

(2004) 12 J&K CK 0009
In the Jammu And Kashmir High Court
Case No : HCP No. 177 of 2003

Mst. Raja

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 24-12-2004

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 226
Constitution of Jammu and Kashmir, 1956 — Section 103
Jammu and Kashmir Public Safety Act, 1978 — Section 8
Ranbir Penal Code, 1989 — Section 102B, 302, 307
Unlawful Activities (Prevention) Act, 1967 — Section 13

Citation : (2005) 2 JKJ 200

Hon'ble Judges : Hakim Imtiyaz Hussain, J

Bench : Single Bench

Advocate : Mir Shafaqat and B.A. Tak, for the Appellant; M.A. Ward, Dy. A.G, for the Respondent

Final Decision : Allowed

Judgement

Hakim Imtiyaz Hussain, J.—This petition under Article 226 of the Constitution of India read with Section 103 of the Constitution of Jammu

and Kashmir has been filed by Mst. Raja Wife of Ab. Ahad Rather R/o Ajas Sonawari, District Baramulla who has been detained by respondent

No. 3 under the provisions of Public Safety Act by means of the detention order No. 03/DMK/PSA of 2003 dated 16.8.2003. Petitioner has

challenged the said detention on various grounds. It is alleged that the detenu was arrested on 14.8.2003 by the respondents and was subsequently

detained under the provisions of J&K Public Safety Act in terms of the said order which order was neither communicated to the detenu nor was

served upon him. It is submitted in the present petition that the detenu has not been appraised of his right of making representation to the

Government against his detention thus the detention order is bad in the eye of law and cannot stand. It is further alleged that the grounds of

detention as submitted are illegal, ambiguous and cannot form basis for detaining the detenu. There is no 'live and proximate link' between the

grounds of detention and the period of detention and that the same is bad on the ground that the procedural safeguards prescribed under the J&K

Public Safety Act read with Article 21 and 22 of the Constitution of India have not been followed/complied with.

2. The State has in its counter filed by respondent No. 3 stated that the detention of the detenu has been ordered on the basis of the grounds of

detention which give detailed history of the activities of the detenu. It is further alleged that in addition to the involvement of the detenu in FIR of

which reference is made in the grounds of detention and keeping in view his past conduct and antecedents history and the activities which are highly

prejudicial to the security of the State, it was found imperative to detain the detenu under the provisions of J&K Public Safety Act, 1978.

3. Heard. Considered. A perusal of the grounds of detention shows that the detenu has been detained by means of the impugned order which

reads as under:-

whereas Superintendent of Police, Kupwara vide his letter No. PROS/DET/2003/567-70 dated 6.08.2003 has produced material record such as

dossier and other connecting documents in respect of Shri Ab. Ahad Rather S/o Lt. Gh. Mohd. Rather R/o Ajas Sonawari District, Baramulla

who, has reportedly been arrested incase FIR No. 58/2002 u/s _ POTA 302 307, 102B RPC, 7/27 AA 32 peoples representation Act registered

in Police Station Sogam.

Whereas, I Abdul Majid Khanday District Magistrate, Kupwara has gone through the contents of dossier before me carefully in respect of the said

person.

Whereas, I am satisfied that with a view to prevent the said Shri Ab. Ahad Rather S/o Lt. Gh. Mohd. Rather R/o Ajas Sonawari District

Baramulla from acting in any manner which is prejudicial to the security of the State, and it is necessary so to do. Now, therefore, in exercise of

powers vested in me u/s 8 of J&K Public Safety Act 1978, I Abdul Majid Khanday District Magistrate Kupwara hereby direct that the said, Shri

Abdul Ahad Rather S/o Lt. Gh. Mohd. Rather R/o Ajas Sonawari District Baramulla be detained and lodged in Kotbelwal Jail Jammu for a period of 24 Twenty Four months.

4. In the ground of detention it is alleged that the detenu was served in Police Department of J&K Govt. as S.I. that he aided and abetted the activities of the militants, which were hazardous to the security of the State. After giving various alleged activities of the detenu the detaining authority has come to the conclusion that ordinary law of the land will not serve as a corrective so the detention of the detenu under the provisions of J&K P.S.Act, 1978 has become imperative.

