

(2019) 04 J&K CK 0090

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 250 Of 2018

Mohammad Saleem Parray

APPELLANT

Vs

State Of Jammu & Kashmir And Anr

RESPONDENT

Date of Decision : 19-04-2019

Acts Referred:

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

Citation : (2019) 04 J&K CK 0090

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Feroz Ahmad

Judgement

1) In the instant petition, impugned is the detention order bearing No.09/DMB/PSA of 2018 dated 16.08.2018. In terms of said order, Mohammad Saleem Paray son of Mohammad Ramzan Parray resident of Mir Mohalla Hajin Tehsil District Bandipora (hereinafter referred to as the detainee), has been taken into preventive custody by invoking powers under clause (a) of Section 8 of the J&K Public Safety Act.

2) The order of detention has been challenged, mainly, on the ground that the detenu could not have been detained under the provisions of &K Public Safety act when he was already in the custody of respondents in connection with three criminal cases i.e. FIR Nos.66/2017, 36/2018 and 39/2018 registered at Police Station, Hajin for commission of various offences. It has also been projected, in the petition, that there has been non-application of mind on the part of Detaining Authority while passing the impugned order.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition by pleading that the order of detention has been passed after taking into consideration the relevant provisions of J&K Public Safety Act. The grounds of detention have been conveyed to the detainee in the language with which he is conversant and same have been read over and explained to him. The

order of detention has been passed with due diligence after following the procedure/law governing the field.

4) Firstly, it is projected by the learned counsel for the petitioner that when the detainee was already in custody in connection with case FIR Nos.66/2017, 36/2018 and 39/2018 registered at Police Station, Hajin, there was no need to direct his preventive detention. In the grounds of detention as also the counter affidavit arrest of the detainee in the said FIR, at the time of passing of the order of detention, has not been disputed.

5) The Hon'ble Apex Court in paragraph 13 of the judgment delivered in the case of "V. Shantha v. State of Telangana & Others" (AIR 2017 SC 2625), has held as under:

"The order of preventive detention passed against the detainee states that his illegal activities were causing danger to poor and small farmers and their safety and financial well-being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detainee from indulging in further prejudicial activities in the business of spurious seeds, affecting maintenance of public order and that there was no other option except to invoke the provisions of the preventive detention Act as an extreme measure to insulate the society from his evil deeds. The rhetorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the draconian powers of preventive detention. To classify the detainee as a "goonda" affecting public order because of inadequately yield from the chilli seed sown by him and prevent him from moving for bail even is a gross abuse of the statutory power of preventive detention. The grounds of detention are ex-facie extraneous to the Act."

6) Further it is contended that there has been non-application of mind on the part of detaining authority while passing the impugned order as in the impugned order at one place activities of the detainee have been shown to be prejudicial to the maintenance of public order but in the grounds of detention, same have been shown to be prejudicial not only to the maintenance of public peace and order but also to the national integrity/sovereignty"

7) The submission, on perusal of the record, appears to have force. The District Magistrate has not been himself certain as to whether activities of the detainee are prejudicial to the "maintenance of public peace and order" or "detrimental to integrity/sovereignty", which, in turn, shows non-application of mind. It shall be relevant to quote Para 9 of the judgment "G. M. Shah Vs. State of J&K", reported in (1980) 1 SCC 132.:

"As observed by Hidayatullah, J. (as he then was) in Dr. Ram Manohar - Lohia v. State of Bihar & Ors. one has to imagine three concentric circles, in order to understand the meaning and import of the above expressions. 'Law and order' represents the largest circle within which is the next circle representing "public order" and the smallest circle represents "security of State". It is then easy to

see that an act may affect law and order but not public order just as an act may affect public order but not security of State. It is in view of the above distinction, the Act defines the expressions "acting in any manner prejudicial to the security of the State" and "acting in any manner prejudicial to the maintenance of public order" separately. An order of detention made either on the basis that the detaining authority is satisfied that the person against whom the order is being made is acting in any manner prejudicial to the security of the State or on the basis that he is satisfied that such person is acting in any manner prejudicial to the maintenance of public order but which is attempted to be supported by placing reliance on both the bases in the grounds furnished to the detenu has to be held to be an illegal one vide decisions of this Court in *Bhupal Chandra Ghosh v. Arif Ali & Ors.*(2) and *Satya Brata Ghose v. Arif Ali & Ors.*(3).

8) Next, learned counsel for the petitioner would contend that the order of detention has been passed on the basis of the dossier produced by Senior Superintendent of Police, Bandipora, before the District Magistrate which shows that the grounds of detention have not been formulated by the Detaining Authority, which, in turn reflects non-application of mind on the part of Detaining Authority.

9) In opposition learned counsel for the respondents would contend that the detaining authority after going through the relevant material/documents, has derived satisfaction for passing the order of detention. Learned counsel further contended that the detention order has been passed strictly in accordance with law.

10) One of the requirements for deriving subjective satisfaction is to formulate the grounds of detention which shall form basis for passing the order of detention.

In the order impugned as passed by District Magistrate, it is recorded; "Whereas on the basis of dossier placed before me by the Sr. Superintendent of Police, Bandipora, vide his No.Lgl/PSA-23/2018/31254-60 dated 10.08.2018, I am satisfied....." which shows that detaining authority has not scanned and sifted the material itself for preparation of the grounds of detention, which clearly shows that there has been non-application of mind on the part of detaining authority which passing the impugned detention order, which renders the impugned order bad.

11) Learned counsel for the petitioner also contended that the grounds of detention are replica of dossier, therefore, order impugned is illegal and so liable to be quashed.

