
(2019) 07 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 346 Of 2018

Manzoor Ahmad Khawaja

APPELLANT

Vs

State & Ors

RESPONDENT

Date of Decision : 01-07-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 8, 22, 37
Jammu And Kashmir Prevention Of Illicit Traffic In Narcotic Drugs And Psychotropic Substances Act, 1988 — Section 3, 6, 9, 10, 11
Constitution Of India, 1950 — Article 22(5)

Citation : (2019) 07 J&K CK 0004

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Z.A.Qureshi, Rehana, Razia Amin, Javaid Iqbal

Final Decision : Disposed Off

Judgement

Rashid Ali Dar, J

1. Impugned is the order of detention bearing No. DIVCOM 168/2018 dated 16.08.2018, whereby the detainee has been taken into

preventive detention under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

2. The order of detention is challenged by the detainee through the medium of this petition on the following grounds:-

That on 17.04.2018 detainee has to cater the orders placed to his employer of Fenoerox (50 bottles) and had to be supplied to retailers Khan

Medicate, Gava and Doctors Clinic, Gund. While carrying these supplies which had to be supplied to the said clients for which they had placed an

order with the employer of the detainee, the detainee was stopped by the police of Police Station, Pattan without any reason, cause or any justification

and was booked in FIR No. 81 of 2018 under Section 8/22 of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988.

Till date the detainee is in judicial lockup at Sub Jail, Anantnag.

That the detainee was served with the order of detention on 21.08.2018 and except the order of detention and grounds of detention, no other material

was provided to the detainee nor was any material/record and other connected documents which have been relied by the detaining authority and which

were supplied by the Sr. Superintendent of Police, Baramulla to the detaining authority, thus, depriving the detainee to make an effective representation

to the State.

That the copy of detention was sent to the Principal Secretary, Home Department on 16.08.2018 and till date the order passed by the Divisional

Commissioner, Kashmir has not been approved by the Government nor has the period of detention been mentioned either by the detaining authority or

by the Government, therefore, the order of detention is liable to be set aside coupled with the fact that the documents which have been relied by the

detaining authority in detaining the detainee have not been provided to the detainee.

That the detaining authority has not applied his mind to the provisions of the Act and the provisions of the Constitution particularly Article 22(5) of the

Constitution of India. It is a case of non-application of mind by the detaining authority.

That the allegations mentioned in the grounds of detention are vague in the sense that as mentioned in detention order the detainee has been carrying

out an illegal trade for supplying the psychotropic substance to the young generation but not a single instance has been quoted in support of this ground

in the grounds of detention. There is no proof on record that the detainee is a dealer and is working with Life Science, at Gujarat Ahmadabad Medical

Agency. The drugs so seized were to be supplied and is a medial drug used for cough etc. and is also an analgesic drug and is commonly used in the

State of Jammu and Kashmir to cater the patients suffering from allergy/cough and it is only when a person used this drug in huge quantity it is not

safe. Carrying the drugs to the dealer is not an offence that too when such drug is commonly used for cough etc.

That there is no satisfaction recorded by the detaining authority that the ordinary

law is not sufficient to prohibit the detainee to repeat the offence as

alleged that too when the detainee has not applied for bail; secondly there is no satisfaction recorded that the detention of the detainee is necessary

under Section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988. In absence of satisfaction, which was to

be recorded by the detaining authority, the order is bad in law and is liable to be set aside.â??

3. Learned counsel for the detainee pleaded that the impugned order of detention or the grounds of detention formulated by the detaining authority does

not indicate any compelling reason necessitating preventive detention of the detainee after he had already been taken in custody by the police for

alleged commission of offence under Section 8/22 of the NDPS Act. Learned counsel, thus, submitted that preventive detention of the detainee is

illegal for the same having been passed at a time when the detainee was in the custody of the authorities of the State.

4. Learned counsel for the detainee in addition to the grounds of detention of which reference is found in the petition has also made mention as to how

counter affidavit filed by respondent No.2 is suggestive of the fact that the order impugned is bad. He has referred to Para 7 & 9 of the said counter

affidavit. In â??Para 7? it is stated that the consignment seized from the detainee clearly shows that the detainee was involved in the illegal trade with

conscious mind, in an organized manner which is great threat for sustaining moral values of our society. Thus, this aspect poses a serious threat to the

health, wealth and welfare of the people especially young generation of the State in general and of District Kupwara in particular. Whereas, in

â??Para 9? it is being stated that the impugned order has been passed in breach of the mandate of law. Later it was stated in the counter affidavit that

on examination of the material/record it was found necessary to prevent the detainee from indulging in the illegal trade of illicit traffic in narcotic drugs

and psychotropic substances. However, according to the learned counsel for the detainee there is no scope for treating the same as clerical error, as

the liberty of a person is involved and same has to be done in accordance with the procedure established under law. It is also submission of learned

counsel for the petitioner that the material(dossier) which has been received in terms of the communication by the sponsoring agency bearing No.

CS/PSA/2018/2631-34 dated 02.05.2018 were not furnished to the detinue rendering the order impugned non-est.

5. One more plea taken by learned counsel for the petitioner is about the vagueness in the grounds of detention. It is being stated that the detinue is exploiting the young generation making them dependent on drugs and to make them habitual addicts, is not being explained, thereby incapacitating the detinue to make an effective representation in terms of Article 22(5) of the Constitution of India.

6. Learned counsel for the detinue, in order to strengthen his arguments, has relied on the judgment of Hon^{ble} Apex Court reported in AIR 1990 SC 1196, titled Dharmendra Suganchand Chelawat & Anr. Vs. Union of India & ors.

