

(2019) 02 J&K CK 0012

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 370 Of 2018

Reyaz Ahmad Mir

APPELLANT

Vs

State Of Jammu & Kashmir And Anr

RESPONDENT

Date of Decision : 04-02-2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978, — Section 8(a)
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120B, 307
Arms Act, 1959 — Section 7, 27

Citation : (2019) 02 J&K CK 0012

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Wajid Haseeb, Mir Shafaqat Hussain, Mir Suhai

Judgement

1) Noticing the activities of Reyaz Ahmad Mir son of Abdul Rahim resident of Aripal Tral District Pulwama (hereinafter referred to as the detainee) prejudicial to the security of the State, he, pursuant to order No.47/DMP/PSA/18 dated 06.10.2018, passed by District Magistrate, Pulwama, has been taken into preventive custody by invoking powers under Clause (a) of Section 8 of the J&K Public Safety Act. By the instant petition, validity of the said order is assailed on the grounds referred therein.

2) Learned counsel for the petitioner projected various grounds while seeking quashment of the impugned order but the star ground is that as per grounds of detention, the detainee has been arrested on 26th of September, 2018 in case FIR No.91/2018 registered by Police Station Tral for commission of offences punishable under Section 307, 120-B RPC and 7/27 Arms Act and so was in custody of said Police Station when the order of detention has been passed. There was no requirement of passing the order of detention. That apart, in the grounds of detention it has been recorded that the detainee has applied for bail in the said criminal case and there is every likelihood of his getting bailed out. The detainee has not moved any application for grant of bail, as is projected in the

petition, then how the detaining authority in the grounds of detention has recorded that there is likelihood of his getting bail, shows as to how the detaining authority has applied its mind. Learned contended that when bail application has not been filed, how could detaining authority record satisfaction that there is likelihood of release of the detenu on bail.

3) It is evident that the detaining authority has not applied its mind properly while passing the impugned order. 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 or otherwise 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 another" 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....."

4) It is further projected that when the detenu was already in custody, there was no need to direct his preventive detention. It has been stated in the counter affidavit that the detenu is involved in FIR No.91/2018 registered in Police Station, Tral and his arrest in the said FIR, at the time of passing of the order of detention, has not been disputed.

5) The Hon'ble Apex Court in para 27 of the judgment Rekha Vs. State of Tamil Nadu and anr", (2011) 5 SCC 244 has held as under:-

"27. In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed".

6) Since the detenu 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 detenu 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 detenu 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."

7) In the counter affidavit nowhere it has been stated that there was any co-accused who has been granted bail and in case it would have been so, then detaining authority could be justified in stating that there is likelihood of the detenu being released on bail.

8) 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.

9) 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.

10) Registry to return the detention records to the learned counsel for the respondents.