12) While going through the material before me, the ground projected appears to be forceful. The grounds of detention are replica of dossier with interplay of words here and there, which exhibits non-application of mind, in the process deriving of subjective satisfaction has become a causality. The Hon'ble Apex Court in the judgment rendered in the case of *"Jai Singh and ors vs. State of*

J&K" (AIR 1985 SC 764) has held as under:

"First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur, to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father's name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of"

Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is" into "you Jai Singh, S/o Ram Singh, resident of village Bharakh, Tehsil Reasi". Thereafter word for word the police dossier is repeated and the word "he" wherever it occurs referring to Jai Singh in the dossier is changed into 'you' in the grounds of detention. We are afraid it is difficult to find proof of non-application of mind. The liberty of a subject is a serious matter and is not to be trifled with in this casual, indifferent and routine manner."

13) Life and liberty of the citizens are of paramount importance. A duty is cast on the shoulders of the Court to enquire that the decision of the Executive is made upon the matters laid down by the Statute and that these are relevant for arriving at such a decision. A citizen cannot be deprived of personal liberty guaranteed to him/her by the Constitution and of which, he/she cannot be deprived except in due course of law.

14) Article 22(3)(b) of the Constitution of India, which vouchsafes preventive detention, is only an exception to Article 21 of the Constitution. An exception is an exception and cannot ordinarily nullify the full force of main rule, which is right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting civil liberties of people and not to put them in immurement for a long period shorn of recourse to a lawyer and without a trial. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in essence a detention order of three months, or any other period(s), is a punishment of that particular period's incarceration. What difference is it to detenu whether his immurement is called preventive or punitive? Besides, in cases of preventive detention no offence is proved and justification of such detention is suspicion or reasonable probability, and there is no conviction that can only be warranted by legal evidence. Preventive detention is every so often described as a 'jurisdiction of suspicion', Detaining authority passes detention order on subjective satisfaction. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to rule of law. Since Clause (3) of Article 22 specifically excludes applicability of clauses (1) and (2), detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power

the law of preventive detention has to be strictly construed and meticulous compliance with procedural safeguards, howsoever technical, is mandatory and vital.

15) The Supreme Court in *Rekha v. State of Tamil Nadu* AIR 2011 SCW 2262, while making reference to law laid down in *Kamleshwar Ishwar Prasad Patel v. Union of India and Others* (1995) 2 SCC 51, observed that history of liberty is history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of nature of alleged activities of detenu. The Supreme Court quoted with approval the observation made in *Ratan Singh v. State of Punjab and others* 1981 (4) SCC 481, emphasising need to ensure that the Constitutional and Statutory safeguards available to a detenu were pursued in letter and spirit observed:

"But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenu's."

16) Procedural requirements are only safeguards available to a detenu, for the reason that the Court is not expected to go behind subjective satisfaction of detaining authority. As laid down by the Supreme Court in *Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and another* (1987) 2 SCC 22, procedural requirements are 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.

17) It is germane to point out here that individual liberty is a cherished right that is one of most valuable fundamental rights guaranteed by our Constitution to citizens of the country. In the scheme of Constitution, utmost importance has been given to life and personal liberty of individual. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established. In the matter of preventive detention, there is deprivation of liberty, therefore, safeguards provided by Article 22 of the Constitution of the India, have to be scrupulously adhered to. Procedural reasonableness, which is invoked, cannot have any abstract standard or general pattern of reasonableness. The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all provide the basis for considering the reasonableness of a particular provision. The procedure embodied in the Act has to be judged in the context of the urgency and the magnitude of the problem, the underlying purpose of the restrictions and the prevailing conditions.

18) The history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the

right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is of great importance. Personal liberty protected under Article 21, is so sacrosanct and so high in the scale of constitutional values that it is the obligation of detaining authority to show that impugned detention meticulously accords with the procedure established by law. However, the constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In a case of preventive detention, no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time, when a person's greatest of human freedoms, i.e. personal liberty, is deprived, the laws of preventive detention are required to be strictly construed, and a meticulous compliance with the procedural safeguards, howsoever technical, has to be mandatorily made. Reference in this regard is made to *Haradhan Saha v. The State of West Bengal & Others*, (1975) 3 SCC 198 and *Union of India v. Paul Manickam & Another*, (2003) 8 SCC 342.

19) 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 and such power shall 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 order of preventing a person from acting in any manner which shall be prejudicial, in the instant case, to the security of the State but while doing so procedural safeguards are to be respected. Breach in observing the procedural safeguards gives right to the detenu to claim that he has been prejudiced as his liberty has been curtailed de hors the law. In this connection it shall be quite relevant to quote paras 37 and 38 of the judgment rendered by a Bench of three Hon'ble Judges of the Hon'ble Apex Court in case captioned "*Rekha Vs. State of Tamil Nadu and anr*", reported in (2011) 5 SCC 244:

"37. As observed in *Abdul Latif Abdul Wahab Sheikh v. B. K. Jha* vide SCC para 5: (SCC p.27)

"5....The procedural requirements are the only safeguards available to a detenu 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."

As observed by Mr. Justice Douglas of the United States Supreme Court in Joint Anti-Fascist Refugee Committee v. McGrath:(US p. 179)

"...It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards are the main assurances that there will be equal justice under law".

38. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experience".

20) Applying the aforesaid settled legal position to the facts and circumstances of the present case, there is no hesitation in observing that there is non-application of mind on the part of detaining authority in passing the impugned detention order.

21) In view of the facts of the present case and the law laid down by the Hon'ble Apex Court as quoted hereinabove, the order of detention impugned does not sustain, therefore, other grounds projected in the petition are not required to be dealt with.

22) Having regard to the above discussion, the impugned order of detention impugned is unsustainable, as such, quashed. Further custody of the detenu shall be governed by the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against him.

23) Registry to return the detention records to the learned counsel for the respondents.