5. Ld. Counsel for the petitioner would argue that the detention order cannot be maintained for the reasons that it has not been passed by the detaining authority on the recognized grounds contained in Section 8 of the J&K Public Safety Act. The detenu has been detained on the ground that ordinary law of the land will not serve as a corrective measure. This ground is not a valid ground, as submitted by the Ld. Counsel for directing the preventive detention. In this behalf he has relied Gh. Nabi Dar v. State of J&K 2002 KLJ 637. This court in the said authority observed as under:-

The compelling reasons spelled out by the detaining authority are, that ordinary criminal law is not enough to prevent detenu from such subversive activities. Similar proposition of law was also in HCP No. 97/2000 titled Bilal Ahmad Bhat v. State and Ors. Wherein while dealing with it, satisfaction and the reasons disclosed by the detaining authority while directing the preventive detention of the detenu is that the ordinary law of the land is not sufficient to deter the detenu from his activities. This cannot be accepted either as a ground of detention. While dealing with a similar proposition on facts and law, the Supreme Court in ""Surya Prakash Sharma v. State of U.P. 1994 SCC 169 in para 5 has held that:

The question as to whether and in what circumstances and order for preventing detention can be passed against a person who is already in custody has had been engaging the attention of this court since it first came for consideration before a Constitution Bench in ""Rameshwar Shaw v. District Magistrate, Burdan"". To eschew prolixity we refrain from dealing all those cases except that the Dharmandra Suganchand Chelwat v.

Union of India wherein three Judge Bench, after considering all the earlier relevant directions including Rameshwar Shaw answered the question in the following words:

The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose must show that:

(i) the detaining authority was aware of the fact that the detenu was already in detention and;

(ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression ""compelling reasons"" in the context of making an order for detention of a person already 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 detenu is likely to be released from custody in the near future and;

(b) that 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.

The detaining authority has to disclose the compelling reasons if the reasons are not disclosed the impugned order suffers for non-application of

mind. Grounds of detention indicate the awareness of the detaining authority that the detenu was in custody of the respondent at the time of

directing his preventive detention. The detaining authority has not brought on record any cogent material that ordinary law of the land is not

sufficient to deter the detenu from such activities. Such subjective satisfaction of the detaining authority cannot, therefore, be said to be proper and justified.

The case of the detenu is fully covered by the judgement (supra). Respondents have not shown any material to make out that the ordinary law is

not enough to prevent the detenu despite the fact that the detenu was already taken into custody for alleged commission of offence u/s 13 of

Unlawful Activities Act. The subjective satisfaction arrived at under such circumstances cannot be said to be proper and justified. The detention

order therefore deserves to be quashed,

6. The said authority was followed by this court in other cases also including the

cases of HCP NO. 183/03 titled Gh. Rasool Wani v. State HCP

No. 16/2004 titled Tanveer Ahmed Mughal v. State.

7. In view of this authority the ground taken by the detaining authority cannot stand at all.

8. The detenu is already involved in the offences u/s POTA, 302, 307, 102B RPC, 7/27 LA.Act. All these offences are heinous and there is no

material to show that there is likelihood of release of detenu on bail or that he has applied for bail. It is submitted by the Ld. Counsel for the detenu

that there is no likelihood of release of detenu on bail. The Ld. Counsel has in this behalf relied upon 2001 (1) SCC 341 wherein dealing with the

situation where the likelihood of being released was not available, the Apex Court has observed as under:-

As held in Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, , if a person is in custody and there is no imminent possibility of his

being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material before the officer passing the

detention order that the detenu is likely of be released on bail. The inference must be drawn from the available material on record and must not be

the ipse dixit of the officer passing the order of detention. In the present case the requirement that there is likelihood of the detenu's being released

on bail was, however, not available in the reasoning as provided by the officer concerned. The reasoning available is the ""likelihood of his moving

an application for bail"" which is different from likelihood to be released on bail. This reasoning is not sufficient compliance with the requirements as

laid down. The available cogent material in this case was the likelihood of having a bail application moved in the matter but not obtaining a bail

order. Therefore, the detention order is liable to be quashed.

9. As is settled now the object of detaining a person is to prevent him from indulging in any activity which is prejudicial to the security of State or

maintenance of public order. If a person is already in custody under ordinary criminal law in connection with an offence which is non-bailable and

for which he is not ordinarily entitled to bail or is involved under a special offence which contain stringent provisions for bail, there would arise no

requirement or necessity to take such a person in preventive detention. There will however, be no bar in passing an order for such a detention, if

the detaining authority is subjectively satisfied about the same. But in such a case, as held by the Apex Court *Vijay Kumar Vs. State of Jammu and*

Kashmir and Others, , the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is

being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made.

