

(2018) 08 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition Nono.08 Of 2018

Latief Ahmad Dar @APPELLANT@Hash Latief Ahmad Dar

Date of Decision : 03-08-2018

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22(5), 226
Unlawful Activities (Prevention) Act, 1967 — Section 13
Jammu and Kashmir Public Safety Act, 1978 — Section 13
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 120B, 302, 307, 420, 468
Payment and Settlement Systems Act, 2007 — Section 3
Explosive Substances Act, 1883 — Section 3, 4, 5

Citation : (2018) 08 J&K CK 0009

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. District Magistrate, Pulwama â?" respondent no.2 herein (for brevity â?? detaining authorityâ?), aiming at to prevent Shri Latief Ahmad Dar son of

Ghulam Hassan Dar resident of Panzgam Tehsil Litter District Pulwama (for short â??detenuâ?) from acting in any manner prejudicial to the security

of the State, by Order no.23/DMP/PSA/17 dated 02.01.2018, has placed detenu under preventive detention and directed his lodgement in District Jail,

Baramullah. It is this order, of which petitioner is aggrieved and throws challenge thereto on the grounds set out in petition on hand.

2. The case set up in petition on hand is that the detenu was arrested by security forces without any justification in the year 2012 and was implicated

in case FIR no.79/2012 under Section 302, 307, 120-B, 420, 468 RPC 3 PSS Act and 3/5 Explosive Substances Act and detenu was put to trial in the

said case. Detenu is stated to have been acquitted on 14.12.2017 and was to be released. However, he was shifted to police station Awantipora and

kept in custody there. Petitioner maintains that detenu's mother was told that detenu is required for some investigation in connection with case

FIR no.103/2017 as she went to meet him there and while being in custody of police station Awantipora, detenu was shifted to District Jail Baramulla

to be detained under preventive custody in terms of impugned detention order. Petitioner claims that he approached office of respondent no.2 and

unofficially obtained Photostat copies of order of detention, communication letter and grounds of detention.

3. Counter affidavit has been filed by respondents, in which they insist that detenu is affiliated with banned outfit Hizbul Mujahideen. It is insisted that

detenu was arrested in the year 2005 while carrying arms/ammunition and explosives for carrying out subversive activities in the area of Pulwama

District, regarding which case FIR no.460/2005 under Section 7/25 A.Act and 3/4 Explosive Substances Act was registered in police station Pulwama

and investigation was taken up. Detenu is stated to have succeeded in securing the bail from the court of law. On 18.12.2009, detenu along with his

associates kidnapped Lumberdar of village Dogripora, namely, Mohammad Iqbal Dar son of Abdul Gani Dar, which resulted in lodgement of FIR

no.103/2017 under Section 3012, 120-B RPC, 7/27 A. Act, in which there is every likelihood of his getting bailed out. It is maintained that grounds of

detention were read over and explained and served upon detenu along with communication, whereby he was made aware about his preventive

detention and his right to file representation as well. Respondents maintain that it is not the number of acts that matter but what has to be seen is the

effect of an act on the temple of life; the extent of it upon society and its impact.

4. I have heard learned counsel for parties and considered the matter. I have gone through the detention record made available by learned Additional

Advocate General.

5. Prior to adverting to case in hand, it would be appropriate to say that right of personal liberty is most precious right, guaranteed under the

Constitution. It has been held to be transcendental, inalienable and available to a person independent of the Constitution. A person is not to be deprived

of his personal liberty, except in accordance with procedures established under law and the procedure as laid down in Maneka Gandhi v. Union of

India, (1978 AIR SC 597), is to be just and fair. The personal liberty may be

curtailed, where a person faces a criminal charge or is convicted of an offence and sentenced to imprisonment. Where a person is facing trial on a criminal charge and is temporarily deprived of his personal liberty owing to criminal charge framed against him, he has an opportunity to defend himself and to be acquitted of the charge in case prosecution fails to bring home his guilt. Where such person is convicted of offence, he still has satisfaction of having been given adequate opportunity to contest the charge and also adduce evidence in his defence. However, framers of the Constitution have, by incorporating Article 22(5) in the Constitution, left room for detention of a person without a formal charge and trial and without such person held guilty of an offence and sentenced to imprisonment by a competent court. Its aim and object is to save the society from activities that are likely to deprive a large number of people of their right to life and personal liberty. In such a case it would be dangerous for the people at large, to wait and watch as by the time ordinary law is set into motion, the person having dangerous designs, would execute his plans, exposing general public to risk and causing colossal damage to life and property. It is, for that reason, necessary to take preventive measures and prevent the person bent upon to perpetrate mischief from translating his ideas into action. Article 22(5) Constitution of India therefore leaves scope for enactment of preventive detention law.

6. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done, but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of likelihood of detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. The Supreme Court in *Haradhan Saha v. State of W.B.* (1975) 3 SCC 198, points out that a criminal conviction, on the other hand, is for an act already done, which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a Court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case, a person is punished to prove his guilt and the standard is proof, beyond reasonable doubt, whereas in preventive detention a man is prevented from doing something, which it is necessary for reasons mentioned in the Act, to prevent.Â

7. It is long back that an eminent thinker and author, Sophocles, had to say: "Law can never be enforced unless fear supports them." This statement was made centuries back, but it has its relevance, in a way, with enormous vigour, in today's society. Every right-thinking citizen is duty bound to show esteem to law for having an orderly, civilized and peaceful society. It has to be kept in mind that law is antagonistic to any type of disarray. It is completely intolerant of anarchy. If anyone flouts law, he has to face the ire of law, contingent on the concept of proportionality that the law recognizes. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is sometimes said in an egocentric and uncivilised manner that law cannot bind the individual actions which are perceived as flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy, the individual notions are to be ignored. At times certain activities, wrongdoings, assume more accent and gravity depending on the nature and impact of such deleterious activities on the society. It is neither to be guided by a sense of sentimentality nor to be governed by prejudices. Acts or activities of individual or a group of individuals, prejudicial to the security of the State, have magnitude of across-the-board disfigurement of societies. No court should tune out such activities, being won over by passion of mercy. It is the obligation of the court to constantly remind itself the right of society is never maltreated or marginalised by the doings an individual or set of individuals propagate and carry out.

8. Article 22(5) of the Constitution of India and Section 13 of the J&K Public Safety Act, 1978, guarantee safeguard to detenu to be informed, as soon as may be, of grounds on which order of detention is made, which led to the subjective satisfaction of detaining authority and also to be afforded earliest opportunity of making representation against order of detention. Detenu is to be furnished with sufficient particulars to enable him to make a representation, which on being considered, may obtain relief to him. Detention record, made available by learned counsel for respondents, reveals that detention order was made on proper application of mind, to the facts of the case and detenu was delivered at the time of execution of detention

order, the material and grounds of detention and also informed that he had a right to represent against his preventive detention. Perusal of overleaf of detention order depicts its execution. It is mentioned therein that in compliance to District Magistrate, Pulwama's detention order, SI Ab. Rehman no.109393/EXK of Police Station Awantipora took the custody of detenu from police station Awantipora on 03.01.2018 for execution of detention order. It also reveals that contents of detention warrant and grounds of detention were read over to detenu in Urdu and Kashmiri languages, which he fully understood. It also divulges that detenu was informed that he can make representation to detaining authority and advisory board. Grounds of detention are definite, proximate and free from any ambiguity. Detenu has been informed with sufficient clarity what actually weighed with Detaining Authority while passing detention order. Detaining Authority has narrated facts and figures that made the authority to exercise its powers under Section 8 of J&K Public Safety Act, 1978, and record subjective satisfaction that detenu was required to be placed under preventive detention in order to prevent him from acting in any manner prejudicial to the security of the State.

9. Learned counsel for petitioner has stated that the allegations/grounds of detention are vague and the instances and cases mentioned in grounds of detention have no nexus with detenu and have been fabricated by police in order to justify its illegal action of detaining detenu. It may not be out of place to mention here that the Supreme Court, in several decisions, has held that even one prejudicial act can be treated as sufficient for forming the requisite satisfaction for detaining the person. Fleeting look of detention record produced by learned counsel for respondents reveals that detenu is affiliated with banned militant organisation Hizbul Mujahideen. In the year 2012, detenu is said to have taken charge of banned terrorist outfit HM as its commander and carried out various subversive activities, which include issuing and pasting of threatening letters/posters to Panches/Sarpanches of the area for resigning from the post of Panch/Sarpanch and in this regard a case FIR no.39/2012 under Section 13 ULA (P) Act was registered against him and his accomplices in police station Awantipora. Again the year 2012, detenu in order to prove himself as a dreaded terrorist carried a murderous attack by planting and exploding an explosive laden car near police station Bijbehara with an intention to kill police personnel, which besides

damaging public and private property, resulted in severe injuries to large number of persons. One of the associates of detenu also got killed in the

incident while detonating the device. The detenu and his associates, after commission of above gruesome attack, fled from the scene of crime. Case

FIR no.79/2012 under Section 302, 307, 120-B, 420, 468 RPC, 3/5 E.S.Act, was registered in this regard in police station Bijbehara. The detenu was

later apprehended by security forces/police and was sent for judicial determination and since then was lodged in Central Jail, Srinagar, as under trial

prisoner in relation to aforementioned case. The detention record also divulges that while remaining lodged in Central Jail, Srinagar, detenu came to

know that some prominent police officers of Police District Awantipora, which include SDPO Awantipora, I/C Police Component Awantipora and

HC Aashiq Husain, MHC of P/S Awantipora, were allegedly pressurizing families of active militants for surrender of their militant-sons before

security forces/police and detenu under a well-knit criminal conspiracy is stated to have sent a letter to HM militant commander, namely, Reyaz

Ahmad Naiko, asking the said militant to eliminate aforesaid police officers. Acting upon the said designed criminal conspiracy hatched by detenu, the

above-named militant commander is said to have executed a gruesome murder of HC Aashiq Hussain no.33/AWT MHC of P/S Awantipora at

