

(2019) 04 J&K CK 0046

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 366 Of 2018

Muzamil Ahmad Dar

APPELLANT

Vs

State Of Jammu & Kashmir And Ors

RESPONDENT

Date of Decision : 19-04-2019

Acts Referred:

Explosive Substances Act, 1908 — Section 3, 4
Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 —
Section 3(3)
Jammu & Kashmir Public Safety Act, 1978 — Section 8
Constitution Of India, 1950 — Article 22(5), 22(6)

Citation : (2019) 04 J&K CK 0046

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M.A. Qayoom, N. H. Shah

Judgement

1) By the instant petition, petitioner seeks quashment of the order of detention bearing No.49/DMA/PSA/DET/2018 dated 22.09.2018 passed by District Magistrate, Anantnag. In terms of said order, Muzamil Ahmad Dar (hereinafter referred to as the detainee), has been taken into preventive custody by invoking powers under Section 8 of the J&K Public Safety Act.

2) The detention order has been challenged, mainly, on the grounds that the detaining authority has failed to apply its mind to the fact whether the preventive detention of the detainee was imperative notwithstanding the fact that he was implicated in case FIR No.131/2018 registered at Police Station, Bijbehara under Section 34 Explosive Substance Act. To this, it has been added that the respondent No.2 has passed the order of detention on the dictates of the sponsoring agency i.e. the officer who has prepared the police dossier and no attempt has been made by respondent No.2 to scan and evaluate it before passing the order of detention.

Further, it is added that the respondents have violated the procedural safeguards

available to the detainee under the Constitution, thus, rendering the impugned order illegal and liable to be set aside.

3) Respondents have filed counter affidavit wherein they justified the passing of impugned detention order. Learned Sr. AAG has made available the detention records to lend support to the submissions made in the counter affidavit.

4) Heard learned counsel for the parties and also perused the records.

5) The main plank of argument of the learned counsel for the petitioner is that since the detainee was in custody of the police in connection with case FIR No.131/2018 P/S Anantnag, therefore, there was no need to direct his preventive detention. The arrest of the detainee in the said criminal cases at the time of passing of the orders of detention has not been disputed.

6) Since the detainee was in the custody of the police at the time of passing of the order of detention, therefore, question arises for consideration whether an order of detention could be passed on the face of such an eventuality? The answer to this question is emphatically "No", taking into consideration the law laid down by the Hon'ble Apex Court in "Sama Aruna v. State of Telangana & Anr" (AIR 2017 SC 2662). Para 24 of the said judgment is apposite to be quoted herein below:

"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 2002-03. 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."

7) The same view has been repeated and reiterated by the Hon'ble Supreme Court in the judgment delivered in the case of "V. Shantha v. State of Telangana & Others" (AIR 2017 SC 2625). Para 13 of the said judgment is relevant to be quoted 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 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."

8) Testing the instant case on the touchstone of the law laid down above, the detainee 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 cases, the details whereof have been given in the grounds of detention. His custody in police for the offences referred in the grounds of detention, has been converted into the custody under the impugned detention order. May be the detaining authority might have been laboring under the belief that the detainee applies for bail, he may succeed in seeking his release but this apprehension of the detaining authority could have been guarded against by resisting and opposing the bail application. Notice of fact cannot be lost that the offence punishable under Section 34 Exp. S. Act carries punishment of death or life imprisonment and so possibility of grant of bail was almost bleak. Even in the event of his release on bail, the State could have exercised its right to knock at the doors of higher forum. This single infraction knocks the bottom out of the contention raised by the State that the detainee can be detained preventatively when he is already in custody and has not applied for bail. It cuts the very root of the state act. The State could have taken recourse to the ordinary law of the land.

9) Learned counsel for the petitioner further contended that in the grounds of detention, it is nowhere mentioned as to whether detainee in connection with criminal case registered against him was released on bail or as to whether he had applied for bail. The Detaining Authority too has not given any cogent reason so as to derive satisfaction or to record compelling reasons for passing the order of detention.