7. On the other hand, Mr. Javaid, learned Sr.AAG, submitted that the Divisional Commissioner was right in ordering the detention of the detinue as

his activities were prejudicial to the State. He has also referred to Section 6, 9, 10 and 11 of the J&K Prevention of Illicit Traffic Substance Act, 1988

and submits that the order of detention is proper. He has placed reliance on the judgments of Hon^{ble} Ape Court reported in AIR 1993 SC 962,

Birendra Kumar Rai Vs. Union of India & ors., and AIR 2001 SC 2303, Rajan Worlikar Vs. State of Karnataka & Ors.

8. Heard the rival arguments.

9. Legal position in regard to preventive detention of a person, who is already in custody of the State Agencies in connection with commission of

offence under substantive law allegedly committed by him is well settled. Normally, preventive detention of such a person should not be ordered.

However, preventive detention of such a person can still be ordered, if the detaining authority has â??compelling reasons? to believe that he is likely to

be released in the substantive offence either on bail or due to his acquittal or discharge. In Binod Singh v District Magistrate Dhanbad, Bihar and

others, (1986) 4 SCC 416, Hon^{ble} Apex Court has held that if a man is in custody and there is no imminent possibility of his being released, the

power of preventive detention should not be exercised. In Surya Prakash Sharma v State of U.P. and others, 1994 Supp (3) SCC 19,5 Hon^{ble} Apex

Court has referred to an earlier three-Judge Bench judgment in Dharmendra Suganchand Chelawat v Union of India, (1990) 1 SCC 74,6 wherein

observation has been made in following manner:

â??The decisions referred to above lead to the conclusion that an order for detention 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 detaining authority was aware of the fact that the detainee is already in detention: and (ii) there were compelling reasons justifying such detention despite the fact that the detainee is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implied that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detainee is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detainee, 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.

10. The grounds of detention formulated by the detaining authority inter alia would show that the detainee was a member of an organized drug trafficking gang working in district Baramulla, which was involved in procuring, transporting and sale of psychotropic substances. He has spoiled the youth of the area by supplying them narcotic drugs leading to law and order problem, according to the detaining authority. However, he was apprehended on 17.04.2018 and 50 bottles of Phenerex were recovered from his possession and the aforementioned case was, thus, registered against him. The detaining authority was, thus, of the opinion that it has become imperative to detain the detainee in preventive detention with a view to prevent him from further committing any offence under the provisions of the NDPS Act.

11. It is clear that the detaining authority was aware that at the time of passing of the order of detention the detainee was already in custody in connection with offence under Section 8/22 of NDPS Act, which is a non-bailable offence. The order of detention or the grounds of detention would show that the detaining authority has not recorded any reason to believe that there was any possibility of immediate release of the detainee from custody nor any compelling reason for passing the order of detention at that point of time has been stated.

12. To explain it further, the alleged recovered substance in terms of FIR No.81/2018 does appear to fall within the ambit of commercial slab in terms

of the provisions of NDPS Act and so the bail in ordinary situation could not be granted due to rigor of Section 37 of NDPS Act. There is nothing in the detention order to infer that the bail can be granted in favour of the petitioner herein in view of the involvement in the case of this nature. Normal law, rightly according to the learned counsel for the petitioner, could properly deal with the matter in hand. Bail even if granted in favour of the detenu by the regular criminal court, could be challenged before appropriate forum. Reliance on the judgment of Mohammad Ashraf Mir Vs. State & Ors. (HCP No.69/2018), can be made.

13. It is also true that the allegations levelled against the detenu that he was involved in exploiting the young generation by making them drug addicts, is all vague and in such situation the petitioner herein would not be in a position to submit a meaningful representation before the detaining authority or the competent authority to have a fresh look into the matter. Vagueness does invalidate the detention order in the circumstance. In this regard reliance can be taken on the judgment of Chaju Ram Vs. State of J&K, AIR 1971 SC 263, wherein their lordships have observed and enunciated that:-

“Even as to the grounds, we have something to say. The grounds charge him with having conspired with some leaders of Democratic Conference and having incited landless people of R.S Pura Tehsil to forcibly occupy the land comprised in Nandpur Mechanised Farm and to have persuaded them to resist violently any attempt to evict them. No details of the leaders of the Conference or of the persons incited or the dates on which he conspired or incited the squatters or the time when such conference took place, are mentioned. It would be impossible for anybody to make a representation against such grounds. These grounds, on the authorities of this Court, too numerous to be cited here, must be held to be vague.

Therefore on both the twin grounds, namely, that he was deprived of his right to make a representation and also because the grounds in themselves were very vague, we must hold that there was no compliance with the law as laid down in the Jammu and Kashmir Preventive Detention Act. The result, therefore, is that the detention must be declared to be unlawful and Chaju must be declared to be entitled to his liberty. He is ordered to be released. The detenu was questioned by us and he expressed a desire that he may not be released in Delhi, because he has no means of going back.

He asked to be released in Jammu. We direct therefore that he shall be taken back to the place where he was in detention in Jammu and released within the shortest possible time.â??

14. In view of the legal position as stated above and in particular having regard to the fact that an order of preventive detention against a person passed at a time when that person is already in the custody of the State Authorities for commission of the Act under substantive law, is illegal unless there is possibility of immediate release of a person from custody in the substantive offence and there are compelling reasons for passing of the order of preventive detention. Such a situation is required to be reflected in the order of detention or the grounds of detention formulated by the detaining authority. The impugned order is, therefore, liable to be quashed on this count alone.

15. Resultantly, this petition is allowed. The impugned detention order bearing No. DIVCOM-â??Kâ?/168/2018 dated 16.08.2018, is quashed. The detenu namely Manzoor Ahmad Khawaja S/o Ghulam Rasool Khawaja R/o Noulari, Pattan, District Baramulla, is directed to be set free, if not required in any other case(s).

16. Disposed of accordingly.