

(2019) 07 J&K CK 0046

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 145 Of 2019

Rameez Ahmed Shah

APPELLANT

Vs

State Of Jammu & Kashmir And & Ors

RESPONDENT

Date of Decision : 31-07-2019

Acts Referred:

Jammu And Kashmir Public Safety Act 1978 — Section 8
Code Of Criminal Procedure, 1973 — Section 161
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 506
Unlawful Activities (Prevention) Act, 1967 — Section 13(2), 18, 20, 38, 39
Arms Act, 1959 — Section 7, 27
Constitution Of India, 1950 — Article 22(5)

Citation : (2019) 07 J&K CK 0046

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M. A. Makroo, Mr. S. Naqashbandi

Final Decision : Disposed Off

Judgement

Rashid Ali Dar, J

1. By virtue of order bearing No. 16/DMK/PSA/2019 dated 08.04.2019, passed by respondent No. 2 - District Magistrate, Kulgam, Rameez Ahmed Shah S/o Manzoor Ahmad Shah R/o Souch District Kulgam, has been taken into preventive custody by invoking powers under Section 8 of the Jammu and Kashmir Public Safety Act 1978, as his activities were found to be prejudicial to the Security, Sovereignty and Integrity of the State. By the instant petition, quashment of the said order is sought on the following grounds.

i) That the detaining authority - Respondent no. 2 has not prepared and formulated the grounds of detention by himself which is a pre-requisite for detaining authority before passing any detention order. Same are replica of the police dossier which depicts the non application of mind on the part of detaining authority.

ii) That the detention order provides, "whereas on the basis of grounds of detention placed before me by the Sr. Superintendent of Police, Kulgam vide his No. Legal/PSA-18/2019/1452-55 dated 28.03.2019, I am satisfied that with a view to prevent the detainee from acting in any manner prejudicial to the Security, Sovereignty and integrity of the State, it is necessary to do so". The detaining authority passed the detention order on the grounds that the activities of the detainee are prejudicial to the 'security, sovereignty and integrity of the State', these grounds are non-existent and unknown under Public Safety Act. The detaining authority may detain a person either under 'security of State' or under 'Public Order.' Thus non-application of mind by the detaining authority has rendered the detention order bad in law.

iii) That the grounds of detention, on the basis of which the respondent no. 2 has derived satisfaction are vague, equivocal, obscure, indefinite, not proximately connected with the detainee and are mere assertion of detaining authority and no prudent man can make an effective representation against these allegations.

iv) That no other material except the dossier has been considered by the detaining authority while passing the detention order. The detaining authority has to derive subjective satisfaction on the basis of record of detention i.e. dossier, FIR, recovery memo, statement under section 161 of Cr. PC and other documents. The respondents have also not given the copies of documents i.e. order of detention, dossier, copy of FIR, recovery memo, statement under Section 161 Cr. PC and other documents referred in the narration of the grounds of detention to enable him to make an effective representation, therefore, the constitutional rights guaranteed to the detainee under Article 22 (5) of the constitution of India stands infringed.

v) That the detainee was already in police custody in respect of FIR No. 161/2018 U/S 506 RPC, 13(2) 18, 20, 38 & 39 ULA (P), 7/27 Arms Act and there was no requirement of passing of detention order against him as the allegations are such there was no immediate possibility of being released him on bail. The detention order and the grounds of detention neither make even a whisper about the compelling reasons nor the detaining authority has brought on record any cogent material that ordinary law of the land is not sufficient to prevent him from such activities which are prejudicial to the security of the state.

vi) That the detainee has been enlarged on bail on 18.03.2019 by the Court of Addl. District and Sessions Judge, TADA/POTA (Special Court) Srinagar in respect of FIR No. 161/2018 U/S 506 RPC, 13(2) 18, 20, 38 & 39 ULA (P) Act, 7/27 Arms Act and the detaining authority has not mentioned in the grounds of detention whether the detainee had applied for bail or not. However, the detaining authority has not brought any cogent ground in support of this fact. Either this fact was not brought to the notice of the detaining authority or the detaining authority has not applied its mind. Further the satisfaction of the detaining authority that the detainee might indulge in serious offence causing threat to sovereignty, integrity and security of the state solely on the basis of his apprehension in criminal cases

can not be said to be proper and justified.

2. Respondents have filed the counter affidavit wherein it is submitted that the detenue has been found involved in several subversive activities. The detenue has been named in case FIR No. 161/2018 registered u/s 506 RPC, 13(2), 18, 20, 38 & 39 ULA (P) Act, 7/27 Arms Act in Police Station Kulgam for providing logistic support to militants including food, shelter and helping in transportation of arms and ammunition. Finding the activities of the detenue prejudicial to the Security, Sovereignty and Integrity of the State, District Magistrate Kulgam ordered for his preventive detention under J&K Public Safety Act, 1978 and accordingly lodged in Central Jail Kotbhalwal, Jammu. The material forming base of the detention has been supplied to the detenue. The grounds of detention have been read over and explained to the detenue in the language which he is conversant. The order of detention does not suffer to the from accuracy and illegality and it has been passed with due diligence and in accordance with provisions of applicable law and rules. There are some further points recited in the counter.