10) The contention raised, on perusal of the grounds of detention as well as the detention record, is found to be correct, so non-application of mind is explicit which renders the order of detention illegal. In my view I am fortified by the judgment rendered in the case captioned "Anant Sakharam Raut Vs. State of Maharashtra and others" reported in AIR 1987 SC 137. Para 8 of the judgment is apt to be quoted:

"We hold that there was clear non-application of mind on the part of the

detaining authority about the fact that the petitioner was granted bail when the order of detention was passed. In the result we set aside the judgment of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith.

11) The Hon'ble Apex Court in para 27 of the judgment *Rekha Vs. State of Tamil Nadu and anr*", (2011) 5 SCC 244 has held as under:-

"27. In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed".

5. It shall also be quite apposite to quote Para 5, 6 and 7 of the judgment of the Hon'ble Apex Court in *"Surya Prakash Sharma v. State of U. P. and others*, 1994 SCC (Cri) 1691:

"5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this court since it state first came up for consideration before a Constitution Bench in *Rameshwar Shaw vs District Magistrate Burdwan* to eschew prolixity we refrain from detailing all those cases accept that of *Dharmendra Sugan Chand Chelawat v. Union of India* wherein a three judge Bench after considering all the earlier relevant decisions including *Rameshwar Shaw* answered the question in the following words:

"The decisions referred to above lead to the conclusion that an order for detection can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detailing authority was aware of the fact that the detenu is 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 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) taking into account the nature of the antecedent activities of the detenu, 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."

6. When the above principles are applied to the facts of the instant case, there is

no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in judicial custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment made in the grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail "he may again indulge in serious offences causing threat to public order". (emphasis supplied) To put it differently, the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

7. On the conclusions as above we quash the order of detention."

12) Learned counsel for the petitioner next contended that the material forming base of the grounds of detention and consequent order of detention has not been supplied to the detenu whereby he has been deprived from exercising his right guaranteed under Article 22(5) of the Constitution of making an effective representation against his detention, which renders the detention order bad.

13) In opposition learned counsel for the respondents would contend that the material/documents, based on which detaining authority has derived subjective satisfaction for passing the order of detention, have been supplied to the detenu and besides this, the narrations of acts of the detenu has also been given in the grounds of detention, therefore, detenu, in any way has not been prejudiced or disabled from making a representation. However, the detention record as produced failed the learned counsel for the respondents to justify his argument regarding supply of material to the detenu as no receipt in token of acceptance of material has been placed on record.

14) 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 detenu 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 detenu 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."

15) In paras 27 and 28 of the judgment captioned "Thahira Haris etc. etc. Vs. Government of Karnataka & Ors, reported in AIR 2009 Supreme Court 2184, Hon'ble Apex Court has held as under:

"27. There were several grounds on which the detention of the detenu was

challenged in these appeals but it is not necessary to refer to all the grounds since on the ground of not supplying the relied upon document, continued detention of the detenue becomes illegal and detention order has to be quashed on that ground alone.

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detenue who has been detained in pursuance of the order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detenue at the earliest opportunity to make effective and meaningful representation against his detention.

16) It is also quite apposite to quote para 10 of the judgment of the Hon'ble Apex Court in "Ibrahim Ahmad Bhatti alias Mohd. Akhtar Hussain alias Kandar Ahmad Wagher alias Iqbal alias Gulam Vs. State of Gujarat and others", (1982) 3 SCC 440:

"10. Two propositions having a bearing on the points at issue in the case before us, clearly merge from the aforesaid resume of decided cases : (a) all documents, statements and other materials incorporated in the grounds by reference and which have influenced the mind of the detaining authority in arriving at the requisite subjective satisfaction must be furnished to the detenu along with the grounds or in any event not later than five days ordinarily and in the exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of his detention and (b) all such material must be furnished to him in a script or language which he understands and failure to do either of the two things would amount to a breach of the two duties cast on the detaining authority under Article 22 (5) of the Constitution. Relying upon this legal position counsel for the petitioner urged before us that in the instant case a breach of the mandate contained in Article 22 (5) read with Section 3 (3) of the COFEPOSA is clearly involved because of three things that have happened, namely, (i) supply of Urdu translations of the bulk of documents and statements incorporated in the grounds and relied upon by the detaining authority was delayed beyond the normal period of 5 days without any exceptional circumstances obtaining in the matter, (ii) the alleged exceptional circumstances purporting to justify the delay and the fact that the reasons had been recorded in writing were not communicated to the detenu which has prevented him from making effective representation against his continued detention and (iii) Urdu translations of quite a few documents and statements incorporated in the grounds and relied upon by the detaining authority have not been supplied to him at all. As regards the first two aspects counsel relied upon two decisions of the Patna High Court, namely, *Bishwa Mohan Kumar Sinha v. State of Bihar and Ors.*(1) and *Bishwanath Prasad Keshari v. State of Bihar & Ors.*(2) where the Patna High Court has taken the view that not merely should the exceptional

