

(2018) 11 J&K CK 0080

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 165 Of 2018

**Nameez Ahmad Yatoo @APPELLANT@Hash State Of Jammu & Kashmir
And Ors**

Date of Decision : 02-11-2018

Acts Referred:

Unlawful Activities (Prevention) Act, 1967 — Section 13
Constitution Of India, 1950 — Article 21, 22(3) (b), 22(5), 22(6)

Citation : (2018) 11 J&K CK 0080

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : R.A. Bhat, Shah Aamir

Judgement

1. Challenge in this petition is to the order No.37/DMB/PSA/2018 dated 20.06.2018, passed by District Magistrate, Baramulla-respondent No.2 herein, whereby Nameez Ahmad Yatoo (hereinafter referred to as the detainee), has been taken into preventive detention and lodged in Central Jail, Kotebhuwal.

2. Respondents have filed the counter affidavit wherein they have disputed the contentions raised in the petition.

3. Heard learned counsel for the parties and also perused the records.

4. Firstly, learned counsel for the petitioner contended that the detainee has been disabled from making an effective representation by not supplying the material forming base of the grounds of detention and the consequent order of detention.

Submission has a prevailing force as the nothing has been brought on record to suggest that the material forming basis of the grounds detention has been supplied to the detainee, therefore, infringement of right guaranteed under Article 22(5) of the Constitution. 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 detainee 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 detainee 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."

6. 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 detainee 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 detainee 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 detainee 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 detainee at the earliest opportunity to make effective and meaningful representation against his detention.

7. Next learned counsel contended that detainee has been booked in a criminal cases, i.e. FIR No.49/2018 registered at Police Station, Tarzoo under Section 13 ULA Act but despite that he has been detained under the provisions of Public Safety Act without assigning any compelling reasons. When it is so, the order of detention as invalid.

8. It is trite that when a person is involved in criminal case/cases, it has to be recorded that there are compelling reasons for passing the order of detention. No such reason has been recorded. It shall be apposite to quote Para 5 of the judgment of the Hon'ble Apex Court in "Surya Prakash Sharma v. State of U. P. and others, 1994 SCC (Cri) 1691, has held as under:

"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 detainee is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detainee 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 detainee is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detainee, 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."

9. In the grounds of detention, it is nowhere mentioned as to whether detainee in connection with criminal cases registered against him was released on bail or as to whether he had applied for bail. On the contrary, it is positive assertion of the counsel for the petitioner that the detainee had neither applied for bail nor was released on 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 personal liberty protected under Article 21 of the Constitution of India is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. Right to liberty as guaranteed under Article 21 of the Constitution can be negated in view of Article 22(3) (b) of the Constitution, which is an exception to Article 21 of the Constitution. The said exception authorizes the concerned authorities to pass preventive detention but while passing such orders, the authority concerned is required to be alive to the personal liberty of a person. Such power has to be exercised in a manner, which may not have the trappings of depriving a person of the guaranteed liberty. In short, an exceptional case has to be made out for passing the preventive order, still then procedural safeguards are to be respected. Breach in observing the procedural safeguards gives right to the detainee to claim that he has been prejudiced as his liberty has been curtailed de

horse the law. In this regard, it shall be quite relevant to quote paras 37 and 38 of the judgment rendered by a Bench of three

Hon'ble Judges of the Hon'ble Apex Court in case captioned Rekha Vs. State of Tamil Nadu and anr, reported in (2011) 5 SCC 244.

"37. As observed in Abdul Latif Abdul Wahab Sheikh v. B. K. Jha vide SCC para 5: (SCC p.27)

"5....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." As observed by Mr. Justice Douglas of the United States Supreme Court in Joint Anti-Fascist Refugee Committee v. McGrath:(US p. 179)

"...It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards are the main assurances that there will be equal justice under law".

38. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experience".

12. For the stated reasons and the law laid down by the Hon'ble Apex Court, petition is allowed and impugned detention order bearing No. 37/DMB/PSA/2018 dated 20.06.2018, is quashed. Further custody of the detenu shall be governed in accordance with the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against him.

13. Detention records as produced are returned to the learned counsel for the respondents.