

(2018) 12 J&K CK 0048

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 213 Of 2018

Rameez Mohi-Ud-Din Lone @APPELLANT@Hash State Of Jammu & Kashmir And Ors

Date of Decision : 14-12-2018

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8
Conservation Of Foreign Exchange And Prevention Of Smuggling Activities Act, 1974 — Section 3(3)
Arms Act, 1959 — Section 7, 25
Constitution Of India, 1950 — Article 21, 22, 22(1), 22(2), 22(3), 22(3)(b), 22(5)

Citation : (2018) 12 J&K CK 0048

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M. A. Qayoom, Mir Suhail, Asifa Padroo

Judgement

1) In the instant petition, impugned is the detention order bearing No.03-DMK/PSA of 2018 dated 31.07.2018. In terms of said order, Rameez Mohi-ud-din Lone son of Ghulam Mohi-ud-din Lone resident of Mir Mohalla Trehgam District Kupwara (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 and so has been lodged in District Jail, Mattan Anantnag.

2) The petitioner's case, as set out in the petition, is that the detainee, without any justification and cause was arrested by the personnel of Special Operation Group of Police on 04.07.2018 and was thereafter implicated in case FIR No.174/2018 P/S Kupwara and while in custody, detention order impugned was slapped upon him. The respondents are stated to have ignored to provide material relied upon by the detaining authority while passing the impugned order of detention and thus deprived the detainee of his Constitutional and Statutory rights. Grounds of detention are stated to be vague, baseless, non-existent and unfounded.

3) The respondents, in their counter affidavit, have disputed the averments made in the petition and insisted that the activities of detainee are highly prejudicial to

the security of the State. It is pleaded that the detention order and grounds of detention were handed over to the detainee and same were read over and explained to him. The grounds taken by the petitioner are legally misconceived, factually untenable and without any merit.

4) Firstly, learned counsel for the petitioner would contend that the order of detention has been passed on the basis of the material produced by Senior Superintendent of Police, Kupwara, before the District Magistrate, such as dossier and other connected documents as reflected in the order of detention. Neither copy of the letter dated 12.07.2018 addressed by SSP to the District Magistrate, referred in the impugned order, nor the material/connected documents accompanying said letter has been supplied to the detainee, therefore, detainee has been deprived from making an effective representation against his detention.

5) In opposition learned counsel for the respondents would contend that the material/documents, based on which detaining authority has derived satisfaction for passing the order of detention, have been supplied to the detainee.

6) The submission of learned counsel for the petitioner appears to have substance as nothing has been brought on record by the respondents to show that the material forming base of the grounds of detention and the consequent order of detention has been supplied to the detainee which has prejudiced the detainee as he could not submit an effective representation against his detention in absence of such material. Infringement of such right guaranteed under Article 22(5) of the Constitution would render the order of detention as illegal.

7) It is 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 detainee 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."

8) Learned counsel for the petitioner further submitted that that the detenu has also 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 detenu is not in a position to understand.

9) The submission of learned counsel for the petitioner carries weight as the respondents, due to non-production of the detention records, have not been able to negate the said submission regarding production of translated copies of the grounds of detention to the detenu, which has prejudiced the detenu 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."

10) It is further projected by the learned counsel for the petitioner that when the detainee was already in custody in connection with case FIR No.174/2018 registered at Police Station, Kupwara, for commission of offences punishable under Section 7/25 Arms Act and $\frac{3}{4}$ Exp. Substance Act, there was no need to direct his preventive detention. In the grounds of detention as also the counter affidavit arrest of the detainee in the said FIR, at the time of passing of the order of detention, has not been disputed.

11) 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."

12) Further it is contended that there has been non-application of mind on the part of detaining authority while passing the impugned order as in the impugned order at one place activities of the detainee have been shown to be prejudicial to the public order but at another place, same have been shown to be prejudicial to the security of the State.

