
(2000) 04 J&K CK 0008
In the Jammu And Kashmir High Court
Case No : H.C. Petition No. 29 Of 2000

Mohammad Amin Alia

APPELLANT

Vs

State of J & K

RESPONDENT

Date of Decision : 18-04-2000

Acts Referred:

Constitution of India, 1950 — Article 22(5), 226

Citation : (2000) SriLJ 523 : (2000) 2 SriLJ 523

Hon'ble Judges : Syed Bashir-Ud-Din, J

Bench : Single Bench

Advocate : M.Abdul Qayoom, G.Mustaffa, Advocates appearing for the Parties

Judgement

1. Petitioner alleges that he was arrested on 18011996 in connection with FIR No. 30/96, registered at Police Station Saddar, Srinagar. His

punitive detention ended when he was acquitted in this case on 28061999 by District and Sessions Judge, Budgam (AnnexureA). The District

Magistrate, Srinagar under order No: DMS/PSA/149/96 dated 11061996 has ordered preventive detention of the petitioner under section 8 of

the Jammu and Kashmir Public Safety Act for a period of 18 months with a view to prevent him from acting in any manner prejudicial to the

security of the State. This order, petitioner alleges, has remained unexecuted all along. As the order is sought to be executed, he has challenged the

order in main on the ground that the proximate live link between grounds of detention and purpose sought to be achieved by the detention is

missing due to nonexecution of the order for last over three and a half years. It is stated that there is no nexus between the order and detention.

2. Despite opportunity, respondents have not filed counter/objections, though Mr. G. Mustaffa, GA appeared and was heard. Counsel for the

parties addressed their arguments and placed their respective contentions before court.

The question to be determined is whether petitioner can in the facts and circumstances of the case challenge order of detention passed under

Section 8 of the J&K Public Safety Act, 1978, before detention order is executed and the subject (petitioner) is actually detained thereunder.

3. The counsel for petitioner relying on N.K. Bapna Vs. union of India and others (1992) 3 SGC 512 and Addl. Secretary to Government of India

Vs. Smt. Alka Subhash Gadia (1992 Supp. (1) SCC 496, submits that detention order can be challenged even before service of the order on the

detenue (petitioner here) and further argues that this Habeas Corpus petition is maintainable even at preexecution stage as the 'proximate live link'

between the warrant of arrest and the purpose sought to be achieved by the detention is missing.

4. Mr. G. Mustaffa, GA, in a reply contends that the petitioner's case does not fall within the parameterical limits set out in the above said

authorities. The detention order in question cannot be challenged by petitioner at this preadmission stage. The writ petition is not maintainable

unless petitioner surrenders to or is taken in custody. He cites Union of India and others Vs. Parasmal Rampuria (1998) 8 SCC: 402.

5. In N.K. Bapna case (Supra), Supreme Court on principle of balancing the conflicting claims of State and fundamental rights of citizens, held that

a person sought to be detained under preventive detention order can challenge such order, even at preexecution/predetention stage. It could be

done as an exigency of reconciling above conflicting claims and subjective limits enunciated in Smt. Alka Subhash Gadia case (Supra) in terms as

under:

... It is not correct to say that the Courts have no power to entertain grievance against any detention order prior to its execution. The Courts have

the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on

which the Courts have interfered with them at the preexecution stage are necessarily very limited in scope and number viz, where the courts are

prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed (ii) that it is sought to

be executed against a wrong person (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or

(v) that the authority which passed it had no authority to do so. The refusal by the Courts to use their extraordinary powers of judicial review to

interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their

denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.....In the rare cases where the detenu, before

being served with them, learns of the detention order and the grounds on which it is made and satisfies the Court of their existence by proper

affirmation, the Court does not decline to entertain the writ petition even at the preexecution stage, of course, on the very limited grounds stated

above. The Court no doubt even in such cases is not obliged to interfere with the impugned order at that stage and may insist that the detenu

should first submit to it. It will, however, depend on the facts of each case. The decision and the orders cited above show that in some genuine

cases, the Courts have exercised their powers at the preexecution stage, though such cases have been rare. This only emphasises the fact that the

courts have power to interfere with the detention orders even at the preexecution stage but they are not obliged to do so nor will it be proper for

them to do so save in exceptional cases. Much less can a detenu claim such exercise of power as a matter of right. The discretion is of the Court

and it has to be exercised judicially on well settled principles.

