

(2019) 02 J&K CK 0086

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 468 Of 2018

Nadeem Ahmad Dar

APPELLANT

Vs

State Of Jammu & Kashmir And Anr

RESPONDENT

Date of Decision : 25-02-2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978 — Section 13
Code Of Criminal Procedure, 1973 — Section 161
Constitution Of India, 1950 — Article 21, 22(3), 22(5), 22(6)

Citation : (2019) 02 J&K CK 0086

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Asif Maqbool

Judgement

1. Detenu -Nadeem Ahmad Dar son of Mushtaq Ahmad Dar resident of Nowpora Kalan Sopore District Baramulla, through his father seeks quashment of detention order No.110/DMB/PSA/2018 dated 04.12.2018, passed by District Magistrate, Baramulla (for brevity "Detaining Authority"), directing preventive detention of the detenu.

2. The detention order, through the medium of writ petition on hand, has been challenged on the grounds that the detenu was arrested by the police on 05.05.2018 and during his custody, was detained under the provisions of J&K Public Safety Act vide detention order No.35/DMB/PSA/2018 dated 13.06.2018 which was challenged in HCP No.136/2018 and same quashed vide order dated 23.10.2018. The detenu was not released but was again detained in preventive custody in terms of order impugned.

3. Respondents, on notice, appeared and filed the counter affidavit refuting the grounds urged in the writ petition. The learned Additional Advocate General also produced the detention record to lend support to the stand taken in the counter affidavit.

4. Heard learned counsel for the parties and perused the record.

5. The first ground urged by the learned counsel for the petitioner to assail the detention order is that the grounds of detention pressed into service to place the detenu under preventive detention, are identical to the grounds of detention in support of earlier detention orders which either were quashed or revoked. The respondents have not brought anything on record to negate the submission of the learned counsel for the petitioner.

6. The content and composition of the grounds of detention in successive detention orders remains same with only minor additions attributed to the developments subsequent to the detention orders, unmindful of the fact that the detenu all along remained in detention. Once we find the grounds of detention in support of quashed/revoked detention order(s) and one under challenge to be, in substance, identical, it is next to be seen what is its fall out on the detention order. The question surfaced in *Chhagan Bhagwan Kahar v. N. L. Kalna and others* [AIR 1989 SC 1234]. The Supreme Court held:

"12. It emerges from the above authoritative judicial pronouncements that even if the order of detention comes to an end either by revocation or by expiry of the period of detention, there must be fresh facts for passing a subsequent order. A fortiori when a detention order is quashed by the Court issuing a high prerogative writ like habeas corpus or certiorari, the grounds of the said order should not be taken into consideration either as a whole or in part even along with the fresh grounds of detention for drawing the requisite subjective satisfaction to pass a fresh order because once the Court strikes down an earlier order by issuing rule, it nullifies the entire order.

7. In *Jahangir Khan Fazal Khan Pathan v. The Police Commissioner, Ahmedabad and another* [AIR 1989 SC 1812], the Supreme Court held:

".....It is, therefore, clear that an order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the Court, and if such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making a detention order, the order of detention will be vitiated. It is of no consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered."

8. Again in *Ramesh v. State of Gujarat* [AIR 1989 SC 1881], it is held:

"10. On a careful scrutiny of grounds of detention, we unreservedly hold that the detaining authority has taken into consideration the two criminal cases mentioned under Sr. Nos.1 and 2 of the table which where the materials in the earlier order of detention that had been quashed and that it cannot be said that those two cases are mentioned only for a limited purpose of showing the antecedents of the detenu."

9. It is well settled law that when the detention order is quashed by the Court,

grounds of the order so quashed should not be taken into consideration, either as whole or in part, even along with fresh grounds of detention for drawing subjective satisfaction to pass fresh detention order. It is to be appreciated that once the Court sets-aside the detention order, it nullifies the entire order. The Detaining Authority, therefore, cannot make use of the grounds that were relied upon to pass the earlier detention order(s) or activities that were detailed in such grounds. No such recourse is available where the earlier detention order is struck down by the Court as it sets at naught not only detention order but the grounds on which the detention order is based. A reference in this regard may as well be made to law laid down in *Masrat Alam Bhat v. State & Others* [2003 (II) SLJ 570]; *Mst. Zahida v. State & Others* [2008 (1) SLJ 245]; *Masrat Alam Bhat* [2008 (II) SLJ 689] and *Fayaz Ahmad Wani v. State of J&K* [SLJ 2003(I) 272].

10. In *Dr. Ram Krishan Bhardwaj v. The State of Delhi and Ors.* [1953 SCR 708], the Supreme Court, while interpreting Article 22(5) of the Constitution, observed as under:

".....Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In this case, the petitioner has the right, under article 22(5), as interpreted by this Court by majority, to be furnished with particulars of the grounds of his detention "sufficient to enable him to make a representation which on being considered may give relief to him." We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of article 22. That not having been done in regard to the ground mentioned in sub-paragraph (e) of paragraph 2 of the statement of grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of article 21. The petitioner is therefore entitled to be released and we accordingly direct him to be set at liberty forthwith."