3. Learned counsel for the petitioner reiterated the pleas referred in the petition and also contended that the detenue was arrested on 17.09.2018 and was under illegal police custody in view of his alleged involvement in FIR No. 161/2018 but after a gap of about 7 months, respondent no. 2 - District Magistrate, Kulgam detained him under PSA in terms of impugned detention order dated 08.04.2019 and lodged in Central Jail, Kotbhalwal, Jammu.

4. Learned counsel for the respondents submits that the detaining authority was right in passing the detention order against the detenue as he was providing all necessary support like food, logistics, shelter and transport facility to the active banned militant organization and also facilitate them in carrying out subversive activities. He further submits that each and every material has been provided to the detenue so as to enable him to make effective representation. The order of detention does not suffer from any illegality and it has been passed with due diligence and in accordance with provisions of applicable law and rules.

5. Considered the rival arguments and perused the record.

6. Perusal of the record reveals that the detenue had been admitted to bail in FIR No. 161/2018 on 18.03.2019 by the Learned Addl District & Sessions Judge, TADA/POTA (Special Court) Srinagar. This fact has not been made mention of in the grounds of detention. Either detaining authority has been kept in dark or otherwise detaining authority has not applied its mind properly. While detaining a person under Public Safety Act, detaining authority is under a legal obligation to analyze all the circumstances and material and then to gather conclusion about the requirement of depriving a person of his personal liberty. Non-mention about the grant of bail is serious lapse which in turn gives rise to the inference that there is non-application of mind. Similar situation has been dealt with by the Apex Court. It is quite relevant to quote following portion from para 8 of the

judgment rendered by the Hon'ble Apex Court in the case of "Anant Sakharam Raut v. State of Maharashtra and " reported in AIR 1987 SC 137:-

"We hold that there was clear non-application of mind on the part of 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 judgement of the Bombay High Court under appeal, quash the order of detention and direct that the petitioner be released forthwith....."

7. Since the detinue was in the custody of the police at the time of passing of the order of detention in FIR No. 161/2018 U/S 506 RPC, 13(2), 18, 20, 38 & 39 ULA (P) Act, 7/27 Arms Act in Police Station Kulgam and so the compelling reason has to be recited if preventive detention was to be ordered. Apex Court in Para 24 of the judgment titled "Sama Aruna v. State of Telangana & Anr" (AIR 2017 SC 2662) observed:

"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 detinue 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 detinue 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."

8. It is also important to note that the translated copies of the grounds of detention have not been supplied to the detinue as can be gathered from the record. This vividly can be inferred to have prejudiced the detinue in the I attest to the exercise of accuracy and of his right to make an effective representation against his detention.

9. It shall be quite advantageous to quote following para from the judgment rendered in case captioned Powanammal vs. State of T. N. and another reported in 1999 (2) SCC 413:

"The amplitude of the safeguard embodied in Article 22(5) extends not merely to oral explanation of the grounds of detention and the material in support thereof in the language understood by the detinue but also to supplying their translation in script or language which is understandable to the detinue. Failure to do so

would amount to denial of the rights of being communicated the grounds and of being afforded the opportunity of making a representation against the order."

10. Last but not least the ground on which the detention order has been ordered is alien to section 8 of the Act. Preventive detention cannot be ordered for "security, sovereignty and integrity of the State". Pertinent it may be to quote Para 9 of the judgment rendered by the Hon'ble Apex Court in the case of "G.M. Shah Vs. State of J&K", reported in (1980) 1 SCC 132:

"As observed by Hidayatullah, J. (as he then was) in Dr. Ram Manohar - Lohia v. State of Bihar & Ors. one has to imagine three concentric circles, in order to understand the meaning and import of the above expressions. 'Law and order' represents the largest circle within which is the next circle representing "public order" and the smallest circle represents "security of State". It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of State. It is in view of the above distinction, the Act defines the expressions "acting in any manner prejudicial to the security of the State" and "acting in any manner prejudicial to the maintenance of public order" separately. An order of detention made either on the basis that the detaining authority is satisfied that the person against whom the order is being made is acting in any manner prejudicial to the security of the State or on the basis that he is satisfied that such person is acting in any manner prejudicial to the maintenance of public order but which is attempted to be supported by placing reliance on both the bases in the grounds furnished to the detent has to be held to be an illegal one vide decisions of this Court in Bhupal Chandra Ghosh v. Arif Ali & Ors.(2) and Satya Brata Ghose v. Arif Ali & Ors(3)."

11. 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.

12. Taking conspectus of the above discussion, the petition is allowed and the impugned detention order bearing No. 16/DMK/PSA/2019 dated 08.04.2019, passed by District Magistrate, Kulgam, being unsustainable, is quashed. Detenue namely, Rameez Ahmed Shah S/o Manzoor Ahmad Shah R/o Souch District Kulgam, is directed to be set free from the preventive custody forthwith provided he is not required in connection with any other case.

Disposed of.