13) In para 4 of the impugned order it is mentioned that the activities of the detainee are highly prejudicial to the peace and public order whereas in para 6 thereof it is recorded "to prevent him from acting in any manner prejudicial to the security of the State". The District Magistrate has not been himself certain as to whether activities of the detainee are prejudicial to the "maintenance of public order" or "security of the State". It shall be relevant to quote Para 9 of the judgment "*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 detainee 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).

14) Next it is contended that the order is illegal as the detaining authority has mentioned in the grounds of detention that the detainee be detained for maximum period when the District Magistrate who passed the order of detention was not empowered to fix the period of detention, same is domain of the Government.

15) Fixing of period of detention is wholly and solely domain of the Government and the District Magistrate has no power in this regard. Similar position has been dealt with by the Hon'ble Apex Court in the judgment captioned "Makhan Singh Tarasika Vs. State of Punjab", AIR (39) 1952 SC 27, wherein it has been held as under:-

"The fixing of the period of detention in the initial order itself in the present case was, therefore, contrary to the scheme of the Act and cannot be supported. The learned Advocate General, however, urged that in view of the provisions in S.11(2) that if the Advisory Board reports that there is no sufficient cause for the detention, the person concerned would be released forthwith, the direction in the order dated 30.7.1951 that the petitioner should be detained till 31.3.1951 could be ignored as mere surplusage. We cannot accept that view. It is obvious that such a direction would tend to prejudice a fair consideration of the petitioner's case when it is placed before the Advisory Board. It cannot be too often emphasized that before a person is deprived of his personal liberty, the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected.

16) Learned counsel for the petitioner also contended that the grounds of detention are replica of dossier, therefore, order impugned is illegal and so liable to be quashed.

17) While going through the material before me, the ground projected appears to be forceful. The grounds of detention are replica of dossier with interplay of words here and there, which exhibits non-application of mind, in the process deriving of subjective satisfaction has become a causality. The Hon'ble Apex Court in the judgment rendered in the case of "Jai Singh and ors vs. State of J&K" (AIR 1985 SC 764) has held as under:

"First taking up the case of Jai Singh, the first of the petitioners before us, a perusal of the grounds of detention shows that it is a verbatim reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur, to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Jai Singh, father's name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of"

Thereafter follow various allegations against Jai Singh, paragraph by paragraph.

In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is" into "you Jai Singh, S/o Ram Singh, resident of village Bharakh, Tehsil Reasi". Thereafter word for word the police dossier is repeated and the word "he" wherever it occurs referring to Jai Singh in the dossier is changed into 'you' in the grounds of detention. We are afraid it is difficult to find proof of non-application of mind. The liberty of a subject is a serious matter and is not to be trifled with in this casual, indifferent and routine manner."

18) Life and liberty of the citizens are of paramount importance. A duty is cast on the shoulders of the Court to enquire that the decision of the Executive is made upon the matters laid down by the Statute and that these are relevant for arriving at such a decision. A citizen cannot be deprived of personal liberty guaranteed to him/her by the Constitution and of which, he/she cannot be deprived except in due course of law.

19) Article 22(3)(b) of the Constitution of India, which vouchsafes preventive detention, is only an exception to Article 21 of the Constitution. An exception is an exception and cannot ordinarily nullify the full force of main rule, which is right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting civil liberties of people and not to put them in immurement for a long period shorn of recourse to a lawyer and without a trial. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in essence a detention order of three months, or any other period(s), is a punishment of that particular period's incarceration. What difference is it to detenu whether his immurement is called preventive or punitive? Besides, in cases of preventive detention no offence is proved and justification of such detention is suspicion or reasonable probability, and there is no conviction that can only be warranted by legal evidence. Preventive detention is every so often described as a 'jurisdiction of suspicion', Detaining authority passes detention order on subjective satisfaction. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to rule of law. Since Clause (3) of Article 22 specifically excludes applicability of clauses (1) and (2), 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 procedural safeguards, howsoever technical, is mandatory and vital.

