criminal involved in many criminal cases, the petitioner was directed to be detained under the J & K Public Safety

Act (hereinafter referred to as the Act) for a period of 12 months vide order passed by respondent No. 2 on 27101989. In the grounds of

detention his criminal activities were enumerated as under :

1. That on 181989 you along with your associates, namely Mohinder Singh S/o Bal Singh R/o Simbal More and 5/6 other unknown persons,

restrained one Pawan Kumar S/o Ishar Dass R/o Brij Nagar Miran Sahib at B. C. Road, Jammu. You and your said associates were armed with

swords and inflicted serious injuries on the person. In this connection a case FIR No. 189/89 U/s 324/341 RPC stands registered at P/S Bakshi

Nagar.

2. That on 1 41989 you along with your associates, namely, Shivdeep Singh at Jitto and Sohan Singh at Khokan armed with swords and

khokharies restrained one Ram Pal S/o Mahesh Chand Verma R/o New Plots

Jammu while he was carrying his auto rickshaw No. 823 JKT towards Janlpura. You also snatchad the said auto and fled away towards New Plot along with your associates. A case FIR No. 207/89 U/s 382/341 RPC stands regist3red at P/S Bakshi Nagar.

3. That on 10.10.1989 an information was received at PP Sarwal through reliable source that you are moving in New Plot Bazar having a DHA in your hands and also threatening the general public with the show of DHA. In this connection a case FIR No. 260/89 U/s 4/27 IAA stands registered at P/S BK. Nagar"".

The detention order has been challenged mainly on the ground of nonapplication of mind by the detaining authority and noncompliance of the mandatory statutory provisions of the Act. It is submitted that, the grounds of detention were not supplied to the petitioner within the time prescribed which has prejudicially affected him depriving the petitioner to make an effective representation against his order of detention. It is submitted that the grounds of detention are false, vague and illegal. The detaining authority has failed to show his awareness relating to the arrest of the petitioner and grant of bail to him by the competent Court of jurisdiction at the time of passing of the detention order. The detention in the instant case is alleged to have been resorted as a punitive measure.

Despite opportunities granted, no counteraffidavit was filed by the respondents.

I have heard learned counsel for the parties and perused the record shown to me by Mr. Kohli.

No person can be deprived of his life or personal liberty except according to the procedure established by law. The right of personal liberty has been acknowledged to be a fundamental right under Art. 21 of the Constitution. Even in the absence of the fundamental rights. It was

acknowledged by the Courts in the country that the executive could not take away the life and liberty of a person on its own responsibility unless it

had the support of some legal provision for doing so and was acting within the bounds of the law. Preventive detention is an exception to the

general law providing protection against arrest and deprivation of personal liberty. Preventive detention has to be distinguished from the punitive

detention the object of the preventive detention is not to punish a man for having done something but to intercept him before he does it and to

prevent him from doing it. Our Constitution itself makes a provision as regards the law of preventive detention under Article 22 and the object of providing the preventive detention in the constitution is intended to prevent an abuse of freedom of anti social and subversive elements which might imperil the national welfare of the republic. Preventive detention does not, however, confer any unrestricted and unbridled powers upon the executive to deprive a person of his personal liberty in the name of the public order and the security of the State. Personal liberty cannot be deprived merely on the asking of the police and without application of mind by the detaining authority. It has to be restored to when the detaining authority is convinced that such detention was necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by law. It has been acknowledged even by the apex court that the ordinary rules of strict construction and presumption in favour of the subject must be followed in interpreting laws relating to preventive detention (AIR 1966 SC 740). The detaining authority is under an obligation to justify its action when challenged in a court of law. The courts in the country have not been favouring the detention without trial unless it is intended for the object of maintenance of public order and security of the State. Even under the Jammu and Kashmir High Court Rules, 1975, when in a writ of habeas corpus, a 'rule nisi' is issued with respect to the alleged wrongful detention of a detainee, the executive is under an obligation to justify the order of detention and if no cause is shown or if cause shown is not satisfactory, this Court has to pass an order directing the detainee to be set at liberty or delivered to the person entitled to his custody. Rule 33(2) of the said Rules provides :

(2) After the service of notice, of the day fixed for hearing or on any subsequent day to which the hearing may be adjourned if no cause is shown or if cause shown and disallowed, the Court shall, in the case of a person found to be illegally or improperly detained, pass an order that he be set at liberty or delivered to the person entitled to his custody. In other cases, the Court shall pass such orders as the circumstances of the case may require. If cause is allowed, the application shall be dismissed. The order for release made by the Court shall be a sufficient warrant to any jailor or other public servant or other person for the release of the person under restraint.

It follows, therefore, that preventive detention, can be resorted to in exceptional cases and for the purpose of enactment relating to such detention,

by strictly following the procedure prescribed therein and allowing the person concerned opportunity of making the representation and compliance

of other constitutional guarantees.

It cannot be held as a general rule that the pendency of the criminal cases debars the executive from directing preventive detention. It was held by

the Supreme Court in N. Meera Ram Vs. Govt. of Tamil Nadu AIR 189 SC 2077, that subsisting custody of the detainee by itself does not

invalidate an order of preventive detention and the decision must depend upon the facts of the particular case. It was further held that the

preventive detention ordinarily is not needed when the detainee is already in custody and the detaining authority was under an obligation to show its

awareness to the effect of subsisting custody of the detainee and to take that factor into account while making the order of preventive detention. If

the detaining authority was satisfied that there was likelihood of his release and In view of his antecedent activities which were approximate in point

of time he was to be detained in order to prevent him from indulging in such prejudicial activities the detention order can validly be made even in

anticipation.

