

(2019) 02 J&K CK 0030

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 302 Of 2018

Mohammad Saleem Mir

APPELLANT

Vs

State Of Jammu & Kashmir And Anr

RESPONDENT

Date of Decision : 07-02-2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978 — Section 8
Constitution Of India, 1950 — Article 21, 22(3) (b)

Citation : (2019) 02 J&K CK 0030

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Waqjid Haseeb, Mir Shafaqat Hussain, Mir Suhail

Final Decision : Allowed

Judgement

1. Challenge in this petition is to the order No.DMS/PSA/22/2018 dated 08.09.2018, passed by District Magistrate, Srinagar in exercise of powers conferred by Section 8 of the J&K Public Safety act, whereby Shri Mohammad Saleem Dar (hereinafter referred to as the detainee), has been taken into preventive detention as his activities were noticed to be prejudicial to the security of the State.
2. Respondents have filed the counter affidavit wherein they have disputed the contentions raised in the petition. The detention record has also been produced.
3. Heard learned counsel for the parties and also perused the records.
4. Firstly, learned counsel for the petitioner contended that the detainee has been disabled from making an effective representation by not supplying the material forming base of the grounds of detention and the consequent order of detention.
5. In opposition, learned counsel for the respondents, however, submitted that the whatever material considered by the detaining authority has been furnished to the detainee, therefore, none of his rights has been violated.

6. Next learned counsel contended that detainee had been booked in criminal cases, i.e. FIR No.02/2016, 54/2017 and 90/2017 registered by Police Station, Batamaloo Act but despite that he has been detained under the provisions of Public Safety Act without assigning any compelling reasons. When it is so, the order of detention as invalid.

7. It is trite that when a person is involved in criminal case/cases, it has to be recorded that there are compelling reasons for passing the order of detention. No such reason has been recorded. It shall be apposite to quote Para 5 of the judgment of the Hon'ble Apex Court in "Surya Prakash Sharma v. State of U. P. and others, 1994 SCC (Cri) 1691, has held as under:

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this court since it state first came up for consideration before a Constitution Bench in Rameshwar Shaw vs District Magistrate Burdwan to eschew prolixity we refrain from detailing all those cases accept that of Dharmendra Sugan Chand Chelawat v. Union of India wherein a three judge Bench after considering all the earlier relevant decisions including Rameshwar Shaw answered the question in the following words

The decisions referred to above lead to the conclusion that an order for detection 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 detailing 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 in custody implies 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."

8. In the grounds of detention, it is nowhere mentioned as to whether detainee in connection with the criminal cases registered against him was released on bail or as to whether he had applied for bail. The Detaining Authority also has not given any cogent reason so as to derive satisfaction or to record compelling reasons for passing the order of detention.

9. The contention raised, on perusal of the grounds of detention placed on record, is found to be correct, so non-application of mind is explicit which renders the order of detention illegal. In my view I am fortified by the judgment rendered in the case captioned "Anant Sakharam Raut Vs. State of Maharashtra and others" reported in AIR 1987 SC 137. Para 8 of the judgment is apt to be quoted:

"We hold that there was clear non-application of mind on the part of the 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 judgment of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith.

10. The personal liberty protected under Article 21 of the Constitution of India is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. Right to liberty as guaranteed under Article 21 of the Constitution can be negated in view of Article 22(3) (b) of the Constitution, which is an exception to Article 21 of the Constitution. The said exception authorizes the concerned authorities to pass preventive detention but while passing such orders, the authority concerned is required to be alive to the personal liberty of a person. Such power has to be exercised in a manner, which may not have the trappings of depriving a person of the guaranteed liberty. In short, an exceptional case has to be made out for passing the preventive order, still then procedural safeguards are to be respected. Breach in observing the procedural safeguards gives right to the detainee to claim that he has been prejudiced as his liberty has been curtailed de hors the law.

11. For the stated reasons and the law laid down by the Hon'ble Apex Court, petition is allowed and impugned detention order bearing No. DMS/PSA/22/2018 dated 08.09.2018, is quashed. Further custody of the detainee shall be governed in accordance with the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against him.

12. Detention record be returned to the learned counsel for the respondents.