

(2019) 04 J&K CK 0086

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 346 Of 2018

Mohammad Yousuf Bhat

APPELLANT

Vs

State & Ors

RESPONDENT

Date of Decision : 22-04-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164A
Jammu & Kashmir Public Safety Act, 1978 — Section 8(a)
Constitution Of India, 1950 — Article 22(5)

Citation : (2019) 04 J&K CK 0086

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : B.A.Tak, Asif Maqbool

Judgement

1. In terms of the detention order No. 103/DMB/PSA/2018 dated 03.12.2018 passed by District Magistrate, Baramulla(respondent No.2) in exercise of powers conferred on him under clause(a) of Section 8 of the J&K Public Safety Act, 1978, the detainee namely Mohammad Yousuf Bhat has been detained.

2. The said detention order has been challenged in terms of the instant petition being in breach of the provisions of Article 22(5) of the Constitution of India.

3. It is being pleaded in the petition that the detaining authority-respondent No.2 has not attributed any specific allegation against the detainee. Furthermore, it is stated that he has been incapacitated in filing a representation as the grounds of detention are hyper technical in nature i.e. not in a language which could be understood by the detainee. It is being stated that the detainee has read upto 9th class only and it is not possible for him to understand such a hyper technical language. It is also the submission of learned counsel for the detainee that the order of detention has been passed on the dictates of the sponsoring agency and the connected documents annexed with the petition, according to him, clearly shows violation of the right of the detainee guaranteed in terms of the Article 22(5) of the Constitution of India.

4. In the counter affidavit filed on behalf of the respondents, it is stated that the detenue was ordered to be detained for maintenance of security of the State. The detention of the detenue was approved by the Government, same being corroborated by the record, which has been produced by learned GA.

5. Learned counsel for the detenue while being heard has reiterated the grounds taken in the petition. Reliance has been placed on the judgment rendered by the co-ordinate Bench of this Court in HCP No.316, Reyaz Ahmad Dar Vs. State of J& & anr., decided on 02.03.2018 and also on the judgment of Hon'ble Apex Court in Sama Aruna Vs. State of Telangana & Anr. Reported, AIR 2017 SC 2662.

6. On the other hand learned GA submitted that the judgment of Hon'ble Apex Court referred in Sama Aruna's case would not be applicable in the instant case as the grounds quoted therein had become stale as noted by the Hon'ble Apex Court. Furthermore, according to him, the detenue was not illiterate person and the material furnished to him could be properly understood by him and representation could have been filed. It is also being submitted that the detention of the detenue has been ordered on the approval of the Government. Relevant record from the office of respondent No.1 is also produced, same has been perused.

7. Heard the rival arguments.

8. The detention record, as produced, reveals that the detenue was involved in FIR No. 319/2018. Involvement of the detenue in the aforementioned criminal case appears to have heavily weighed with the detaining authority while passing detention order. In the grounds of detention the respondents have not brought anything on record to indicate that the copies of FIR, statements recorded under Section 161/164-A Cr.PC and other material collected in connection with investigation of aforesaid case was ever supplied to the detenue. It needs no emphasis that the detenue cannot be expected to make a meaningful exercise of his constitutional and statutory rights guaranteed under Article 22(5) of the Constitution of India unless and until the material on which the detention is based, is supplied to the detenue. If the detenue is not supplied the material on which detention order is based, the detenue cannot be in a position to make an effective representation against his detention. The failure on the part of the detaining authority to supply material renders detention under illegal and unsustainable.

9. The Hon'ble Apex Court in the judgment rendered in the case of "Sophia Gulam Mohd. Bham V. State of Maharashtra & Ors. (AIR 1999 SC 3051, has held as under:-

"The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detenue to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are

communicated to the detainee and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language."

10. Another argument raised by learned counsel for the petitioner that since the detainee was in the custody of the police at the time of passing of the detention order, therefore, the question that arises for consideration is whether an order of detention could be passed on the face of such an eventuality. The answer has to be 'no'. The law on the subject has been laid down by the Hon'ble Apex Court in *Sama Aruna V. State of Telangana & Anr.* (AIR 2017 SC 2662). Para 24 of the judgment reads as :-

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No. 221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-2003. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In *Ramesh Yadav v. District Magistrate, Etah and Ors.*, this Court observed as follows:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detainee was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."

11. The same view has been reiterated in the case of *V. Shantha V. State of Telangana & Ors.* (AIR 2017 SC 2625), that reads as:-

"13. 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 inadequate yield from the chilli seed sold 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.

12. Testing the instant case on the touchstone of the law laid down above, the detinue could not have been detained after taking recourse to the provisions of the Public Safety Act, when he was already in the custody of the police authorities in the above referred case.

13. 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 on the aforesaid grounds, therefore, other grounds projected in the petition are not required to be dealt with.

14. In the backdrop of what has been said and observed above, the instant petition is allowed. Order of detention No. 103/DMB/PSA/2018 dated 03.12.2018 passed by District Magistrate, Baramulla, impugned, is as such, quashed. The detinue namely Mohammad Yousuf Bhat S/o Gh. Hassan Bhat R/o Duroo, Sopore, District Baramulla, be released from the preventive custody forthwith provided he is not required in connection with any other case/cases.

15. Detention record, as produced, be returned to learned GA.