
(2012) 06 J&K CK 0006
In the Jammu And Kashmir High Court
Case No : HCP No. 5 of 2012

Masarat Alam

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 02-06-2012

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22(2), 22(3), 22(5)
Jammu and Kashmir Public Safety Act, 1978 — Section 13, 8, 8(4)

Citation : (2012) CriLJ 4305

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Advocate : M.A. Qayoom, for the Appellant; Shabir Ahmad, for the Respondent

Final Decision : Allowed

Judgement

Hasnain Massodi, Judge

1. To deprive a man of his natural liberty, to deny him the ordinary amenities of life is worse than starving the body; it is starvation of the soul, the

dweller in the body, 'said Gandhi Ji' father of the nation'. Right to personal liberty is heart and soul of the Constitution. The right in words of

Supreme Court is 'transcendental, inalienable and primordial'. Right to personal liberty, it has been held, is not conferred by the State on a citizen.

It is there because we are all members of human race. The right to personal liberty does not owe its origin to any of the Constitutional Provisions.

The Principle was succinctly stated by the Supreme Court in M. Nagaraj and Others Vs. Union of India (UOI) and Others, as under :

It is fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any

Constitution by reason of the basic facts that they are members of the human

race

The Supreme Court in *Rekha Vs. State of Tamil Nadu* AIR (2011) SC 260 reiterated the principle;

Our Constitution makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought

hard to preserve. They believed like Jefferson that "'an elective despotism was not the Government we fought for'". And, therefore, while arming the

Government with large powers to prevent anarchy from within and consequent from without, they took care to ensure that those powers were not

abused to mutilate the liberties of the people.

The preventive detention and a democratic set up do not go hand in hand. The democracy has its edifice on Rule of Law and the Rule of Law

mandates that a person can be deprived of his personal liberty only when he is facing a criminal charge or has been convicted by a competent

Court, of an offence punishable under law. Where a person is deprived of his personal liberty as an under-trial he faces a criminal charge, there is

an implicit condition that he has full and fair opportunity to insist that the charge is groundless and where trial notwithstanding such plea proceeds'he

has a fair opportunity to cross examine the witnesses, explain the material, if any, brought on the file against him and to adduce evidence in defence.

A person placed in preventive detention and deprived of his personal liberty is not convicted by a Court of Law and remanded to prison to serve

the sentence nor is a formal charge framed against him and he tried on such charge, and given an opportunity to deny the charge and set up his

defence. A person on whom preventive detention is slapped is held in custody without charge or trial. The Detaining Authority deprives a person

on whom preventive detention is slapped, on a mere suspicion that his apprehended activities are likely to prejudice 'security of the State' or 'public

order'. The Detaining Authority has power to place a person under detention on his subjective satisfaction that the grounds exist to put such person

under preventive detention. The Court lacks power to dive deep in to the facts to assess and evaluate as to whether the ground reasonably leads to

such suspicion. This is the reason that Detaining Authority while exercising the powers under Detention Law is said to exercise, 'jurisdiction of

suspicion'. The only safeguards that a person put under preventive detention as

against the arbitrary exercise of the power under Preventive

Detention Law are those guaranteed under Article 22 (5) Constitution of India and echoed in Preventive Detention Law. The first and foremost

right of a detainee is to be, conveyed the grounds of detention that persuaded the Detaining Authority to pass detention order. The second valuable

right promised under the aforesaid Constitutional and statutory rights is the right to be told that the detainee can represent against his detention to

the Detaining Authority and the Government. The two Constitutional guarantees, in a way, supplement each other and when combined, mean a

right of the detainee to represent against his preventive detention. Since the power to order preventive detention is by its nature repugnant to the

core Constitutional concepts of Rule of Law, it is necessary that the preventive detention law is given a strict interpretation and even a slightest

violation of the valuable rights guaranteed to a detainee is frowned upon and discouraged and the detention order quashed once when disregard of

the constitutional and statutory safeguards is discernible from the record. The Apex Court almost at the dawn of the independence, highlighting

importance of the Constitutional safeguards promised to a detainee in *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, has

observed;

Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper

exercise of the power must be jealously watched and enforced by the Court.