Padgampora on 02.10.2017. These facts, as is conspicuous from the detention record, are also evidenced by recovery of a purse containing a photo

identity card of HM Commander Reyaz Ahmad Naikoo and aforesaid handwritten letter of detenu from the scene of occurrence. In this regard case

FIR no.103/2017 under Section 302, 120-B RPC, 7/27 A. Act was registered in police station Awantipora. Thus, there was material before detaining

authority to come to conclusion and hence, it cannot be said that subjective satisfaction of detaining authority was wrongly arrived at or grounds of

detention are self-contradictory or vague. The role of detenu has been specifically described. Even otherwise it is settled law that this Court in

proceedings under Article 226 of the Constitution is limited to scrutinizing whether detention order has been passed on material placed before it, it

cannot go further and examine sufficiency of material. This Court does not sit in appeal over decision of detaining authority. This Court cannot

substitute its own opinion over that of detaining authority when grounds of detention are precise, pertinent, proximate and relevant. This Court can only

examine 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 detenu from engaging in activities prejudicial to security of the State or maintenance of public order. In this regard I am fortified by law laid

down by the by the Supreme Court in State of Gujarat vs. Adam Kasam Bhaya (1981) 4 SCC 216; State of Punjab vs. Sukhpal Singh (1990) 1 SCC

35; Union of India vs. Arvind Shergill (2000) 7 SCC 601; Pebam Ningol Mikoi Devi vs. State of Manipura, (2010) 9 SCC; and Subramanian vs. State

of T.N. (2012) 4 SCC 699.Â

10. Learned counsel for petitioner also avers that detaining authority has made basis a single FIR in grounds of detention for slapping preventive

detention upon detenu inasmuch as in another FIR, detenu has been acquitted and that could not have been made use of for slapping detention on

detenu. It may not be out of place to mention here that the Supreme Court, in several decisions, has held that even one prejudicial act can be treated

as sufficient for forming requisite satisfaction for detaining a person. The power of preventive detention is a precautionary power exercised in

reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on

certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be, made before or during

prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The

pendency of prosecution is no bar to an order of preventive detention and an order of preventive detention is also not a bar to prosecution. Thus,

submission of learned counsel for petitioner that detaining authority should not make use of one of FIR, in which detenu has been acquitted, for passing

detention order, is specious.Â Discharge or acquittal of a person will not preclude detaining authority from issuing a detention order. In this regard the

Constitution Bench of the Supreme Court in Haradhan Saha's case (supra), while considering various facets concerning preventive detention,

observed:

32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power

exercised in reasonable anticipation. It may or may not relate to an offence. It is

not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be, made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu. 34. The recent decisions of this Court on this subject are many. The decisions in *Borjahan Gorey v. State of W.B.*, *Ashim Kumar Ray v. State of W.B.*; *Abdul Aziz v. District Magistrate, Burdwan* and *Debu Mahato v. State of W.B.* correctly lay down the principles to be followed as to whether a detention order is valid or not. The decision in *Biram Chand v. State of U.P.*, (1974) 4 SCC 573, which is a Division Bench decision of two learned Judges is contrary to the other Bench decisions consisting in each case of three learned Judges. The principles which can be broadly stated are these. First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth, the mere circumstance

that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary

measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances.

11. Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanising the harsh authority over individual liberty. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation. These observations have been made by the Supreme Court in *The Secretary to Government, Public (Law and Order-F) and another v. Nabila and another* (2015) 12 SCC 127.

12. The Supreme Court in the case of *Debu Mahato* (supra), has observed that while ordinarily-speaking one act may not be sufficient to form the requisite satisfaction, there is no such invariable rule and that in a given case one act may suffice. That was a case of wagon-breaking and given the nature of the Act, it was held therein that one act is sufficient. The same principle was reiterated in the case of *Anil Dely v. State of W.B.* (supra). It was only a case of theft of railway signal material. Here too one act was held to be sufficient.

Similarly, in *Israil SK v. District Magistrate of West Dinajpur* (1975) 3 SCC 292 and *Dharua Kanu v. State of W.B.* (1975) 3 SCC 527, single act of theft of telegraph copper wires in huge quantity and removal of railway fish-plates respectively, was held sufficient to sustain the order of detention. In *Saraswathi Seshagiri*'s (supra), a case arising under a single act, viz. attempt to export a huge amount of Indian currency was held sufficient. In short, the principle appears to be this: Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an

order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity.â? The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. That is the reason why single acts of wagon-breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish-plates were held sufficient by the Supreme Court. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, as in the present case detenu has been apprehended with arms and ammunition, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity.â? â?

13. If one looks at the acts, the J&K Public Safety Act, 1978, is designed for, is to prevent, they are all these acts that are prejudicial to security of the State or maintenance of public order. The acts, indulged in by persons, who act in concert with other persons and quite often such activity has national level ramifications. These acts are preceded by a good amount of planning and organisation by the set of people fascinated in tumultuousness. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed, but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention. The said views and principles have been reiterated by the Supreme Court in Gautam Jain v. Union of India another AIR 2017 SC 230.

14. For the foregoing discussion, the petition sans any merit and is, accordingly, dismissed.

15. Detention record be returned to learned counsel for respondents.