

(2018) 08 J&K CK 0017

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition Nono.25 Of 2018

Mohammad Subhan Wani @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 03-08-2018

Acts Referred:

Constitution of India, 1950 — Article 21, 22(1), 22(3), 22(3)(b), 22(5)
Jammu and Kashmir Public Safety Act, 1978 — Section 8(2), 8(4), 13, 19, 19(2)
General Clauses Act, Samvat, 1977 — Section 21
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 147, 148, 149, 307, 336, 427

Citation : (2018) 08 J&K CK 0017

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

1. Order impugned, bearing No.169/DMB/PSA/2018 dated 27.01.2018, passed by District Magistrate, Baramulla, (for brevity â??Detaining

Authorityâ?), has been questioned by the petitioner, namely, Mohd. Subhan Wani @ Subal Wani S/o Gh Mohd Wani R/o Beigh Mohalla Dangerpora,

Sapore, District Baramulla (for short â??detenuâ?) by virtue of which he has been placed under preventive detention, on the â?? grounds projected in

the petition on hand.â?

2. On notice, counter-affidavit has been filed by respondents, resisting strenuously the petition.â?

3. I have heard learned counsel for parties and considered the matter.â?

4. Learned counsel for petitioner states that the procedural safeguards, as provided under Section 8(4) of J&K Public Safety Act, 1978, by which prior

to Governmentâ??s approval of detention order, which is to be done within 12 days of detention order, detaining authority has also power to revoke

detention order, have been observed in breach. This power is clearly relatable to Section 21 of the General Clauses Act, Samvat, 1977, which has

been saved by virtue of Section 19 of Act of 1978. He has also averred that till the Government's approval of detention order is granted, as

detaining authority had the power to revoke the detention order, a representation could have been made to detaining authority for revoking detention

order. Learned counsel for petitioner submits that respondents had not disclosed in the detention order to which authority or to whom the detenu can

represent for redressal of his grievance and as such deprived him to represent by not disclosing at the relevant point of time. He further states that it

was incumbent upon the detaining authority to have informed detenu that he could also make a representation to detaining authority, if he so desired.

His further contention is that since detaining authority did not communicate to detenu that such a representation could be made to detaining authority,

this in itself amounts to infraction of provisions of Section 13 of Act of 1978, read with Article 22(5) of the Constitution of India. To buttress his

arguments, learned counsel for petitioner relies upon State of Maharashtra and others v. SantoshShankar Acharya, (2000) 7 SCC 463, and Tariq

Ahmad Dar v. State of J&K & ors. 2017 Legal Eagle 131. On the strong point of theaforesaid decisions of the Supreme Court and this Court, learned

counsel for petitioner has contended that detention order in the present case also became invalid because of the non-communication of fact that

detenu could make a representation to detaining authority till the Government had approved detention order.

5. Per contra, learned counsel for respondents has insisted that all thetechnical requirements had been complied with, more particularly Section 13 of

J&K PSA, which required that earliest opportunity of making a representation, be provided to the detenu.Â

6. Section 8 of Act of 1978, and, in particular, Sub-Section (2) thereof, envisages that a detention order can be passed, inter alia, by a District

Magistrate. Sub-Section (4) of Section 8 of the Act envisions that when any order is made under Section 8 by a person mentioned in Subsection (2),

he shall forthwith report the fact to the Government together with grounds on which order has been made and such of particulars as in his opinion

have a bearing on the matter, and no such order shall remain in force for more than 12 days after making thereof unless in the meantime it has been

approved by Government. This clearly implies that though District Magistrate can make a detention order, such detention order requires to be

approved by Government not later than 12 days from the date of the order. Section 19 of the Act of 1978 says about revocation of detention orders. It

envisages that without prejudice to the provisions of Section 21 of General Clauses Act, Samvat 1977, a detention order may, at any time, be revoked

or modified by the Government, notwithstanding that the order has been made by any officer mentioned in Subsection (2) of Section 8. Sub Section (2)

of Section 19 envisages that there shall be no bar in making a fresh order of detention against a person on the same facts as an earlier order of

detention made against such person in any case where earlier order of detention or its continuance is not legal on account of any technical defect or

earlier order of detention has been revoked by reason of any apprehension, or for avoiding any challenge that such order, provided that in computing

the maximum period for which a person against whom such fresh order of detention has been issued may be detained, the period during which such

person was under the earlier order of detention shall be excluded.