2. The Supreme Court has made use of every chance to impress upon the Courts to guard the Constitutional and statutory safeguards guaranteed

to a detainee under Article 22 Constitution of India. The Apex Court in *Dhananjay Das Vs. District Magistrate, Darrang and Another*, spelt out

the Constitutional and statutory rights available to a detainee as under:

.The law is by now well settled that the detainee has two rights under Article 22(5) of the Constitution : (1) to be informed, as soon as may be of

the grounds on which the order of detention is made, that is, the grounds which led to the subjective satisfaction of the detaining authority, and (2)

to be afforded the earliest opportunity of making representation against the order of detention, that is to be furnished with sufficient particulars to

enable him to make representation which on being considered may obtain relief

to him.

3. The Supreme Court in *Union of India Vs. Chaya Ghoshal* (2005) 10 SCC 1997 observed:-

the laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguards, however technical, is mandatory.

Earlier the Court in *Abdul Latif Abdul Wahab Sheikh Vs. B.K. Jha and another*, held:

The procedural requirements are the only safeguards available to a detainee since the Court is not expected to go behind the subjective satisfaction of the detaining Authority. The procedural requirements are, therefore to be strictly complied with if any value is to be attached to the liberty of the subject and the Constitutional rights guaranteed to him in that regard.

The latest in series of decision on the subject has been *Rekha's case*(supra) wherein it is held;

To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with

the procedural safeguards, however, technical, is, in our opinion, mandatory and vital the history of liberty is the history of procedural safeguards.

These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour can not be allowed to be diluted on

the basis of the nature of alleged activities of the detainee.

The Supreme Court in a recent judgment reported as *Yumman Ongbi Lembi Leima Vs. State of Manipur and Others*, has held;-

.The personal liberty of an individual is the most precious and prized right guaranteed under the Constitution in part III thereof. The State has been

granted the power to curb such rights under criminal laws as also under the laws of preventive detention, which, therefore, are required to be

exercised with due caution as well as upon a proper appreciation of the facts as to whether such acts are in any way prejudicial to the interests and

the security of the State and its citizens, or seek to disturb public law and order, warranting the issuance of such an order.

4. The case in hand illustrates how the power u/s 8 Jammu and Kashmir Public Safety Act, 1978 to place a person under preventive detention has

been exercised, in an arbitrary manner, in effect converting preventive into

punitive detention. The Supreme Court has reminded the Authorities clothed with power to place a person under preventive detention that detention though called preventive may in effect assume the characteristics of preventive detention, by observing :

It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in substance a detention order of one year (or any other period) is a punishment of one year's imprisonment. What difference is it to the detainee whether his imprisonment is called preventive or punitive.

5. In the present case, the petitioner has been put under preventive detention vide detention order dated 30th December, 2011 petitioner has been ordered to be detained on the ground that such order was necessary to prevent the detainee from acting in a manner prejudicial to the 'Security of the State'. The detention order is third in a row slapped by the District Magistrate, Srinagar against the detainee. The detainee was placed under preventive detention under order No. DMS/PSA/Gud/661-64/2010 dated 11.12.2010. The detention order was questioned in HCP No. 49/2011. The petition was allowed on 10th June, 2011 and the detention order quashed. The detainee after quashment of the detention order was not let off, but again placed under preventive detention vide order No. DMC/PSA/14/2011 dated 04.08.2011.

The aforesaid detention order was questioned through the medium of petition registered as HCP 304/ 2011. The petition was accepted on 23.12.2011 and the detention order set aside with a direction to the respondents to release the petitioner from detention. However, the detainee was not able to get any benefit under the order dated 23.12.2011.

