

(2018) 11 J&K CK 0115

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 156 Of 2018

**Maqsood Ahmad Khan @APPELLANT@Hash State Of Jammu & Kashmir
And Others**

Date of Decision : 30-11-2018

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8, 13
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 307
Arms Act, 1959 — Section 7, 27
Unlawful Activities (Prevention) Act, 1967 — Section 19

Citation : (2018) 11 J&K CK 0115

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Shafqat Nazir, Shah Aamir

Final Decision : Allowed

Judgement

1) By virtue of order bearing No.DMB/PSA/07 of 2018 dated 04.07.2018, passed by respondent No.2-District Magistrate, Budgam, in exercise of powers under Section 8 of the J&K Public Safety Act, 1978, Maqsood Ahmad Khan, has been taken into preventive custody and lodged in Central Jail, Kotebhalwal, Jammu. The veracity of the said order is assailed in the instant petition.

2) The petitioner's case, as set out in the petition, is that the detainee was arrested in connection with case FIR No.37/2017 registered by Police Station, Beerwa, under Section 307 RPC, 7/27 Arms Act and 19 ULA Act and there after impugned detention order was slapped upon him. The allegations/grounds of detention are stated to be vague and mere assertions. The detainee had applied for bail which was granted on 26.06.2018 but the said fact has not been made mention of in the grounds of detention. The respondents are stated to have ignored to provide material relied upon by the detaining authority while passing the impugned order of detention and thus deprived the detainee of his Constitutional and Statutory rights. Grounds of detention are stated to be vague, baseless, non-existent and unfounded.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and insisted that the activities of detainee are highly prejudicial to the security of the State. It is pleaded that the detention order and grounds of detention were handed over to the detainee and same were read over and explained to him. The grounds taken by the petitioner are legally misconceived, factually untenable and without any merit. The learned counsel for the respondents has made available detention records to lend support to the case set up in the counter affidavit.

4) Heard learned counsel for the parties and also perused the record.

5) The main plank of the argument of the learned counsel for the petitioner contended that the detainee had been admitted to bail in FIR No.37/2017 which fact has not been made mention of in the grounds of detention though reference to said FIR has been made. Either detaining authority has been kept in dark or otherwise detaining authority has not applied its mind properly. While detaining a person under Public Safety Act, detaining authority is under a legal obligation to analyze all the circumstances and material and then to gather conclusion about the requirement of depriving a person of his personal liberty. Non-mention about the grant of bail is serious lapse which in turn gives rise to the inference that there is non-application of mind. Similar situation has been dealt with by the Apex Court. It is quite relevant to quote following portion from para 8 of the judgment rendered by the Hon'ble Apex Court in the case of "Anant Sakharam Raut v. State of Maharashtra and another" reported in AIR 1987 SC 137:-

"We hold that there was clear non-application of mind on the part of detaining authority about the fact that the petitioner was granted bail when the order of detention was passed. In the result we set aside the judgement of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith....."

6) It is further projected that when the detainee was already in custody, there was no need to direct his preventive detention. It has been stated in the counter affidavit that the detainee is involved in FIR No.37/2018 registered in Police Station, Beerwa and his arrest in the said FIR, at the time of passing of the order of detention, has not been disputed.

7) Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, question arises for consideration whether an order of detention could be passed on the face of such an eventuality? The answer to this question is emphatically "No", taking into consideration the law laid down by the Hon'ble Apex Court in "Sama Aruna v. State of Telangana & Anr" (AIR 2017 SC 2662). Para 24 of the said judgment is apposite to be quoted herein below:

"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 2002-03. 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."

8) The learned counsel for the petitioner has also argued that the Officer, who handed over the detainee to the jail authorities of Central Jail, Kotebhalwal, along with relevant documents, should have filed an affidavit in the matter, which has not been done.

9) From a bare glimpse of the execution report, annexed with the detention records, what comes to the fore is that the detention warrant has been executed on 05.07.2018. It also reveals that the contents of the detention warrant and grounds of detention were read over and explained to the detainee in Urdu language, which languages he understood fully well and, in token thereof, his signature was attained on the execution report itself. However, to clear all doubts, it was incumbent on the part of the officer, namely, SI Amit Pal Singh, who did the exercise of handing over the documents and conveying the contents thereof to the detainee to file an affidavit in order to attach a semblance of fairness to his statement. In this regard, support can be had from the law laid down by the Hon'ble Apex Court in the case of "*State Legal Aid Committee, J&K v. State of J&K & Ors.*" (AIR 2005 SC 1270), wherein it has been held as under:

"Though several questions have been raised in this petition, it is not necessary to deal with them in detail as we find that there is no definite material to show that the requirements of section 13 of the Jammu & Kashmir Public Safety Act, 1978, (in short the Act), requiring the grounds of order of detention to be disclosed communicated to the person affected by the order has been complied with. Though in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served, read over and explained to the assessee and he was informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detainee refused to receive copy of the detention order and also refused to put his signatures on the documents. The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement to the effect that there was refusal. Even the name of the official has not been indicated

in the affidavit. That would have been sufficient to comply with the requirements of section 13 of the Act."

10) In the backdrop of what has been stated above, the petition is allowed, as a consequence of which, order of detention bearing No. DMB/PSA/07 of 2018 dated 04.07.2018, passed by respondent No.2, is quashed. Detenue is directed to be released from the preventive custody forthwith, unless, of course, not required in any other case.

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