10. The principle laid down by the Supreme Court in *Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others*, , *Rameshwar Shaw Vs.*

District Magistrate, Burdwan and Another, and *Ramesh Yadav Vs. District Magistrate, Etah and Others*, is that if a person is in custody and there

is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised.

11. In *Kamarunnissa and Others Vs. Union of India and another*, , the Apex Court reviewed the whole case law on the subject and held:-

From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be

passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable

material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all

probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after

recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose

the bail and if bail is granted notwithstanding such opposition to question it before a higher Court. What this court stated in the case of *Ramesh*

Yadav Vs. District Magistrate, Etah and Others, was that ordinarily a detention order should not be passed merely to pre-empt or circumvent

enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that

even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive

detention. This seems to be quite clear from the case law discussed above and there is no need to refer to the high Court decisions to which our

attention was drawn since they do not hold otherwise. We, therefore, find it difficult to accept the contention of the counsel for the petitioners that

there was no valid and compelling reason for passing the impugned orders of detention because the detenus were in custody.

12. Recently the Apex Court in T.P. Moideen Koya Vs. Government of Kerala and Others, held that in law there is no bar in passing a detention

order even against a person who is already in custody in respect of a criminal offence if the detaining authority is subjectively satisfied that detention

order should be passed and that there must be cogent material before the authority passing the detention order for inferring that the detenu was

likely to be released on bail.

13. A Division Bench of this court in Mohammad Yousuf Soft v. State of J&K 2003 (1) SLJ 218 dealt with the issue and relying upon an authority

of the Apex Court reported as Dharmendra Suganchand Chelawat and another Vs. Union of India and others, laid down the following tests for

issuing detention order u/s 8 of the Public Safety Act in respect of a person who is already in custody:

(a) that the detaining authority was aware of the fact that detenu was already in detention and (b) that there are compelling reasons justifying such

detention because the person to be detained already being in custody cannot be expected to engage himself in the prejudicial activities and

compelling reasons would imply that there must be cogent material on the basis of which the detaining authority is satisfied (i) that detenu is likely to

be released in the near future and (ii) that taking into account the nature of the antecedent activities of the detenu it was likely that after his release

from custody he would indulge in the prejudicial activities and that it was necessary to detain him in order to prevent him from engaging in such

activities.

14. The court held that once these tests are satisfied a detention order under Sec. 8 can be issued against a person who is in custody.

15. Thus under the provisions of the Public Safety Act and in of the case law on the subject-

(a) If a person is in custody in respect of a criminal offence and there is no imminent possibility of his being released therefrom, or the nature of

offences against him is such that there is no likelihood of grant of bail in his favour, the power of detention should not ordinarily be exercised.

(b) There is however no bar in passing a detention order even against such

person but in such a situation the detaining authority must be satisfied that for compelling reasons a preventive detention order needs to be made.

(c) In such cases however, ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary law.

(d) Detention of a person in custody can be ordered:

(1) if the authority passing the order is aware of the fact that he is actually in custody. The authority should disclose such awareness in the grounds

of detention;

(2) if the authority has reason to believe on the basis of reliable material placed before him

(a) that there is a real possibility of his being released on bail, and

(b) that on being so released he would in all probability indulge in prejudicial activity; and

(3) if it is felt essential to detain him to prevent him from so doing.

(e) Order of detention in such a case should be a speaking order disclosing the awareness of the authority of the fact relating to custody and his

subjective satisfaction that there were compelling circumstances for such detention. The subjective satisfaction should be based on the cogent

material before the authority.

16. We find that in the present case the detaining authority thus has not drawn subjective satisfaction about the detention of the detenu. There is no

mention of the fact that the detenu has applied for bail in the criminal cases against him nor is there any satisfaction that there is likelihood of his

release on bail.

17. For the aforesaid reasons, the petition is allowed and the detention order No. 03/DMK/PSA of 2003 dated 16.8.2003 is set aside with

direction to the respondents to release the detenu namely Abdul Ahad Rather S/o Lt. Gh. Mohd. Rather R/o Ajas Sonawari District Baramulla

from preventive detention forthwith, if not required in any other offence(s).

18. The Record produced by Ld. Dy. AG is returned to him in the open court.