6. The Detaining Authority instead of releasing the detainee passed a fresh detention order No. DMS/PSA 1155/ dated 30th December, 2011 and once again put the petitioner under preventive detention. The detainee in the circumstances is under detention since 11.12.2010 the date the detention order No. DMS/PSA/661-64 dated 11.12. 2010 was passed. The grounds of detention on which the present detention order is made indicate that the detainee, after the earlier detention order was set aside in HCP No. 304/2011 was arrested in case FIR No. 74 of 2010 u/s 13

ULA (P) Act, 153-b RPC of Police Station Shaheed Gunj, on 30th December,

2011. The Detaining Authority, however instead of allowing the custody of the petitioner in a substantive offence i.e. case FIR No. 74 of 2010 Police Station Shaheed Gunj, Srinagar and opposing the bail to the petitioner, again made use of the extraordinary power u/s 8 Jammu and Kashmir Public Safety Act, 1978 and slapped the impugned detention order on the detainee. The reasons justifying use of the power to pass the preventive detention order is spelt out in the grounds of detention formulated on 30.12.2011, as under:-

though, you are presently under custody but there is likelihood and you are being admitted to bail and in that eventuality there is well founded apprehension that you will again indulge in similar activities as mentioned above.

7. The grounds of detention proceed to give, the reasons for detention as 'well founded apprehension', as involvement of the detainee in case FIR

No. 86 of 2011 u/s 148, 336, 152 RPC, Police Station M.R. Gunj, Srinagar and the reports from 'discrete source' that the detainee has been 'in

touch with the youth who have been found indulged in various stone pelting incidents in District Srinagar' and 'instigating the violence ' and the fact

that 'the detenu's name finds a mention in print media, in press release issued by secessionist elements' 'hailing detainees 'scarifies' that inspire the

'attacks on the activities of main stream political parties.'

8. The question arises, whether the respondents instead of opposing the detainee's bail in case FIR No. 74 of 2010 Police Station Shaheed Gunj,

Srinagar in connection with which he was arrested after the earlier detention order was quashed, during trial and taking steps to bring home guilt to

the detainee, so that the detainee was convicted of the alleged offences, and awarded punishment laid down under law, have power to perpetuate

his detention by making use of extra ordinary power u/s 8 Jammu and Kashmir Public Safety Act, 1978.

9. It is pertinent to point out that there was no material before the Detaining Authority to conclude that the detainee had approached the Court with

an application for grant of bail in case FIR No. 74 /2010 Police Station Shaheed Gunj, Srinagar, in his favour and his application was likely to be

allowed. The grounds of detention obviously do not make mention of such an application having been made, by or on behalf of detainee. There was

therefore admittedly no material before the Detaining Authority to rush to

conclusion that the detenue would be released on bail when the detenue had not moved the Court for grant of bail. This Court in Syed Asiya Andrabi Vs. State of Jammu and Kashmir & Others HCP No. 257/2011

decided on 25th August, 2011 reported at JKJ HC 2011 (3) 204 confronted with a similar question has held:

24. wherever a person is to face or is facing criminal trial, the right course for the authorities is to make use of ordinary penal law which gives a

right to authorities/ respondents to resist and oppose grant of bail to the accused

Seeking support from law laid down by Supreme Court in Rekha's case, this Court observe;

The Supreme Court in Rekhas's case (supra) while holding that observations made in Haradhan Saha Vs. The State of West Bengal and Others, ,

case cannot be regarded as unqualified statement that in every case that even if a person is liable to be tried in a criminal court for commission of a

criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law,

The Court reproduced the following observation made by the Supreme Court in Rekha's case:-

Article 22(3) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the while chapter on

fundamental rights in our constitution. The right to liberty means that before sending g a person to prison a trial must ordinarily be held given him

opportunity of placing his defence though his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence,

the ordinary criminal law (Indian Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the

preventive detention law be taken recourse to

10. In Rekha's case it has been held by the Supreme Court that power under Preventive Detention Law may be exercised in case a person already

in custody in a substantive offence, on the ground that he may be admitted to bail only when detenue has to the knowledge of the Detaining

Authority laid an application for grant of bail or any of his co-accused, to the knowledge of Detaining Authority has been admitted to bail. The law

has been reiterated in Yumman Ongbi's case (supra) where the detenue was put under preventive detention for the only reason that he was likely

to be released on bail in near future by the normal criminal courts, as, bails are granted in similar cases by the criminal courts. The Supreme Court disapproving the detention order observed :

