

(2018) 11 J&K CK 0094

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 187 Of 2018

**Reyaz Ahmad Ahangar @APPELLANT@Hash @APPELLANT@Hash State Of
Jammu & Kashmir And Anr**

Date of Decision : 22-11-2018

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 8
Constitution Of India, 1950 — Article 21, 22(3), 22(5)

Citation : (2018) 11 J&K CK 0094

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : M.Y. Lone, Saad Rafi Ganai

Judgement

1) Challenge in this petition is to the order of detention bearing No.DMB/ PSA/10 of 2018 dated 18.07.2018. In terms of said order, Reyaz Ahmad Ahangar (hereinafter referred to as the detainee), has been taken into preventive custody while invoking powers under Section 8 of the J&K Public Safety Act and so has been lodged in District Jail, Kathua.

2) The petitioner's case, as set out in the petition, is that the detainee, without any justification and cause was arrested on 02.06.2018 and while in custody, he has been ordered to detained in preventive custody pursuant to impugned detention order. The respondents are stated to have violated the procedural safeguards and 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 and there is non-application of mind on the part of detaining authority while passing the impugned detention order.

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. The learned counsel for the respondents has made available detention records to lend support to the case set up in the counter affidavit.

4) The records, as produced, carries copy of execution report dated 22.07.2018 which suggests that only copy of detention warrant and grounds of detention (06) leaves have been supplied to the detainee, which means entire material forming base of the grounds of detention has not been supplied to the detainee. When it is so, detainee has been disabled from making an effective representation which, in fact, is an infraction of valuable 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."

5) In "Ibrahim Ahmad Batti v. State of Gujarat, (1982) S SCC 440, the Hon'ble Apex Court, while relying on its earlier judgment Khudiram Das v. State of W.B, (1975) 2 SCR 81; Icchu Devi Choraria v. Union of India, (1980) 4 SCC 531; Shalini Soni v. Union of India, (1980) 4 SCC 544; Lulluabhai Jogibhai Patel v. Union of India, (1981) 2 SCC 427; Kamla Kanyalal Khushalani v. Dutt v. Union of India, held as under: State of Maharashtra, (1981) 1 SCC 748 and Sunil (1982) 3 SCC, in paragraph 10 of the judgment, has held as under:

"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 detenu 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 Art. 22 (5) of the Constitution."

6) The Hon'ble Apex Court in Smt. Icchu Devi's case (supra) has taken a view that the documents, statements and other material referred to or relied upon in

the grounds of detention by the detaining authority in arriving at subjective satisfaction get incorporated and become part of the grounds of detention by reference and, as a necessary corollary, right of the detainee to be supplied copies of such documents, statements and other material flows directly from the right conferred upon him to be afforded the earliest opportunity of making representation against the detention because unless the former right is available, the later cannot be meaningfully exercised.

7) Examining the case in hand on the touchstone of the above settled position of law, the detainee having been prevented from making an effective representation against the order of detention by not supplying him the material relied upon by detaining authority for arriving at subjective satisfaction, the detention of the detainee is vitiated.

8) 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 detainee 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 detainee 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 detainee. 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".

9) 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 above referred grounds alone, therefore, other grounds projected in the petition are not required to be dealt with.

10) Having regard to the above discussion, the impugned order of detention impugned is unsustainable, as such, quashed. In the grounds of detention, the detenu has been shown involved in various criminal cases, therefore, his further custody shall be regulated by the orders as shall be passed by the court of competent jurisdiction in the said criminal cases.

11) Detention record be returned to be learned counsel for the respondents