circumstances exist justifying the delayed supply of the grounds of detention but these should be communicated to the detenu to enable him to make an effective representation. Counsel urged that because of the aforesaid failure the continued detention of the petitioner must be held to be illegal. We find considerable force in these submissions made by the counsel for the petitioner."

17) Learned counsel for the petitioner also added that the detenue has been disabled from making an effective representation by not supplying him the translated copies of the ground of detention which are in English language besides being in a hyper technical language which the detenue is not in a position to understand.

18) The submission appears to have force as the respondents have not brought anything on record to show that the translated copies of the grounds of detention have been supplied to the detenue which has prejudiced the detenue in the exercise of his right to make an effective representation against his detention. For this, Para

13 of the judgment in Ibrahim Ahmad Batti's case (supra) shall be quite apposite to be reproduced herein:

"Lastly, Urdu translations of quite a few documents and statements referred to in the grounds of detention and relied upon by the detaining authority were admittedly not supplied to the detenu at all and the only explanation given by the counsel for the respondents at the hearing has been that most of these documents (Urdu translations whereof were not supplied) comprised statements of accounts which had figures in English with some English words written in capital letters and some documents were in Hindi and Gujarati and the record (statements of Rekha, her sister Indi and one Jayantilal Soni, all co-conspirators of the detenu, recorded during the investigation) clearly shows that the petitioner knows English figures, understands English words written in capital letters and can also converse or talk in Hindi and Gujarati and as such the non-supply of Urdu translations of these documents cannot be said to have caused any prejudice to the petitioner in the matter of making a representation against his detention. In our view, the explanation is hardly satisfactory and cannot condone the non-supply of Urdu translations of these documents. Admittedly, the petitioner is a Pakistani national and Urdu seems to be his mother tongue and a little knowledge of English figures, ability to read English words written in capital letters and a smattering knowledge of Hindi or Gujarati would not justify the denial of Urdu translations to him of the material documents and statements referred to as incriminating documents in the grounds and relied upon by the detaining authority in arriving at its subjective satisfaction. In fact, the claim made before us on behalf of the detenu that he only knows Urdu cannot be brushed aside as false especially in view of the fact that the same was accepted on the earlier occasion by the Advisory Board who had actually opined that failure to supply Urdu translations of grounds of detention and documents had vitiated the earlier order of detention and following this opinion respondent No. 1

had revoked the said order. Moreover, with the assistance of counsel on either side we have ourselves gone through many of these documents and statements and it is not possible to say that most of them are merely statements of account containing figures in English with English words written in capital letters. These documents recovered from three flats in three different societies, include, for instance, documents like bills and vouchers showing purchases made from some shops, while a large number of documents are in Hindi and Gujarati and relate to transactions in contraband articles like gold, silver, watches, etc., and comprise accounts of such transactions, the figures as well as recitals pertaining to which are entirely in Gujarati. All these, in our view, are material documents which have obviously influenced the mind of the detaining authority in arriving at its subjective satisfaction and these are all in a script or language not understood by detenu, and, therefore, the non-supply of Urdu translations of these documents has clearly prejudiced the petitioner in the exercise of his right to make an effective representation against his detention and hence the safeguard contained in Article 22(5) is clearly violated."

19) 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 above referred grounds, therefore, other grounds projected in the petition are not required to be dealt with.

20) Having regard to the above discussion, the impugned order of detention order of detention bearing No.49/DMA/PSA/DET/2018 dated 22.09.2018 being unsustainable, is, as such, quashed. Further custody of the detenu shall be regulated in terms of the orders as shall be passed by the court of competent jurisdiction in connection with the criminal case registered against him.

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