7. It may not be out of place to mention here that till the Government grants approval to detention order in terms of Subsection (4) of Section 8 of Act

of 1978, detaining authority has power to add to, amend, vary or rescind inter alia, any order issued by him which includes a detention order. The

Supreme Court, after considering the Constitutional Bench decision in Kamleshkumar Ishwardas Patel v. Union of India, (1995) 4 SCC 51, came to the

conclusion that until detention order is approved by the State Government, detaining authority can entertain representation from detenu in exercise of

powers of the General Clauses Act of Bombay and annul revoke or modify the order, as is provided under Section 14 of the Maharashtra Act. The

Supreme Court held that, this being the position, non-communication of the fact to detenu that he could make a representation to detaining authority so

long as the order of detention has not been approved by the State Government in a case where order of detention is issued by an officer other than the

State Government under Section 3(2) of the Maharashtra Act would constitute an infraction of a valuable right of detenu under Article 22(5) of the

Constitution of India and that the ratio of the Constitutional Bench decision in case of Kamleshkumar's case (supra) would apply notwithstanding the

fact that in Kamleshkumar's case (supra) the Court was dealing with an order of detention issued under the provisions of COFEPOSA Act. In the end

the Supreme Court held as under:-

This being the position, it goes without saying that even under the Maharashtra Act a detenu will have a right to make a representation to the

detaining authority so long as the order of detention has not been approved by the State Government and consequently non-communication of the fact

to the detenu that he has a right to make representation to the detaining authority would constitute an infraction of the valuable constitutional right

guaranteed to the detenu under Article 22(5) of the Constitution and such failure would make the order of detention invalid. We, therefore, see no

infirmity with the impugned judgment of the Full Bench of the Bombay High Court to be interfered with by this Court. These appeals accordingly fail

and stand dismissed.

9. From the above, it is unequivocally clear that non-communication of fact that detenu can make a representation to detaining authority, till detention

order is not approved by the Government, would constitute an infraction of a valuable Constitutional right guaranteed under Article 22(5) of the

Constitution of India as also of the right under Section 13 of J&K Public Safety Act, 1978. Failure of such non-communication would invalidate the

order of detention.Â

10. It is pertinent to mention here, apart from what has been discoursed herein before, that reverence of life is inseparably concomitant with the

dignity of a human being who is basically divine, not obsequious. A human personality is endued with potential infinitude and it blossoms when dignity

is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a

momentary spark of light or, for that matter, â??a brief candleâ?, or â??a hollow bubbleâ?. The spark of life gets more splendiferous when man is

treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of â??creative intelligenceâ?. When

a dent is created in the reputation, humanism is paralyzed. Reverence for the nobility of a human being has to be the cornerstone of a body polity that

believes in orderly progress. But, some, the incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our

Constitutional philosophy and it has its ubiquitous presence and the majesty and sacro-sanctity dignity cannot be allowed to be crucified in the name of

precautionary incarceration. Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers

me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when

it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a

thinker about the respect that life commands.

11. 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 of 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.

12. Preventive detention law makes room for detention of a person without a formal charge and without trial. The person detained is not required to be

produced before the Magistrate within 24 hours, so as to give an opportunity to the Magistrate to peruse the record and decide whether the detenu is

to be remanded to police or judicial custody or allowed to go with or without bail. The detenu cannot engage a lawyer to represent him before the

detaining authority. In the said background it is of utmost importance that whatever procedural safeguards are guaranteed to the detenu by the

Constitution and the preventive detention law, should be strictly followed. Right

to liberty guaranteed by Article 21 implies that before a person is imprisoned a trial must ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself except through a lawyer. The importance of a lawyer to enable a person to properly defend himself has been elaborately explained by the Supreme Court in *A.S. Mohd. Rafi v. State of Tamilnadu* AIR 2011 SC 308 and *Md. Sukur Ali v. State of Assam*, JT 2011 (2) SC 527. As observed by Mr Justice Sutherland of the U.S. Supreme Court in *Powell v. Alabama*, 287 U.S. 45 (1932) “Even the intelligent and educated layman has small and sometimes no skill in the science of law”, and hence, without a lawyer he may be convicted though he is innocent. Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of preventive detention to very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after long, arduous, historical struggles, will become nugatory. In *State of Maharashtra & Ors. Vs. Bhaurao Punjabrao Gawande*, (2008) 3 SCC 613 this Supreme Court observed:

“...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, was to protect the people against the government. That is why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a lesson taught by all history and all human experience. 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 conquest from

without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide A.K. Roy Vs. Union of India (1982)

1 SCC 271, and Attorney General for India Vs. Amratlal Prajivandas, (1994) 5 SCC 54.â??

13. The Constitution Bench of the Supreme Court in M. Nagaraj & ors.Vs. Union of India & ors. (2006) 8 SCC 212, observed:

â??It is a 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 fact that they are members of the human race.â??

