
(2018) 08 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition No28 Of 2018

Mysar Majid Malik @APPELLANT@Hash State And Ors

Date of Decision : 01-08-2018

Acts Referred:

Jammu and Kashmir Public Safety Act, 1978 — Section 8
Constitution of India — Article 21, 22(3)(b)

Citation : (2018) 08 J&K CK 0006

Hon'ble Judges : M. K. Hanjura, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

The detainee - Mysar Majid Malik, was detained vide order No. 160/DMB/PSA/2018 dated 12-01-2018, passed by the respondent No.2 - District

Magistrate, Baramulla, in exercise of powers vested in him under clause (a) of section (8) of the Jammu & Kashmir Public Safety Act, 1978 (for

short Act of 1978) and he was lodged in Central Jail Kotbhalwal, Jammu. The detainee continues to be there at the moment. Â The grounds of

detention, along with the allied documents, are said to have been served on the detainee and the contents thereof, as contended, are said to have been

read over and explained to him in the language which he understood fully well.

02/ The order of detention has been challenged on the grounds, inter alia, that Â the detainee could not have been detained under the provisions of

PSA when he was already in the custody of the respondents in connection with Â F.I.R No. 05/2018 for the offences punishable u/s 7/25 Arms Act.

It is also stated that the detainee has been deprived of the right to file an effective representation against the order of his detention, as the relevant

material, relied upon by the Detaining Authority while passing the impugned order of detention, in the form of the dossier, copy of Â the FIR, the

statement u/s 161 Cr.PC etc., have not been furnished to him.Â

03/ In the counter affidavit, the respondents have pleaded that the order of detention has been passed after taking into consideration the relevant

provisions of J & K Public Safety Act. 1978 (JKPSA). The grounds of detention have been conveyed to the detainee in the language with which he is

conversant and these have been read over and explained to him. Therefore, the order of detention does not suffer from any vice. It has been passed

with due diligence and it will sustain in the eyes of the law.Â

04/ Heard and considered. The detention record has also been perused.

05/ As already stated, the impugned order of detention has been challenged chiefly, on the ground that the detainee could not have been detained under

the provisions of PSA when he was already booked in substantive offences in connection with F.I.R No. 05/2018 for the offences punishable u/s 7/25

Arms Act, registered in Police Station Pattan. The detainee was arrested on 03-01-2018 by the Security Forces and kept in illegal custody in Police

Station, Pattan, till the time the impugned order of detention came to be passed.

06/Â Preventive detention, as has been held in the cases of A.K.Gopalan Â v. State of Madras (1950) SCR 88 Â and Rekha Â vs. Â State of Tamil

Nadu (AIR 2011 SCW 2262), is, by nature, repugnant to democratic ideas and an anathema to the rule of law. The Supreme Court in Rekhaâ??s

case (supra) emphasized that article 22 (3) (b) of the Â Constitution of India is to be read as an exception to article 21 of the Constitution of India and

not allowed to nullify the right to personal liberty guaranteed under article 21. The Supreme Court further observed that since article 22(3)(b) of the

Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow

limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long,

arduous, historic struggles. It has, therefore, to be understood that if the ordinary law of the land (India Penal Code and other penal statutes) can deal

with a situation, recourse to a preventive detention law will be illegal. The Supreme Court added that it must be remembered that if, in the case of

preventive detention, no offence is proved and there is no conviction, which can only be sanctioned by legal evidence, preventive detention is often

described as â??jurisdiction of suspicion.â? 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. The Supreme Court, after putting reliance on the law laid down in Kamleshwar Ishwar Prasad Patel vs. Union of India and others (1995) 2 SCC 51 (para 49) observed that the history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigor cannot be allowed to be diluted on the basis of the nature of alleged activities of the detainee. The Supreme Court quoted with approval the observation made in Ratan Singh Vs. State of Punjab and others 1981 (4) SCC, emphasizing the need to ensure that the constitutional and statutory safeguards available to a detainee are followed in letter and spirit. It observed, "but the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set up, it is essential that at least those safeguards are not denied to the detainees.

07/ The procedural requirements are the only safeguards available to a detainee since the Court is not expected to go behind the subjective satisfaction of Detaining Authority. As laid down by the Apex Court in the case of Abdul Latif Abdul Wahab Sheikh v. B.K.Jha and anr. (1987) 2 SCC 22, the procedural requirements are, therefore, to be strictly complied with, if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard.

08/Looking at the instant case from the above perspective, the detainee was already booked in substantive offences in connection with F.I.R No. 05/2018 for the offences punishable u/s 7/25 Arms Act, registered in Police Station, Pattan. He was in the custody of the respondents at the time of the passing of the impugned order of detention. The said F.I.R forms the baseline of the order of the detention of the detainee. The question, which arises for consideration, therefore is, can an order of detention be passed on the face of what has been detailed above. The answer to this question can be a big "No" taking into consideration the law laid down by the Apex Court of the Country at para 24 sub para (6) of the judgment delivered in the case of Sama Aruna Vs. State of Telangana and another, reported in AIR 2017 SC 2662, which reads as under:-

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.

09/ The same view has been repeated and reiterated by the Hon'ble Supreme Court in paragraph 13 of the judgment delivered in the case of V.Shanta Vs. State of Telangana and others, reported in AIR 2017 SC 2625, which reads as follows:

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.

10/ Testing the case on hand on the touchstone of the law laid down above, the detainee could not have been detained after taking recourse to the provision of PSA, when he was involved in the commission of substantive offences and was in the custody of the respondents. So much so, he had not applied for bail. The proper course would have been to challenge the order of bail, if granted to him. He could not have been detained preventatively. This single infraction renders the order of detention liable to be

set aside.

11/ Viewed in the context of all that has been said and done above, the petition is allowed, as a consequence of which, the order of detention bearing

No. 160/DMB/PSA/2018 dated 12-01-2018 passed by the respondent No.2 â?" District Magistrate, Baramulla, is quashed with a further direction to

the respondents to release the person of Mysar Majid Malik, S/O Abdul Majid Malik R/O Mohalla Dhoni, Seriwarpura, Pattan, District Baramulla,

Kashmir, forthwith from the preventive custody, unless required in any other case.

12/Â The petition is, accordingly, disposed of along with connected IAs. The record shall be returned to the learned counsel for the respondents.