11. The right which the detenu enjoys under Article 22(5) is of immense importance. In order to properly comprehend the submissions of the detenu, Article 22(5) is reproduced as under:

"22(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

12. This Article of the Constitution can be broadly classified into two categories:

(i) the grounds on which the detention order is passed must be communicated to the detenu as expeditiously as possible and (ii) proper opportunity of making representation against the detention order be provided.

13. The 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. The Supreme Court in *Rekha v. State of Tamil Nadu Through Secretary to Government and Anr.* [(2011) 5 SCC 244], while emphasizing need to adhere to the procedural safeguards, observed:-

"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 "jurisdiction of suspicion", 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 detenu 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.

14. The Court making reference to law laid down in *Kamleshwar Ishwar Prasad Patel Vs. Union of India and Others* (1995) 2 SCC 51 (para 49) observed:

"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 rigour cannot be allowed to be diluted on the basis of the nature of alleged activities of the detenu".

15. The Court also quoted with approval following observation made in *Ratan Singh Vs. State of Punjab and others* (1981 (4) SCC 1981) :- 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 detenu's"

16. Law on the subject was succinctly laid down by the Apex Court in *Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and another* (1987 2 SCC 22) in following words:

"The procedural requirements are the only safeguards available to a detenu since the court is not expected to go behind the subjective satisfaction of the Detaining Authority. 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".

17. The Constitution of India - Article 22(5) and Section 13, J&K Public Safety Act 1978, guarantee two important safeguards to the detenu - first that the detenu is informed of grounds of detention that prompted the detaining authority to pass the detention order and second that the detenu is allowed to represent against his/her detention immediately after the detention order is made or executed. The Constitutional and Statutory safeguards guaranteed to the detenu are to be meaningful only if the detenu is handed over the material referred to in the grounds of detention that lead to subjective satisfaction that the preventive detention of detenu is necessary to prevent him from acting in any manner prejudicial to the security of the State of public order and further it is ensured that the grounds of detention are not vague, sketchy and ambiguous so as to keep the detenu guessing about what really weighed with the detaining authority to make the order.

18. Next it is contended that the material considered by the detaining authority while issuing the detention order has not been supplied to the detenu thereby disabling him from making a purposeful representation against his detention.

19. The respondents have not been able to convincingly establish that the entire material forming base of the grounds of detention was actually supplied to the detenu. Further in the grounds of detention, detenu has been shown involved in various criminal case. The involvement of the detenu in the said cases appears to have weighed with the detaining authority while making detention order. Nothing has been brought on record to indicate that copies of aforementioned First Information Reports, statements recorded under section 161 Cr.P.C. and other material collected in connection with investigation of aforesaid case(s), were ever supplied to the detenu. The material, mentioned above, thus assumes significance in the facts and circumstances of the case. It needs no emphasis that the detenu cannot be expected to make a meaningful exercise of his Constitutional and Statutory rights guaranteed under Article 22 (5) of Constitution of India and Section 13 of Jammu and Kashmir Public Safety Act, 1978, unless and until the material on which the detention order is based, is supplied to him. It is only after the detenu has all said material available, that he can make an effort to convince the Detaining Authority and thereafter Government that their apprehension as regards his activities are baseless and misplaced. If the detenu is not supplied material, on which detention order is based, he cannot be in a position to make an effective representation against his detention order. The failure on the part of Detaining Authority to supply material relied at the time of making detention order to detenu, renders detention order illegal and unsustainable. While holding so, support is drawn from law laid down in Thahira Haris Etc. Etc. v. Government of Karnataka [AIR 2009 SC 2184]; Union of India v. Ranu Bhandari [2008, Cr. L. J. 4567]; Dhannajoy Dass v. District Magistrate [AIR, 1982 SC 1315]; Sofia Ghulam Mohammad Bam v. State of Maharashtra & ors [AIR, 1999, SC 3051]; and Syed Aasiya Indrabi v. State of J&K & ors [2009 (I) S.L.J 219]; and Union of India v. Ranu Bhandari (2008 Cr. L. J. 4567);

20. 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 alone, therefore, other grounds projected in the petition are not required to be dealt with.

21. For what has been stated above, the petition is allowed and detention order No. 110/DMB/PSA/2018 dated 04.12.2018, passed by the District Magistrate, Baramulla - respondent No. 2, is quashed. Resultantly, the respondents are directed to release the detenu from preventive detention, provided he is not required in connection with any other case.

22. The detention record, as produced, be returned to the learned counsel for the respondents