13. Having carefully considered the submissions made on behalf of respective parties, we are inclined to hold that the extra-ordinary powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution was not warranted in the instant case, where the grounds of detention do not disclose any material which was before the detaining authority, other than the fact that there was every likelihood of Yumman Somendro being released on bail in connection with the cases in respect of which he had been arrested, to support the order of detention. Article 21 of the Constitution enjoins that no person shall be deprived of his life or personal liberty except, accordingly to procedure established by law. In the instant case, although the power is vested with the concerned authorities, unless the same are invoked and implemented in a justifiable manner, such action of the detaining authority cannot be sustained as, such a detention order is an exception to the provisions of Articles 21 and 22(2) of the Constitution.

11. The detention order impugned, herein is, therefore, liable to be quashed only on the ground that there was no material before the Detaining Authority to rush to the conclusion that the detainee would be let off, on bail in case FIR No. 74 of 2010 Police Station Shaheed Gunj, Srinagar wherein he was arrested and that instead of having recourse to the ordinary law, extraordinary measure of preventive detention was required to be taken in the matter.

12. This apart the detention order is also liable to be set aside on the ground that the reason set out in the grounds of detention in support of the detention order No. DMS/PSA/Gud/661-64/2010 slapped on the petitioner echo in the subsequent two detention orders including one questioned in the present petition. There are only the minor additions and alterations here and there with the primary/main grounds of the detention remaining un-altered. It is well settled law that the grounds of detention in support of a detention order quashed by the Court cannot be used to pass a fresh detention order. This Court in Qazi Yasir Ahmad Vs. State HCP No. 218/2011 dated 6th July, 2011 held;

It is well settled law that when a detention order is quashed by the Court, the grounds of the order so quashed should not be taken into

consideration, either as whole or in part, even along with fresh grounds of detention for drawing subjective satisfaction to pass fresh detention

order. It is to be appreciated that once the Court sets aside the detention order, it nullifies the entire order. The Detaining Authority therefore

cannot consider the ground that were relied upon to pass the earlier detention order or activities that were detailed in such grounds. The position

may be different where the earlier detention order is revoked due to technical reasons. In such a situation the grounds of detention may be used to

make fresh detention order after removal of technical impediment or loopholes. However, no such recourse is available where the earlier detention

order is struck down by the Court as it sets at naught not only detention order but the grounds on which the detention order is based

13. The Court while holding so placed reliance on: *Chhagan Bhagwan Kahar Vs. N.L. Kalna and Others*, *Jahangir Khan Fazalkhan Pathan Vs.*

Police Commissioner, Ahmedabad and Another, and *Ramesh Vs. State of Gujarat and Others*,

14. The detention record made available by learned Counsel for the State reveals that the petitioner has not been provided the material that

weighed with the Detaining Authority to pass the impugned detention order. The detainee, therefore has been prevented from making an effective

and meaningful use of Constitutional and statutory safeguards available to him under Article 22(5) Constitution of India and Section 13 of Jammu

and Kashmir Public Safety Act, 1978. Needless to state that the detainee in absence of the material, relied upon by the Detaining Authority, is to

be expected to have been in a position to convince the Detaining Authority that the apprehensions nursed by it as regards activities of the detainee

were grossly misplaced. The detainee again has not been informed that he can make a representation to the Detaining Authority pending approval

of the detention order by the Government in terms of Section 8(4) of J&K Public Safety Act, 1978. The endorsement made on reverse of the

detention order makes it amply clear that the detainee was only informed of his right to make representation to the Government. It needs no

emphasis that the detainee during the period intervening between the date the detention order is made and it finds approval of the Government has a

right to file a representation to the Detaining Authority and depriving him of this right renders detention liable to be quashed. For the reasons

discussed above, the petition is allowed and order No. DMS/PSA 1155/ dated 30th December, 2011 is quashed. The respondents are stripped

of authority to detain the detainee under order No. DMS/PSA 1155/ dated 30th December, 2011. So viewed the detainee is directed to be

forthwith released from the preventive detention under the quashed detention order.