14. The Nine Judge Constitution Bench of the Supreme Court in I.R.Coelho (dead) By LRs. Vs. State of T.N., (2007) 2 SCC 1,observed: Â

â??It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution.....

Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as & â??transcendentalâ?,

inalienable, and primordialâ?.

8. In the present case, detenu was earlier placed under preventive detention vide detention order No.78/DMB/PSA/2016 dated 19.08.2016, which was

questioned by him in HCP No.165/2016 and this Court vide judgment dated 25.11.2016 allowed the said petition by quashing the detention order and

directed for release of the detenu on the ground that the documents which were made basis to pass detention order, were not supplied to him. Detenu,

however, was again slapped with another detention order bearing No.196/ DMB/ PSA/2016 dated 14.12.2016, which became subject matter of

challenge in HCP no.40/2017. AÂ Coordinate Bench of this, while allowing the said petition, held that detention of detenu was made on similar

grounds, which formed base in earlier detention order and quashed detention order dated 14.12.2016. Nonetheless, third detention order bearing No.

59/DMB/PSA/2017 dated 04.07.2017 was made use of by respondents, again detaining detenu under preventive detention, forcing him to fall back

upon the alternative, by knocking at the portal of this Court with a petition, being HCP no.237/2017. The petition succeeded and detention order was

quashed vide judgment dated 13th December 2017. However, by impugned

detention order bearing no.169/DMB/PSA/2018 dated 27.01.2018, detenu has again been placed under preventive detention.

9. Grounds of detention, on its cursory look, divulges that on 06.01.2018 at Main Chowk, Sopore, one unruly/violent mob, armed with lathies and stones, headed by detenu and his associates resorted to heavy stone pelting on the Police/CRPF Nafri, deployed for law and order duty, with an intention of killing them, as a result whereof some vehicles of CRPF got damaged. In this regard, FIR No. 08/2018 for commission of offence punishable under Sections 147, 148, 149, 336, 307, 427 RPC, was registered with Police Station Sopore and the said FIR is under investigation. It is also made mention of in grounds of detention that detenu has a tendency to gather people and attract them towards anti-national activities inasmuch as he is a close associate of Syed Ali Shah Geelani and District Secretary of Tehreek-i-Hurriyat (G).

10. On perusal of detention record produced by Mr. Shah Aamir, learned AAG, it reveals that no specific proof of detenu's involvement is coming to fore qua the acts which took place on 06.01.2018. The Overleaf of detention order reveals that detenu has not been provided the material, which has been made basis for passing impugned detention order.

11. This Court, in earlier petitions, has quashed detention orders, while dealing with grounds of detention, made use of in support of detention order impugned in petition on hand. The same grounds could not have been relied upon for making a fresh detention order. The authoritative judicial pronouncements on the subject are that even if the order of detention comes to an end either by revocation or by expiry of the period of detention, there must be fresh facts for passing a subsequent order. When a detention order is quashed by the Court, issuing a high prerogative writ, like habeas corpus or certiorari, the grounds of said detention order should not be taken into consideration either as a whole or in part even along with fresh grounds of detention for drawing requisite subjective satisfaction to pass a fresh detention order because once the Court strikes down an earlier order by issuing rule, it nullifies the entire order. It is, therefore, clear that an order of detention cannot be made after considering previous grounds of detention when the same had been quashed by the Court, and if such previous grounds of detention are taken into consideration while forming

subjective satisfaction by detaining authority in making a detention order, the order of detention will be vitiated. It is of no consequence if further fresh

facts, disclosed in the grounds of impugned detention order, have been considered. Reference in this regard is made to Chhagan Bhagwan Kaharv. N.

L. Kalna and othersAIR 1989 SC 1234; Jahangir Khan Fazal Khan Pathan v. The Police Commissioner, Ahmedabad and another AIR 1989 SC 1812;

Ramesh v. State of GujaratAIR 1989 SC 1881.Detention order, impugned herein, is, thus, liable to be quashed as the grounds of detention made use of

by respondent No.2 while passing earlier detention orders, subsequently quashed by this Court, have also been pressed into service while passing

detention order in question.Â

15. For the foregoing reasons, this petition is, disposed of, and Order impugned bearing No.169/DMB/PSA/2018 dated 27.01.2018 passed by District

Magistrate, Baramulla, quashed. Consequently, Government Order Home/PB-V/423 of 2018 dated 23.04.2018 is also quashed. Respondents are

directed to release the detenu, namely, Mohd. Subhan Wani @ Subal Wani S/o Gh Mohd Wani R/o Beigh Mohalla Dangerpora, Sapore, District

Baramulla, forthwith, providedhe is not required in any other case.

16. Disposed of with the aforesaid observations.

17. Registry is directed to return the detention record to Mr. Shah Aamir, learned AAG.