20) The Supreme Court in *Rekha v. State of Tamil Nadu* AIR 2011 SCW 2262, while making reference to law laid down in *Kamleshwar Ishwar Prasad Patel v. Union of India and Others* (1995) 2 SCC 51, observed that history of liberty is 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 nature of alleged activities of detenu. The Supreme Court quoted with approval the observation made in *Ratan Singh v. State of*

Punjab and others 1981 (4) SCC 481, emphasising need to ensure that the Constitutional and Statutory safeguards available to a detenu were pursued in letter and spirit 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 detenu's."

21) Procedural requirements are only safeguards available to a detenu, for the reason that the Court is not expected to go behind subjective satisfaction of detaining authority. As laid down by the Supreme Court in Abdul Latif Abdul Wahab Sheikh v. B. K. Jha and another (1987) 2 SCC 22, procedural requirements are 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.

22) It is germane to point out here that individual liberty is a cherished right that is one of most valuable fundamental rights guaranteed by our Constitution to citizens of the country. In the scheme of Constitution, utmost importance has been given to life and personal liberty of individual. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established. In the matter of preventive detention, there is deprivation of liberty, therefore, safeguards provided by Article 22 of the Constitution of the India, have to be scrupulously adhered to. Procedural reasonableness, which is invoked, cannot have any abstract standard or general pattern of reasonableness. The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all provide the basis for considering the reasonableness of a particular provision. The procedure embodied in the Act has to be judged in the context of the urgency and the magnitude of the problem, the underlying purpose of the restrictions and the prevailing conditions.

23) The history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the Court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is of great importance. Personal liberty protected under Article 21, is so sacrosanct and so high in the scale of constitutional values that it is the obligation of detaining authority to show that impugned detention meticulously accords with the procedure established by law. However, the constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In a case of preventive detention, no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by

legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. But at the same time, when a person's greatest of human freedoms, i.e. personal liberty, is deprived, the laws of preventive detention are required to be strictly construed, and a meticulous compliance with the procedural safeguards, howsoever technical, has to be mandatorily made. Reference in this regard is made to *Haradhan Saha v. The State of West Bengal & Others*, (1975) 3 SCC 198 and *Union of India v. Paul Manickam & Another*, (2003) 8 SCC 342.

24) It may not be out of place to mention here that preventive detention is not a quick alternative to normal legal process, is the saying of the Supreme Court in *V. Shantha v. State of Telangana & ors*, AIR 2017 SC 2625. The Supreme Court has held that preventive detention of a person by a State after branding him a 'goonda' merely because the normal legal process is ineffective and time-consuming in 'curbing the evil he spreads', is illegal and that detention of a person is a serious matter affecting the liberty of the citizen. Preventive detention cannot be resorted to when sufficient remedies are available under the general laws of the land for any omission or commission under such laws, the Supreme Court observed. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detenu 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. To classify the detenu as a 'notorious stone pelter' cannot be sufficient to invoke the statutory powers of preventive detention. No doubt the offences alleged to have been committed by detenu are such as to attract punishment under the prevailing laws but that has to be done under the said prevalent laws and taking recourse to preventive detention laws would not be warranted. Preventive detention involves detaining of a person without trial in order to prevent him from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes which the detenu may have committed. After all, preventive detention cannot be used as an instrument to keep a person in perpetual custody without trial. My views are fortified by the judgements rendered in *Rekha's case* and *V. Shantha v. State of Telangana case* (supra) and *Sama Aruna v. State of Telangana* AIR 2017 SC 2662.

25) 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 and such power shall 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 order of preventing a person from acting in any

manner which shall be prejudicial, in the instant case, to the security of the State but while doing so procedural safeguards are to be respected. Breach in observing the procedural safeguards gives right to the detenu to claim that he has been prejudiced as his liberty has been curtailed de hors the law. In this connection 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".

26) Applying the aforesaid settled legal position to the facts and circumstances of the present case, there is no hesitation in observing that there is non-application of mind on the part of detaining authority in passing the impugned detention order.

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

28) Having regard to the above discussion, the impugned order of detention impugned is unsustainable, as such, quashed. Further custody of the detenu shall be governed by the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against him.