6. In Abdul Hamid Hajam Vs. State of J&K & others, (H.C. Petition No: 211/98, decided on 220298) after referring to Article 22 and on

examining the relevant provisions of Jammu and Kashmir Public Safety Act, I have observed:

....All these mandatory provisions of the J&K Public Safety Act, have to be complied with and if any of the provisions is not satisfied or complied

with, the detention under the order will be void. Obviously, in such cases the detention is arbitrary and not legal. The point of time for compliance

of these provision (Ss 13, 16, 18) is 'the date of detention'. In otherwords actual detention, may be on surrender or arrest, is a precondition or

basis for compliance with the above provisions of Public Safety Act.

7. Contextually, in the light of whatever is stated herein above, it is obvious that

the basis of a H.C. Writ, postulates the detention of the person

concerned. The legality or otherwise of the detention is to be judged and ruled at the time of the return and not with reference to the date of filing of

the petition, so long the person is not detained, it cannot be said that the order of detention or the grounds therefor are served on the petitioner.

Service of grounds is in fact visualized by the Act only when the person is actually taken in custody and detained.....For the above reasons and

on

consideration of the matter, in the facts and circumstances of this case, this Writ petition is not maintainable, as the Court cannot scan the grounds

and inquire into the facts and circumstances of the case, when the detainee is free as he has not been detained pursuant to the detention order and

has even failed to surrender and the order and grounds have not been served on him in accordance with the procedure established by law....

The same view has been taken in H.C. Petition No. 198/98 with two other petitions decided on 08121999 by a learned Single Bench of this

Court.

8. In Union of India Vs. Parasmal Rampuria (Supra) the Apex Court held that the detainee must surrender before filing writ petition and in the

context of preexecution challenge to detention order observed:

....5. When the writ petition was filed, the respondent had not surrendered. Under these circumstances, the proper order which was required to

be passed was to call upon the respondent first to surrender pursuant to the detention order and then to have all his grievances examined on merits

after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22 (5)

of the Constitution of India.....After surrendering it will be open to the respondent to amend his writ petition and to take all permissible legal

grounds to challenge the detention order and these grounds will have to be considered by the High Court on their own merits after hearing the

parties....

9. This case does not fall within the outlined legal parameters so as to call for interference with the detention order at preexecution stage. Detention

order is passed under Section 8 of the Jammu and Kashmir Public Safety Act, 1978. It is sought to be executed against the petitioner, the right

person. There is no dispute that it has not been passed for a wrong purpose or on vague, extraneous or irrelevant grounds. It is equally not a fact, as conceded by the counsel, that the detaining authority had no authority to do so. The delay in executing the detention order, has sufficient ground to vitiate the detention, (for which preposition counsel referred to T.A. Abdul Rehman Vs. State of Kerala and others (AIR 1990 SC: 225) and K.P.M. Bashir Vs. State of Karnataka and Anr. (1992 2 SCO 295) is a question that has to arise only after detention order is executed and not at predetention stage. This ground of attack was examined in the above cited cases after the detainees were taken in preventive custody. The raised question of cessation of live and proximate link between grounds and purpose of detention is a challenge to the detention order on merits, apt to be considered after hearing parties, at postexecution/postdetention stage. The petitioner's case is not falling within the limited scope of the challenge at predetention stage as set out in the aforementioned judgments.

10. In result, the petition is not maintainable at this preadmission stage. This brings the petition to an end. If petitioner/detenuel surrender or is taken in preventive custody, it will be open to him to throw challenge to his detention (order) as permissible under law. The interim application for stay of execution of detention order dated 11061996 goes with the main petition. Accordingly disposed of.