

(2018) 05 J&K CK 0037
In the Jammu And Kashmir High Court
Case No : HCP NO.01 OF 2018

MUMTAZ ALI

APPELLANT

Vs

STATE OF JAMMU & KASHMIR AND OTHERS

RESPONDENT

Date of Decision : 28-05-2018

Acts Referred:

Constitution of India, 1950 — Article 21, 22(1), 22(3), 22(3)(b), 22(5)
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 366, 382, 392, 394
Jammu and Kashmir Public Safety Act, 1978 — Section 8, 8(a)(i), 8(4), 13, 19, 19(2)
General Clauses Act, 1977 — Section 21

Citation : (2018) 05 J&K CK 0037

Hon'ble Judges : TASHI RABSTAN

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1. Order impugned bearing No.PSA/1994 dated 16th of July, 2017, passed by District Magistrate, Kathua, has been questioned by the petitioner,

namely, Mumtaz Ali alias Billu S/o Faquir Ali R/o Samna Bank, Majalta,, District Udhampur, at present Village Palai Tehsil Hiranagar District Kathua,

by virtue of which he has been placed under preventive detention, on the grounds set out therein.

2. Reply affidavit has been filed by respondents, resisting the petition.

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

4. Detenu has been placed under detention vide detention order No. PSA/94 dated 16th of July, 2017, passed by District Magistrate, Kathua, in

exercise of powers conferred by Clause (a) (i) of Section 8 of Jammu and Kashmir Public Safety Act, 1978 (for short "Act of 1978") on the

ground of his being allegedly involved in several criminal cases viz. FIR Nos.68/2017, 13/2017 and 76/2017.

5. Learned counsel for petitioner states that the procedural safeguards as provided under Section 8(4) of Act of 1978, by which prior to

Government'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. 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 the 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 amounted 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. Santosh Shankar Acharya, (2000) 7 SCC 463, and Tariq Ahmad Dar v. State of J&K & ors.

2017 Legal Eagle 131. On the strong point of the aforesaid 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.

6. Per contra, learned counsel for respondents has insisted that all the technical 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

7. 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.

8. 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 Constitution 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.)

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

"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."

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:

"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 "transcendental,

inalienable, and primordial".

15. In the present case, averment of learned counsel for respondents is that the petitioner is a habitual inter-state offender and is involved in multiple

criminal cases, particularly three FIRs registered against him, one with Police Station, Raj Bagh, Kathua bearing No.68/2017 for the commission of

offence punishable under Sections 382, 392 and 394 RPC, another bearing No.13/2017 with Police Station Narote Jaimal Singh, Pathankot, Punjab for

the commission of offence punishable under Sections 379, 411 and 472 IPC and the third one bearing No. 76/2017 again with Police Station, Raj Bagh,

Kathua, for the commission of offence punishable under Sections 366, 382 RPC. Mr. L.K Moza, learned AAG submits that in all the above referred

three FIRs the petitioner has stolen the vehicles of private public carriers and has also subjected the custodians/drivers of the said vehicles to robbery

and other crimes and the stolen vehicles were used in criminal activities like transport of banned substances, commission of smuggling of bovine

animals for slaughtering purposes, which is also a violation and against the orders passed by respondent No.2 (District Magistrate, Kathua). Learned

counsel further submits that in view of serious involvement of detenu in several criminal activities, respondent No.2 passed the impugned detention

order against the petitioner and thereafter, respondent No.1, i.e., Principal Secretary to Government, Home Department, J&KÂ approved by

extending the period of detention order dated 16th of July, 2017 and detained the detenu in Central Jail Kathua. He further contends that lastly vide

Government Order No. Home/PB-V/402 of 2018 dated 11th of April, 2018, the detenu was further detained for a period of three months.

16. Per contra, learned counsel for the petitioner submits that in all the three FIRs mentioned above, petitioner is bailed out by the competent court of

law, however he is facing trial. Further contention of the petitionerâ??s

counsel is that the matter is subjudice before the trial courts and the respective trial Courts have yet to give its findings in the criminal cases.

Submission of learned counsel for the petitioner has substance. Maybe, offences allegedly committed by detenu attract punishment under prevailing

laws but that has to be done under prevalent laws and taking recourse to preventive detention laws would not be warranted. Detention cannot be

made a substitute for ordinary law and absolve investigating authorities of their normal functions of investigating crimes, which detenu may have

committed. After all, preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. The Supreme Court in

â??Rekha v. State of Tamil Naduâ?? AIR 2011 SCW 2262, while emphasizing need to adhere to procedural safeguards, observed:

â??It must be remembered that in case of preventive detention no offence is proved and the justification of such detention case is suspicion or

reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as

â??jurisdiction of suspicionâ??, The Detaining Authority passes the order of detention on subjective satisfaction. Since Clause (3) of Article 22

specifically excludes the applicability of Clauses (1) and (2), the detenue 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 the procedural safeguards, however, technical, is, in our opinion, mandatory and vital.â??

17. It may not be out of place to mention here that preventive detention is not a quick alternative to normal legal process, is the saying of the Supreme

Court in *V. Shantha v. State of Telangana & ors*, AIR 2017 SC 2625. The Supreme Court has held that preventive detention of a person by a State

after branding him a â??goondaâ? merely because the normal legal process is ineffective and time-consuming in â??curbing the evil he spreadsâ?, is

illegal and that detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when sufficient

remedies are available under general laws of the land for any omission or commission under such laws, the Supreme Court observed. Recourse to

normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu 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. No doubt the offences alleged to have been committed by detenu are such as to

attract punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws

would not be warranted. Preventive detention involves detaining of a person without trial in order to prevent him from committing certain types of

offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of

investigating crimes which the detenu may have committed. After all, preventive detention cannot be used as an instrument to keep a person in

perpetual custody without trial. My views are fortified by the judgments rendered in *Rekhaâ??s case* and *V. Shantha v. State of Telangana case*

(supra) and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

18. For the foregoing reasons, this petition is, disposed of, and Order impugned bearing No.PSA/94 dated 16th of July, 2017, passed by District

Magistrate, Kathua, quashed. Consequently, Government Orders No.Home/PB-V/1448 of 2017 dated 25th of July, 2017, Home/PB-V/ 1686 of 2017

dated 6th of September, 2017 and Home/PB-V/402 of 2018 dated 11th of April, 2018 are also quashed. Respondents are directed to release the

detenu, namely, Mumtaz Ali S/o Faquir Ali R/o Village Palai Tehsil Hiranagar District Kathua, forthwith, provided he is not required in any other

case.Â

19. Disposed of with the aforesaid observations.