The purpose and scope of preventive detention and the limitation imposed upon were dealt with by this Court in Pir Hissam Din Vs. State Habeas

Corpus Petition No. 102 of 1987 decided on 14/12/1987, holding :

'Preventive detention in democratic set up, is a serious invasion of personal liberty and such meager safeguards as the constitution has provided

against the improper exercise of the power have to be jealously watched and enforced by the courts in this country (AIR 1953 SC 318).

Preventive detention is not a punishment for the past activities of a person but is intended to prevent a person detained from indulging in future

activities which are mentioned in a particular statute governing the preventive detention of the citizen, as such detention means a complete negation

of freedom of movement and of personal liberty.

There is no authoritative definition of the term of preventive detention in Indian law though as description of a topic of legislation it appeared in the

legislative list of the Government of India Act 1935 for the first time and has

been used in item 9 of List 1 and item 1 of List III In Schedule 7 of the Constitution of India. The expression has its origin in the language used by the Judges or the law Lords in England while explaining the nature of detention under Regulation 14 (B), Defence of Realm Consolidated Act, 1914. The words 'preventive' is used in contradistinction to the word 'punitive'. It is not a punitive detention but in fact a precautionary measure (A. K. Gopalan's case AIR1950SC 27). In case of punitive detention, the person concerned is detained by way of punishment, after he is found guilty of wrong doing as a result of a trial where he has every opportunity to defend himself under the law of the land while preventive detention is intended to preempt a person from indulging in any conduct injurious to the society. The detenue is detained merely on suspicion with a view to prevent him from doing harm in future and the opportunity that he has for contesting the action initiated against him is very limited. Having regard to the special character of preventive detention, the restrictions placed on a person under law relating to preventive detention, must consistently with the effectiveness of the detention, be minimal (AIR 1981 SC 746). Power of detained is primarily intended to be exercised in such rare cases where the large interests of the State demand that the restrictions be placed upon the liberty of a citizen curbing his future activities. Such restrictions, therefore, should be consistent with the object of detention and be minimum (AIR 1969 SC 1153). The concept of personal liberty is a matter of great constitutional importance in our system of governance (AIR 1968 SC 1303). The liberty of a citizen being a most precious freedom sedulously secured by our Constitution. Art. 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Art. 22 of the Constitution regulates the freedom and movement and provides for the law regarding the preventive detention. Our Constitution perhaps is the only constitution which makes provision in itself regarding the law of preventive detention.

Art. 22 (5) of the constitution provides that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be communicate to such person the grounds on which the order has been made and

shall afford him the earliest opportunity of making a representation against the order. Upon a combined reading and interpretation of Articles 21 and

22 of the constitution, it emerges that no citizen in this country shall be detained or deprived of his personal liberty without compliance of the

provisions of law and the constitutional guarantees as enshrined in Part III of the Constitution. Some of the rights arising and flowing out of the

aforesaid constitutional provisions admitted and acknowledged by different courts in the country are :

(a) No citizen would be detained except under the authority of law

(b) The detaining authority shall communicate to such person the grounds on which the said order was made, as soon as may be.

(c) The grounds shall be accompanied with such particulars which are sufficient to enable the detainee to make an effective representation.

(d) The grounds of detention must be consistent with the object of the statute governing the preventive detention of the citizens.

(e) Detention order must be passed for the object contemplated by the constitution and the statute governing such detention.

(f) The detention order should appear to have been based on the subjective satisfaction of the detaining authority.

(g) Preventive detention should not be the result of the mala fide action of the executive and should not have been passed in a routine and

mechanical manner.

(h) The preventive detention should not be resorted to as a measure of punishment for the past acts of citizen and should be intended to prevent,

such person from acting in a manner prejudicial to the security of the State or the public order.

(i) Grounds of detention should not be vague, nonexistent, not relevant and not connected with the object of the enactment and of detention of a

citizen.'

Despite the issuance of 'rule nisi' the respondents have not filed any counter affidavit or shown any cause to justify the detention of the petitioner.

The averments of facts made in the petition supported by the affidavit of the father of the detainee, have not been denied by the respondents. The

record produced by the respondents is not satisfactory and consists of communication by the SSP, Distt. Police Office, Jammu, along with the

dossiers pertaining to the petitioner 'dated 24101989. The District Magistrate appears to have obliged the police by passing the order of detention against the petitioner on 27101989. Record, however, does not show as to when the copy of the dossiers was received in the office of the detaining authority. A note prepared, in the office of the detaining authority however, shows that the letter was received on 2510 1989 and the District Magistrate passed the order of detention on 27101989. The grounds of detention served upon the petitioner are carbon copy of the dossiers showing nonapplication of mind by the detaining authority. Even otherwise the allegation of the petitioner that he was not supplied the grounds of detention in the language he understood have not specifically been denied by the respondents on affidavit. Neither the grounds of detention nor the order of detention shows the awareness of the detaining authority about the arrest of the petitioner and his being released on bail by the competent Court of jurisdiction in the offences, the subject matter of the FIRs mentioned in the grounds of detention. The detaining authority has also not mentioned that the trial of the petitioner in a competent Court of criminal jurisdiction was not possible under the circumstances. The action of the respondents in the instant case appear to punish the petitioner instead of preventing him from acting in any manner prejudicial to the security of the State or public order. The order of detention appears to have been passed in a mechanical manner without compliance with the procedure provided by the Act. The detention of the petitioner, therefore, is, illegal and his detention order is liable to be quashed.

The petition is accordingly allowed and the order of detention of the petitioner passed by respondent No. 2 is set aside. The petitioner is directed to be set at liberty forthwith unless he is required in some other case.